Table 5 Practical Skills Grab Bag

Client Interviewing: Groundhog Day All Over Again!

February 7, 2024

The Daniel Webster-Batchelder American Inn of Court

While our presentation is focused on the civil litigation context, we have included here information that will likely be helpful for attorneys from other practice areas. The materials are organized topically and include areas of interest that we were not able to cover due to time, but are still relevant to the general topic of client interviewing (as well as client communications, expectations, and the client-lawyer relationship). Most of these materials were obtained through Westlaw and citations are included to assist you with accessing the materials in other forms, as needed. These materials do not belong to the presenters but have been reviewed, organized, and compiled by the presenters to assist your understanding and supplement the presentation. **All materials belong to their respective owners and are reproduced here to facilitate the continuing legal education of the members of the Daniel Webster-Batchelder American Inn of Court and not for any other reason. Enjoy!**

TABLE OF CONTENTS

Attorney-Client Privilege **1**

N.H.R. EVID. 502 1

Jeremy D. Eggleton, *Scope of the Attorney-Client Privilege* § 10.2, A Practical Guide to Discovery & Depositions in New Hampshire, MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC. (MCLE) (2011). 5

Attorney-Client Privilege: State Law New Hampshire § 4:1 (2023) 13

Attorney-Client Privilege: State Law New Hampshire § 2:4 (2023). 15

Petition of Stompor, 165 N.H. 735 (2011). 17

Client Interviewing, Communications & Expectations **23**

Lawrence V. Hastings, *Interviewing the Client*, in 1 AM. JUR. TRIALS 1 (1964-2023). 23

Lindsey P. Gustafson et. al., *Teaching and Assessing Active Listening As A Foundational Skill for Lawyers As Leaders, Counselors, Negotiators, and Advocates*, 62 SANTA CLARA L. REV. 1 (2022). 101

Brian M. Casaceli and Richard C. Van Nostrand, *Selected Case Investigation Techniques*, Massachusetts Discovery Practice, MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC. (MCLE) (2021). 132

James W. McElhaney, *Spotting the Losers*, ABA Journal 91 A.B.A J. 28 (June 2005). 164

Terry Carter, *Tell Us What You Want*, ABA Journal 92 A.B.A. J. 32 (March 2006). 167

Nancy L. Schultz, *What Do Lawyers Really Do*?, 50 CAP. U. L. REV. 1 (2022). 169

N.H. R. PROF. CONDUCT 4.2 188

Eunice L. Ross and Thomas J. Reed, *Client Interviewing and Counseling Considerations: Contestant* § 11:3, WILL CONTESTS (2023). 190

Eunice L. Ross and Thomas J. Reed, *Client Interviewing and Counseling Considerations: Proponent* § 11:4, WILL CONTESTS (2023). 194

Eunice L. Ross and Thomas J. Reed, *Client Interviews* § 13:3, WILL CONTESTS (2023). 198

Sateesh Nori, *Communicating with clients: three lessons from the pandemic*, 31 No.08 Westlaw Journal Professional Liability 09 (January 20, 2022). 200

Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373 (Fall 2002). 202

Defending Insureds **236**
RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134 (2000). 236
Leslie S. Ahari and Sean Hanifin, *Ethical Issues for duty to defend counsel – Liability for defense counsel malpractice* § 33:24, LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION (2023). 247
Stephanie D. Gironda and Kimberly W. Geisler, *Employment Practices Liability Insurance: A Guide to Policy Provisions and Challenging Issues for Insureds and Plaintiffs*, 33 A.B.A. J. LAB. & EMP. L. 55 (Fall 2017). 253
Relationship Between Insurance Company and the Lawyer Hired to Represent an Insured, N.H. BAR ASSOCIATION, Ethics Committee Advisory Opinion #2018-19/02 (May 6, 2019). 266
John H. Eickemeyer, *Ethical Considerations in Defending the Insured Professional*, AMERICAN LAW INSTITUTE – AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION (May 2008). 272
Michael F. Aylward, et al, *The Tripartite Relationship of Insureds, Insurers, and Defense Counsel – Three Views*, Massachusetts Motor Vehicle Torts: Liability and Litigation, MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC. (MCLE) (2023) 285
George L. Blum, *Insured-Insurer Communications as Privileged – Generally,* 43 A.L.R. 7th Art. 6 (2019) 337

Ethics & the Client/Lawyer Relationship **396**
RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 (2000). 396
RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000). 403
Dan B. Dobbs, et al, *Duty: establishing a client-lawyer relationship* §719, DOBB'S LAW OF TORTS (2023). 432
Duties to Prospective Clients, N.H. BAR ASSOCIATION, Ethics Committee Advisory Opinion #2009-10/01 (June 10, 2010). 437
Joint Representation of Clients in Estate Planning, N.H. BAR ASSOCIATION, Ethics Committee Advisory Opinion #2014-15/10 (June 18, 2015). 446
Karen Erger, *Are you a Client-Savvy Counselor?*, 95 ILL. B.J. 440 (August 2007) 451
The Prospective Client: Confidentiality and Withdrawal Considerations, N.H. BAR ASSOCIATION, Ethics Committee Advisory Opinion #2019-20/02 (May 4, 2020). 454
N.H. R. PROF. CONDUCT 1.18 460
Thomas E. Spahn, *Who Is Your Client? The First Ethics Question for Counsel*, AMERICAN LAW INSTITUTE – AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION (2023). 463
Karen Erger, *Heed the Warning of the "Bad Feeling"*, 95 ILL. B.J. 212 (April 2007). 605

Revised Statutes Annotated of the State of New Hampshire
New Hampshire Court Rules
New Hampshire Rules of Evidence
Article V. Privileges

New Hampshire Rules of Evidence, Rule 502

RULE 502. LAWYER-CLIENT PRIVILEGE

Currentness

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "representative of a client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) 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.

(b) General Rule of Privilege. 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.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit in the future what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of Duty by a Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Editors' Notes

REPORTER'S NOTES

Rule 502(a) spells out definitions of the terms critical to the privilege. The definition of "client" in paragraph (1) includes every conceivable public or private individual or entity that might seek or obtain legal services. While no New Hampshire decisions could be found, the extension of the definition to public entities finds support in *Riddle Spring Realty Co. v. State,* 107 N.H. 271, 273, 220 A.2d 751, 754 (1966). This broad scope is in accord with authority and seems essential if the lawyer is to be able to fulfill his professional responsibilities of advising and representation for all comers. See Federal Advisory Committee Notes to proposed Federal Rule 503; McCormick, *Evidence* 178 (2d ed. 1972). For the meaning of "professional legal services," see discussion of Rule 502(b) below.

The basic provision of the paragraph is that the status of client includes both one to whom professional services are rendered and one who seeks advice with a view to obtaining such services. Again, this provision is consistent with the early holding in *Chamberlain v. Davis,* 33 N.H. 121 (1856), which refused to limit the privilege to communications concerning pending suits.

The definition in Rule 502(a)(2) finds precedent in *Chamberlain,* supra, as the Court extended the privilege to an agent of the client. 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 Uniform Rule language was in the 1969 and 1971 drafts of the Federal Rules but was dropped before promulgation. The approach of the Uniform Rule has been adopted, because it is consistent with the purpose of the privilege to encourage communication 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. This approach would permit a corporation to insulate all of its normal fact gathering about a matter by using the medium of communication with counsel for it. Cf. *Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (rejects "control group" test); see Note, Attorney-Client Privilege for Corporate Clients:

The Control Group Test, 84 Harv.L.Rev. 424, 432-434 (1970); McCormick, Evidence 178-179 (2d ed. 1972); but see, Superior Court Rule 35(b)(2).

The definition of "lawyer" in Rule 502(a)(3) includes one whom the client reasonably believes to be authorized to practice law. This Rule would alter the result in *Bean v. Quimby,* 5 N.H. 94, 97 (1829), wherein communications to a lay manager of a lawsuit were held within the privilege. It is submitted that the Rule represents the better approach.

Rule 502(a)(4) places in modern terms the language of *Brown v. Payson,* 6 N.H. 443, 444 (1833), extending the privilege to agents of the lawyer. See also Supreme Court Rule 35.

The definition of "confidential" in Rule 502(a)(5) is expressed only in objective terms of the absence of an intent to disclose to third persons. Generally the presence of an unrelated third party will defeat a finding of confidentiality and thus the privilege. Cf. *Shelley v. Landry,* 97 N.H. 27, 31, 79 A.2d 626, 629 (1951); *Scott v. Grinnell,* 102 N.H. 490, 495, 161 A.2d 179, 184 (1960). Also, consultation with an attorney as a mere scrivener will not invoke the privilege. Id.

Note that there is no definition of "communication" in the Rule. In the absence of such a definition, prior case law will apply. Thus, the term should be understood to include nonverbal communications intended as such by the client but not to include matter that the lawyer learns from sources other than the client's intentional communication, including observation of the client's actions. See *Patten v. Moor,* 29 N.H. 163 (1854). The privilege should similarly be held to include information obtained by a lawyer from documents given to him by the client for professional purposes such as study or opinion. See *Brown v. Payson,* 6 N.H. 443, 445 (1833). Except as those rules provide, material subject to production if remaining in the hands of the client should not be protected merely because it has been transferred to the lawyer's files. See *Riddle Spring,* supra at 274, 220 A.2d at 755; See, generally, McCormick, supra, 182-185.

Rule 502(b) sets forth the general proposition that the client may refuse to disclose and and may prevent another's disclosure of confidential communications (as defined in Rule 502(a)(5)) made to facilitate the rendering of professional legal services. The Rule does not define "professional legal services." Generally the privilege does not exist when consultation is held with a lawyer as a friend or in some business capacity not involving the rendering of legal advice or services. See McCormick, supra, 179-180.

This definition is consistent with the general principle enunciated in several decisions:

> The necessity of an unreserved communication, by individuals, to those they employ in legal affairs, has induced courts to the benefit of the client, to hold, that the attorney is not bound to become a witness to those matters of which he derived knowledge from professional confidence. *Brown,* supra, at 444.
>
> We think the right [to legal representation of a person of one's choosing] includes, as a necessary incident without which it cannot be safely enjoyed, the right to instruct those who may thus be employed and have the trust and confidence thus reposed preserved inviolate.... *Bean,* supra, at 97.
>
> [T]he purpose of the attorney-client privilege is to encourage full disclosure of information between an attorney and his client. *Riddle Spring,* supra, at 274, 220 A.2d at 755.

The communications are protected in the absence of waiver by the client. *Stevens v. Thurston,* 112 N.H. 118, 119, 289 A.2d 398, 399 (1972).

Rule 502(c) provides that the privilege may be claimed by the client or various parties in his right. The lawyer or lawyer's representative may claim the privilege for the client alone, if no evidence of lack of such authority appears. New Hampshire cases make clear that the privilege is that of the client and may be claimed by him or his lawyer. *Sleeper v. Abbott,* 60 N.H. 162, 163 (1880). The provisions of the Rule allowing a claim of privilege by the client's personal representative (see Scott, supra,

at 494) or by a corporate successor are a proper and appropriately limited extension consistent with the purpose of the Rule. No New Hampshire case has directly held that the lawyer may make the claim only in the right of the client, or has dealt with the presumptive character of the lawyer's authority. These provisions are consistent with dicta in the cases, however, as well as with the spirit of the Rule. If the lawyer fails to claim the privilege in the client's absence, the client is protected by Rule 511.

Rule 502(d) sets forth five categories of communication which are not privileged. Paragraph (1) provides that there is no privilege where the communication is in aid of the commission or planning of a crime or fraud. This exception applies only to communications involving future wrong-doing, not to discussions or confessions of past misconduct. See Federal Advisory Committee Notes to proposed Federal Rule 503. The Rule on this score is consistent, at least as to crime, with the American Bar Association's *Code of Professional Responsibility* DR 4-101(C)(3). This exception is consistent with *State v. Stone and Merchant,* 65 N.H. 124, 18 A. 654 (1889), where the Court held that an attorney could be compelled to testify concerning a threat made by his client, who had been indicted for procuring another to assault.

Rule 502(d)(2), excepting from the privilege claims through the same deceased client, is in accord with prior New Hampshire law. See *Stevens,* supra, at 119, 289 A.2d at 399.

Paragraph (3) establishes an exception where the communication is relevant to a dispute between client and lawyer. There are no New Hampshire cases asserting this exception, but as the Federal Advisory Committee Note to proposed Federal Rule 503 point out, it "is required by considerations of fairness and policy." Moreover, it is consistent with ABA, *Code of Professional Responsibility* DR 4-101(C)(4).

The exception in Rule 502(d)(4) follows the holding of *Patten,* supra, to the effect that the privilege will not apply to a lawyer present at the execution or attestation of a legal document.

Rule 502(d)(5) excepts from the privilege communications to a lawyer jointly retained by two clients when offered in an action between them. This exception seems consistent with the policy of the Rule, since it is reasonable to conclude that neither party in such cases intended the matter communicated to be confidential as between themselves. See McCormick, *Evidence* 189-191 (2d ed. 1972). This exception also finds support in *Dumas v. State Farm Mutual Ins. Co.,* 111 N.H. 43, 49, 274 A.2d 781, 784 (1971).

The New Hampshire Legislature has established as privileged communications between guardian ad litem and child. RSA 458:17-a II.

2016 NHRE UPDATE COMMITTEE NOTE

No change was made to New Hampshire Rule of Evidence 502 by supreme court order dated April 20, 2017, effective July 1, 2017. None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.

Rules of Evid., Rule 502, NH R REV Rule 502

State court rules are current with amendments received through January 1, 2024. Some rules may be more current; see credits for details.

End of Document

NH Discov. and Dep. s. 10.2

Massachusetts Continuing Legal Education, Inc. (MCLE) | 1st Edition 2011, with 2018 and 2021 Supplements

A Practical Guide to Discovery & Depositions in New Hampshire
Jeremy D. Eggleton, Esq.

Chapter 10. The Attorney-Client Privilege and the Work Product Doctrine

§ 10.2 SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE

§ 10.2.1 Elements of the Privilege

As is the case in many jurisdictions, *see* *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684 (1st Cir. 1997), the New Hampshire Supreme Court has defined the attorney-client privilege by using John Henry Wigmore's influential formulation:

> Where legal advice of any kind is sought from a professional legal adviser 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 by himself or by the legal adviser unless the protection is waived by the client or his legal representatives.

Riddle Spring Realty Co. v. State, 107 N.H. 271, 273 (1966) (citing 8 Wigmore §§ 2292, 2327-29); *see also Brown v. Payson*, 6 N.H. 443, 444 (1833) ("The relations of client and attorney must subsist at the time, and with reference to the subject matter, and the facts must have been acquired by the attorney, through the confidence of his client.").

Practice Note

Although the New Hampshire Supreme Court has referred to communications made ""by the client" to the attorney, the attorney-client privilege, as embodied by N.H. R. Evid. 502, contemplates that the privilege applies to communications made by the attorney to the client as well--provided the remaining conditions of the privilege are satisfied. N.H. R. Evid. 502 (defining the scope of the attorney-client privilege and privileging communications "*between* the client . . . and the client's lawyer") (emphasis added).

The privilege extends to both oral and written communications made within the course of the confidential relationship. *Brown v. Payson*, 6 N.H. at 447-48 ("[An attorney] cannot be said to be privileged as to what he hears, but not as to what he sees . . . [therefore] the situation and contents of a paper, delivered to an attorney for inspection, in the course of employment as an attorney, is as much a matter of professional confidence as an oral statement of its contents or condition can be."); *Scott v. Grinnell*, 102 N.H. 490, 494 (1960) (privileging memoranda exchanged between attorney and client in preparation of client's will).

The privilege attaches to communications between an attorney and a person seeking legal counsel at the person's initial consultation with the attorney, even if no subsequent legal representation occurs. N.H. R. Evid. 502(a)(1) (defining "client" to include one "who consults a lawyer *with a view to obtaining professional legal services from him*."); *see* N.H. R. Prof. C. 1.18(a), (b).

Rule 502(b) of the New Hampshire Rules of Evidence describes the privilege 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.

This expansive articulation protects a dizzying array of potential communications between and among the client, his or her representatives and attorneys, and other attorneys and their agents within the ambit of the attorney-client relationship:

- between a client and his or her lawyer,
- between a client and his or her lawyer's representative,
- between a client's representative and his or her lawyer,
- between a client's representative and his or her lawyer's representative,
- between a client's lawyer and the client's lawyer's representative,
- by a client to a lawyer for another party regarding a matter of common interest,
- by a client to a lawyer's representative for another party regarding a matter of common interest,
- by a client's representative to a lawyer for another party regarding a matter of common interest,
- by a client's representative to a lawyer's representative for another party regarding a matter of common interest,
- by a client's lawyer to a lawyer for another party regarding a matter of common interest,
- by a client's lawyer to a lawyer's representative for another party regarding a matter of common interest,
- by a client's lawyer's representative to a lawyer for another party regarding a matter of common interest,
- by a client's lawyer's representative to a lawyer's representative for another party regarding a matter of common interest,
- between the client's representatives,
- between the client and the client's representative,
- between two or more lawyers representing the same client, and
- between two or more of a client's lawyer's representatives.

4 Richard V. Wiebusch, *New Hampshire Practice: Civil Practice and Procedure* § 22.20, at 536-37 (1997) (interpreting N.H. R. Evid. 502(b)); *Brown v. Payson*, 6 N.H. at 444-45 (noting extension of attorney-client privilege to attorney's clerk); *Chamberlain v. Davis*, 33 N.H. 121, 131 (1856) (communication by client through agent to counsel is privileged). Although New Hampshire has not recognized the "joint defense" or "common interest" privilege, *see, e.g., Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs. Inc.*, 870 N.E.2d 1105 (Mass. 2007), the courts have brought this doctrine into the attorney-client privilege through the drafting of N.H. R. Evid. 502(b)(3). Nevertheless, unless the communication would be privileged under the "common interest" provisions of Rule 502(b), communications from a client to an attorney who is not the client's attorney are not privileged. *State v. Stone & Merchant*, 65 N.H. 124, 125 (1889); *see* *Klonoski v. Mahlab*, 953 F. Supp. 425, 430 n.3 (D.N.H. 1993).

Practice Note

It is important to note that the attorney-client privilege survives the death of the client. N.H. R. Evid. 502(c); *see Scott v. Grinnell*, 102 N.H. at 494 (statement that decedent client's estate representatives may waive the privilege implies the ongoing existence of the privilege after the client's death). *But see Stevens v. Thurston*, 112 N.H. 118 (1972) (privilege cannot be claimed by one party to a contested estate proceeding, as the party seeking disclosure might in fact be the decedent's estate representative); *Petition of Stompor*, 165 N.H. 735 (2013) (rejecting authority that this exception only applies in cases where the attorney in question actually prepared executed testamentary documents); N.H. R. Evid. 502(d)(2). In *State v. Eason*, 133 N.H. 335 (1990), the New Hampshire Supreme Court held that the attorney-client privilege could not be pierced even when the client is alleged to be deceased.

The protection of the privilege extends only to communications from (and to) the client, not to facts observed by the attorney during the course of the attorney-client relationship, or communications to the attorney by someone other than his or her client. *Brown v. Payson*, 6 N.H. at 446 ("But as to collateral matters, the knowledge of which the attorney acquired by personal observation . . . the attorney may be compelled to answer."); *State v. Superior Court*, 116 N.H. 1, 2 (1976) (implying that an attorney could testify in a case in which he was involved as counsel); *Patten v. Moor*, 29 N.H. 163, 168-69 (1854); N.H. R. Evid. 502(d)(4). Similarly, a client cannot claim a privilege for otherwise nonprivileged facts merely by communicating them to his or her attorney, or in the presence of his attorney. *LaCoss v. Lebanon*, 78 N.H. 413, 414 (1917); *Petition of Snow*, 75 N.H. 7, 8 (1908); *see State v. Stickney*, 148 N.H. 232, 235 (2002) (fact that attorney represented client in prior proceeding in which client was certified as a habitual offender is not privileged, even if attorney's only reason for being at said hearings was his representation of the client).

The New Hampshire Supreme Court has observed that information obtained by an attorney when acting solely as a "scrivener" is not privileged. *Shelley v. Landry*, 97 N.H. 27, 31 (1951). But the *Shelley* court appeared to recognize that the difficulty in distinguishing when an attorney is acting as a ""scrivener" from when he or she is offering legal advice favors a broader application of the privilege. *Shelley v. Landry*, 97 N.H. at 31.

A client's identity is also excepted from the privilege, and an attorney is bound to provide it. *Brown v. Payson*, 6 N.H. at 448-49. The New Hampshire Supreme Court reached a similar conclusion in *State v. Stickney*, 148 N.H. at 235, where it rejected a defendant's argument that his former attorney should be prohibited, in a present proceeding, from identifying the defendant as a client in previous proceedings. The New Hampshire Supreme Court has not addressed the full extent of this obligation, or how it affects, for instance, a speaker's First Amendment right to anonymity. *See* *Mortgage Specialists v. Implode-Explode Heavy Indus., Inc.*, 160 N.H. 227 (2010) (noting constitutional protection for anonymous speakers in defamation actions).

Attorney billing records are not, per se, privileged, but may be privileged if "information in a billing record . . . reveals the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law." *Hampton Police Ass'n, Inc. v. Town of Hampton*, 162 N.H. 7, 16 (2011) (citing *Hewes v. Langston*, 853 So.2d 1237, 1248-49 (Miss. 2003) (billing statements that provided "an hour-by-hour rendition of the work performed for a client," including identifying, by name, the people with whom the attorney talked, the topics they discussed, the subjects

the attorney researched, and the papers they reviewed, "necessarily reveal[ed] strategies, confidential communications, and the thought processes behind the representation" and were privileged from disclosure)).

In *State v. Leith*, No. 2017-0426, slip op. (N.H. Aug. 14, 2018), the question arose whether it was proper for the state to subpoena defense counsel to establish whether the defendant had been informed of the time and date of a hearing. Although a slip opinion is deemed not precedential, it is perhaps of note that the New Hampshire Supreme Court declined to adopt rules regarding subpoenas of defense counsel set forth in *State v. Hawes*, 556 N.W.2d 634, 638 (Neb. 1996). The court did note that, in *Hawes*, the Nebraska Supreme Court declined "to hold that communication concerning date, time, and place of scheduled trial is confidential or protected from disclosure by attorney-client privilege." *State v. Leith*, slip. op. at *2 (citing *State v. Hawes*, 556 N.W.2d at 637).

In addition, a client claiming the privilege as justification for sealing court filings cannot take refuge in a "blanket assertion of attorney-client privilege" but must raise the privilege "as to each record so that the court can rule with specificity on the application of the privilege to particular statements[.]" *State v. Kibby*, 170 N.H. 255, 259 (2017).

The client, not the attorney, holds the privilege. *Sleeper v. Abbott*, 60 N.H. 162, 163 (1880). But the attorney is required to invoke it on his or her client's behalf if the attorney is required to testify. *Sleeper v. Abbott*, 60 N.H. at 163; *Shelley v. Landry*, 97 N.H. at 31; *see* N.H. R. Evid. 502(c). Under Rule 502, control of the privilege extends to
• the client's guardian or conservator;

• the personal representative of a deceased client; or

• the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence.

N.H. R. Evid. 502(c).

The attorney-client privilege is considered an evidentiary issue, not a matter of substantive law. *McGranahan v. Dahar*, 119 N.H. 758, 764 (1979). In *McGranahan*, the plaintiff was deemed unable to advance a claim of defamation for statements concerning the plaintiff that the defendant allegedly made to the defendant's attorney during the course of litigation. The fact that these statements were inadmissible as evidence under the attorney-client evidentiary privilege meant that the plaintiff was incapable of proving that the statements were even made, and the claim must fail. *McGranahan v. Dahar*, 119 N.H. at 764-65. This also has ramifications, for instance, in situations where a conflict of laws question arises, or when practicing in the federal courts.

§ 10.2.2 Burden of Proof

The burden of establishing that the attorney-client privilege applies to a communication rests on the party asserting it. *State v. Gordon*, 141 N.H. 703, 705 (1997). The determination of the applicability of the attorney-client privilege rests in the trial court's sound discretion. *State v. Gordon*, 141 N.H. at 705. New Hampshire law is silent as to whether the claimant of the privilege, in addition to establishing each element of the privilege, also has the burden of demonstrating that the privilege has not been waived. *Cf.* *In re Reorg. of Elec. Mut. Liab. Ins. Co.*, 681 N.E.2d 838, 840-41 (Mass. 1997) (noting that claimant of privilege must also affirmatively demonstrate that the privilege has not been waived).

Although the New Hampshire Supreme Court has stated that statutory privileges should be narrowly construed, *e.g.*, *In re "K"*, 132 N.H. 4, 13 (1989), it has not affirmatively said the same for common law privileges such as the attorney-client privilege, which other jurisdictions do construe narrowly. *See* *Pacamor Bearings Inc. v. Minebea Co.*, 918 F. Supp. 491, 500 (D.N.H. 1996) ("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.") (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). Nevertheless, assuming the demonstration of waiver is considered to be one of the elements of the privilege as described in *Riddle Springs Realty Co. v. State*, 107 N.H. 271, 273 (1966), it would seem that the initial burden is met if the claimant can make a prima facie showing that the communication has not been waived.

§ 10.2.3 Corporate or Organizational Client

(a) ***Corporation***

Rule 502(b) permits the privilege to extend to communications between a ""representative of the client" and the attorney. Rule 502(a)(2) defines ""representative of the client" as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." Thus, although the New Hampshire Rules of Professional Conduct underscore that a lawyer "represents the organization acting through its duly authorized constituents," N.H. R. Prof. C. 1.13(a), the attorney-client privilege may apply to communications with agents of the organization, i.e., the "control group" of individuals having "authority . . . to act on [legal] advice rendered" by the attorney. *See Goodrich v. Goodrich*, 158 N.H. 130, 139-40 (2008) (attorney-client privilege vests with the entity that controls a corporation, and is transferred to a new entity with control of the corporation's assets and liabilities).

Significantly, the New Hampshire Supreme Court's articulation of the privilege in a way that appears to restrict the privilege's applicability to a corporation's "control group" contradicts *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *Upjohn v. United States* famously rejected the "control group" test for the application of the attorney-client privilege to corporate employees and agents outside the "control group" if

• the employees are acting at the direction of corporate superiors to secure legal advice,

• the communications are related to the employees' corporate duties,

• the employees were aware that the information was being sought in the context of obtaining legal advice, and

• the employees considered the communications to be confidential and the communications remained confidential.

Upjohn Co. v. United States, 449 U.S. at 394. New Hampshire's apparent reliance on the "control group" test for the application of the attorney-client privilege removes some of the uncertainty that can come with the more liberal *Upjohn* test. "The Attorney-Client Privilege for Corporate Clients: The Control Group Test," 84 *Harv. L. Rev*. 424, 430-31 (1970).

The result is a mixed approach to the attorney-client privilege in corporate contexts, where the federal court will apply New Hampshire privilege law when state law provides the rule of decision and federal privilege law when federal law provides the rule of decision or the matter contains both federal claims and ancillary or pendent state law claims. Fed. R. Evid. 501; *Smith v. Alice Peck Day Mem'l Hosp.*, 148 F.R.D. 51, 53-54 (D.N.H. 1993) (applying federal privilege law to case with mixed federal and state claims). In *Klonoski v. Mahlab*, 953 F. Supp. 425, 427 (D.N.H. 1993), a state law medical malpractice case in federal court, the court applied the "control group" test for whether statements given by attending medical professionals to the hospital's risk manager are protected by the hospital's attorney-client privilege. The court rejected the assertion of the hospital's attorney-client privilege as to these statements and conducted an in-depth analysis of whether the employee's statements could be protected by an individualized privilege. *Klonoski v. Mahlab*, 953 F. Supp. at 428-31 (denying claim of privilege because employees could not have understood that their statements were confidential or that the person gathering them was an agent of *their* attorney). This is one area where venue will have a substantial impact on the procedural law of the case.

(b) ***Unincorporated Association***

The attorney-client relationship, and hence, the attorney-client privilege, can exist between an unincorporated association and an attorney. N.H. R. Prof. C. 1.13; *see Franklin v. Callum*, 148 N.H. 199, 202 (2002). However,
when an unincorporated association has no legal status independent of its members, has operations related directly to the interests of the membership, and has members actively involved in its operation and management, it more closely resembles a partnership. Such [unincorporated associations] are, at best, joint ventures, and have no real existence or interests apart from the members.

Franklin v. Callum, 148 N.H. at 202 (citations and quotations omitted). "An attorney who represents members' joint interests in an unincorporated association represents each individual member of the association as to matters of association business." *Franklin v. Callum*, 148 N.H. at 203. Hence, each individual member has an attorney-client relationship with the unincorporated association's counsel, and the privilege may be claimed--or waived--by each individual member. *Franklin v. Callum*, 148 N.H. at 202-03 (party-member of unincorporated association cannot prevent opposing party-member from viewing association's legal bills by invoking attorney-client privilege).

(c) *Fiduciary or Trustee*

"The fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's responsibilities under the Model Rules of Professional Conduct." *In re Wyatt's Case*, 159 N.H. 285, 299 (2009).
Furthermore, although the doctrine extends to beneficiaries some of the duties owed by the lawyer to the fiduciary-client, including some limited form of loyalty, this does not create a direct attorney-client relationship with the beneficiary. The doctrine, therefore, does not relieve a lawyer undertaking dual representation of fiduciary and beneficiary from discussing with both clients future, material limitations that might occur and the effect of such limitations upon the attorney-client relationships.

In re Wyatt's Case, 159 N.H. at 300 (citations omitted). Presumably, such discussion would include the nuances of the attorney-client privilege and the inference that the privilege will not necessarily attach to communications between attorney and beneficiary or be overcome in a fiduciary claim by the beneficiary against the trustee.

§ 10.2.4 Nature of the Communication

Under Rule 502, 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." N.H. R. Evid. 502(b) (emphasis added). Rule 502 does not define ""professional legal services," but this limitation is consistent with other jurisdictions' interpretations, as well as New Hampshire case law that excepts communications with an attorney that are unrelated to seeking or receiving professional legal services. In *McCabe v. Arcidy*, 138 N.H. 20, 25 (1993), the court declined to extend the protections of the attorney-client relationship to a client's guarantor. "Consultation between an attorney and another person constitutes the fundamental basis of the attorney-client relationship. A critical element of that consultation, however, is that the person initiating it do so with the intent of seeking legal advice from the attorney." *McCabe v. Arcidy*, 138 N.H. at 25.

In *State v. Gordon*, a paralegal student admitted in conversation with his instructor, an attorney, that he had forced his girlfriend to have sex with him. *State v. Gordon*, 141 N.H. 703, 704 (1997). The court analyzed the interaction under the test for whether an attorney-client relationship existed:
It is generally recognized that "[a]n attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance."

State v. Gordon, 141 N.H. at 705 (citing *McCabe v. Arcidy*, 138 N.H. at 25). The defendant admitted that he "sought no legal advice" from his instructor, and that he was "talking to somebody in confidence. You tell somebody that you trust or that you're friendly with things that you wouldn't just openly stand out there and say." *State v. Gordon*, 141 N.H. at 706. The court rejected this evidence as insufficient to show that an attorney-client relationship had been established: "Speaking in confidence is not

enough; where one consults an attorney not as a lawyer but as a friend or as [an] . . . adviser . . ., the consultation is not professional nor the statement privileged." *State v. Gordon*, 141 N.H. at 706. Although the context of the *Gordon* case does not make this a surprising result, the implications are significant: advice given by an attorney that is not legal in nature--for instance, business advice given by an attorney to a corporation--is not privileged. *See* *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).

Commentators have suggested that the determination whether the attorney is acting in his or her professional capacity as a lawyer is whether the task could have been readily performed by a nonlawyer. The analysis should include whether the function that the attorney is performing is a lawyer-related task, such as applying the law to a set of facts, reviewing client conduct based on effective law, or advising the client about status or trends in the law.

The nature of the communication, not the setting, will control the applicability of the privilege. Although business correspondence, interoffice reports, file memoranda, and minutes of business meetings do not ordinarily qualify for the privilege, *Oil Chem. & Atomic Workers Int'l Union v. Am. Home Prods.*, 790 F. Supp. 39, 41 (D.P.R. 1992), memoranda prepared by clients for a lawyer regarding the desired content of a legal instrument the lawyer was drafting are protected by the privilege. *Scott v. Grinnell*, 102 N.H. 490, 495 (1960).

§ 10.2.5 Governmental Entities

The attorney-client privilege applies to the state's communications with its legal counsel. *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 273 (1966). In *Riddle Spring Realty Co. v. State*, the plaintiffs sought to discover appraisal reports prepared by the state in anticipation of an eminent domain hearing. To determine whether a report, memorandum, or appraisal is protected by the state's attorney-client privilege, the test is whether their production could have been ordered before their transfer into the attorney's possession. *Riddle Spring Realty Co. v. State*, 107 N.H. at 274.
Obviously, appraisals and reports thereof made by employees of the State or by independent appraisers to the Department of Public Works and Highways, or other such agency or body, in the regular course [of business] would not come within the attorney-client privilege. However appraisals and reports thereof confidentially made for the State at the request of an attorney from whom the State is seeking legal advice and confidentially communicated or turned over to the attorney would be privileged and not subject to discovery.

Riddle Spring Realty Co. v. State, 107 N.H. at 274.

Revised Statutes Annotated § 91-A:2, New Hampshire's "open meeting" law, expressly exempts "consultation[s] with legal counsel" from the requirements of the open meeting law. Rev. Stat. Ann. § 91-A:2, I(b). In *Society for the Protection of New Hampshire Forests v. Water Supply & Pollution Control Commission*, 115 N.H. 192, 194 (1975), the petitioner sought records from an executive session of the commission at which the attorney general presented terms and potential permutations of a settlement regarding the construction of the Seabrook nuclear power plant. Observing that the statute was silent as to its effect on the attorney-client privilege, the court noted,
The procedure to be followed and the information to be required were all matters properly to be explored in consultations between staff and attorneys to facilitate the hearing task of the commission. Absent specific legislative intent to plainly and unmistakably deprive the commission of the benefits of advice of counsel, the commission's receipt of legal advice cannot be deemed a violation of [the right-to-know law].

Soc'y for the Prot. of N.H. Forests v. Water Supply & Pollution Control Comm'n, 115 N.H. at 194.

With respect to how the provisions of Rev. Stat. Ann. § 91-A:5, the state's public documents or right-to-know law, interact with the attorney-client privilege, the result in *Society for the Protection of New Hampshire Forests v. Water Supply & Pollution Control Commission*, 115 N.H. at 194, would appear to apply as well to the production of documents that would be privileged under the attorney-client privilege. Furthermore, in *Goode v. New Hampshire Office of Legislative Budget Assistant*, 148 N.H.

551 (2002), the court analyzed a request for "records pertaining to confidential information," an exempt class of records under Rev. Stat. Ann. § 91-A:5, IV, using a balancing test: "[T]o determine whether records are exempt as confidential, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government." *Goode v. N.H. Office of Legislative Budget Assistant*, 148 N.H. at 554. "[T]he emphasis should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential. The burden of proving whether information is confidential rests with the party seeking non-disclosure." *Goode v. N.H. Office of Legislative Budget Assistant*, 148 N.H. at 554-55 (citations and quotations omitted).

Two recent cases have provided further guidance on the interaction between the attorney-client privilege and right-to-know requirements. In *Professional Firefighters of New Hampshire v. New Hampshire Local Government Center*, 163 N.H. 613, 615 (2012), the court ruled that even when the attorney-client communication is made in a public meeting, the communication will still be privileged from discovery pursuant to the right-to-know law if no one hears the conversation. However, while communications with counsel are protected from right-to-know access, the discussions of a municipal body concerning the advice of counsel--without counsel present--are subject to the open meeting requirements of Rev. Stat. Ann. c. 91-A, and are required to be disclosed under that statute. *Ettinger v. Town of Madison Planning Bd.*, 162 N.H. 785, 791 (2011).

Practice Note

Although the test described in *Goode v. N.H. Office of Legislative Budget Assistant* is not consistent with the categorical protections of the attorney-client privilege, it nevertheless provides a framework to argue that the attorney-client privilege shields certain state documents from discovery. Attorney-client communications that are privileged are, by definition, confidential, and the ancient origin of the privilege underscores the importance of maintaining that confidentiality. Hence, the benefits of nondisclosure to the government are powerful. If the emphasis is placed on the "potential harm that will result from disclosure," any document that would be protected by the attorney-client privilege if it were not a state document would presumably also be deemed nondiscoverable under the right-to-know law.

End of Document

1 Attorney-Client Privilege: State Law New Hampshire § 4:1

Attorney-Client Privilege: State Law | October 2023 Update
Paul R. Rice

Contributing Authors:

Kevin T. Barnett

Brian J. Shea

David M. Teslicko

Attorney-Client Privilege New Hampshire *

Chapter 4. Client

I. Introduction

§ 4:1. Generally

West's Key Number Digest

- West's Key Number Digest, Attorney and Client 122 to 126(2)
- West's Key Number Digest, Privileged Communications and Confidentiality 115 to 119
- West's Key Number Digest, Privileged Communications and Confidentiality 120 to 127

Treatises and Practice Aids

- Rice, et al., Attorney-Client Privilege in the United States § 4:1

The New Hampshire Rules of Evidence provides the definition of a client:

> A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

New Hampshire Rules of Evidence, Rule 502(a)(1). This definition acknowledges that communications from a prospective client are protected by the attorney-client privilege, even though the attorney has not yet formalized a representative relationship with the individual. One is deemed a client for purposes of applying the attorney-client privilege upon consulting a lawyer "with

a view to obtaining professional legal services from [a lawyer].” New Hampshire Rules of Evidence, Rule 502(a)(1). *See also* Brown v. Payson, 6 N.H. 443, 444, 1833 WL 1321 (1833) (“The relation of client and attorney must subsist at the time, and with reference to the subject matter, and the facts must have been acquired by the attorney through the confidence of his client.”).

Footnotes

* The content for this state has been reviewed for this update through July 2, 2023.

1 Attorney-Client Privilege: State Law New Hampshire § 2:4

Attorney-Client Privilege: State Law | October 2023 Update
Paul R. Rice

Contributing Authors:

Kevin T. Barnett

Brian J. Shea

David M. Teslicko

Attorney-Client Privilege New Hampshire *

Chapter 2. General Principles

§ 2:4. When representation and attorney-client privilege protection begins and ends

West's Key Number Digest

- West's Key Number Digest, Privileged Communications and Confidentiality 100 to 104
- West's Key Number Digest, Privileged Communications and Confidentiality 112
- West's Key Number Digest, Privileged Communications and Confidentiality 115

Treatises and Practice Aids

- Rice, et al., Attorney-Client Privilege in the United States § 2:4

Rule 502 of the New Hampshire Rules of Evidence provides:

> A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

New Hampshire Rules of Evidence, Rule 502(a)(1). Consistent with federal courts, this definition acknowledges that communications from a prospective client are protected by the attorney-client privilege, even though the attorney has not yet formalized a representative relationship with the individual. One will be deemed a client for purposes of applying the attorney-

client privilege upon consulting a lawyer "with a view to obtaining professional legal services from [a lawyer]." New Hampshire Rules of Evidence, Rule 502(a)(1). *See also* Brown v. Payson, 6 N.H. 443, 444, 1833 WL 1321 (1833) ("The relation of client and attorney must subsist at the time, and with reference to the subject matter, and the facts must have been acquired by the attorney through the confidence of his client."). *But see* McCabe v. Arcidy, 138 N.H. 20, 25, 635 A.2d 446, 449 (1993) ("[A]n attorney-client relationship 'is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.'").

Footnotes

* The content for this state has been reviewed for this update through July 2, 2023.

165 N.H. 735
Supreme Court of New Hampshire.

PETITION OFStephen STOMPOR

No. 2012–555
|
Argued: September 19, 2013
|
Opinion Issued: December 6, 2013

Synopsis

Background: Petitioner sought a writ of certiorari challenging an order of the Circuit Court, Concord Probate Division, Hampe, J., which granted petitioner and his brother access to the file of an attorney who drafted estate plan documents for their parents.

[Holding:] The Supreme Court, Conboy, J., held that attorney's file fell within exception to attorney-client privilege for communications relevant to an issue between parties who claim through the same deceased client.

Affirmed.

West Headnotes (11)

[1] **Appeal and Error** Discovery
Appeal and Error Admission or exclusion of evidence in general

Supreme Court reviews a trial court's decisions on management of discovery and admissibility of evidence under an unsustainable exercise of discretion standard.

4 Cases that cite this headnote

[2] **Appeal and Error** Discovery
Appeal and Error Admission or exclusion of evidence in general

Supreme Court will not disturb trial court's order on management of discovery and admissibility of evidence absent an unsustainable exercise of discretion, and to meet this standard, party must demonstrate that trial court's ruling was clearly untenable or unreasonable to the prejudice of the case.

4 Cases that cite this headnote

[3] **Privileged Communications and Confidentiality** Elements in general; definition

Confidential communications between a client and an attorney are privileged and protected from inquiry. N.H. R. Evid. 502(b).

2 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality** Wills, trusts, and estates

For evidence protected by attorney-client privilege to be relevant and admissible under rule excepting from the privilege a communication relevant to an issue between parties who claim through the same deceased client, attorney's file must have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. N.H. R. Evid. 502(d)(2).

1 Case that cites this headnote

[5] **Wills** Presumptions and Burden of Proof

To invalidate a will on ground of undue influence, there must be evidence sufficient to permit inference that testator was misled or coerced into making the will as it was made.

[6] **Wills** Nature and degree in general

To invalidate a will on ground of undue influence, it must appear that the alleged influence amounts to force and coercion, destroying free agency, and not merely the influence of affection, or merely the desire of gratifying another; but it must appear that the will was obtained by this coercion.

[7] **Wills** Nature and degree in general

Undue influence to avoid a will must be of a kind that subjugates mind of testator to that of person seeking to control it, so as to destroy the free agency of testator at time will is made.

[8] **Privileged Communications and Confidentiality** Wills, trusts, and estates

Attorney's file which related to parents' intentions regarding their estate plan prior to time that one child alleged they were unduly influenced by other child and were incompetent to understand what they were signing was relevant to determining whether other child unduly influenced parents at time they executed their estate plan and to ascertain whether estate plan documents reflected parents' true intent, and thus, file fell within exception to attorney-client privilege for communications relevant to an issue between parties who claim through the same deceased client. N.H. R. Evid. 401, 502(d)(2).

[9] **Privileged Communications and Confidentiality** Wills, trusts, and estates

Exception to attorney-client privilege for a communication relevant to an issue between parties who claim through the same deceased client is not limited to attorney-client communications that culminate in an executed estate plan.

2 Cases that cite this headnote

[10] **Privileged Communications and Confidentiality** Wills, trusts, and estates

Assuming, without deciding, that attorney-client privilege protects communications between a prospective client, or a representative of a prospective client, and an attorney, correspondence between attorney and son who alleged that he contacted attorney on parents' behalf as prospective clients was discoverable under exception to privilege for a communication relevant to an issue between parties who claim through the same deceased client, as the communication was relevant to evaluation of claim that son exerted undue influence on parents and that their estate plan documents did not reflect parents' true intent. N.H. R. Evid. 502(d)(2).

1 Case that cites this headnote

[11] **Pretrial Procedure** Discretion of court

Trial courts enjoy broad discretion in determining the limits of pretrial discovery.

**1279 6th Circuit Court—Concord Probate Division

Attorneys and Law Firms

**1280 Roy S. McCandless, Esq., P.L.L.C., of Concord, (Roy S. McCandless on the brief and orally), for Stephen Stompor.

Seufert, Davis & Hunt, PLLC, of Franklin (Christopher J. Seufert on the brief and orally), for Stan Stompor.

Opinion

CONBOY, J.

*736 The petitioner, Stephen Stompor, seeks a writ of certiorari, *see Sup.Ct. R.* 11, challenging an order of the 6th Circuit Court—Concord Probate Division (*Hampe,* J.) granting the petitioner and his brother, the respondent, Stan Stompor, access to the file of an attorney who drafted estate plan documents for their parents, Broneslaw and Amelia Stompor (the parents). We affirm.

*737 The following facts are drawn from the record. In 2001 and 2002, the parents met with an attorney (the Attorney) regarding their estate plans. The Attorney drafted estate plan documents for them; however, due to a conflict, the Attorney subsequently withdrew from representing them, and the estate plan documents were not executed.

In 2004, the petitioner wrote to the Attorney to inquire whether the Attorney would again represent the parents with regard to their estate plans. The Attorney declined to do so. The petitioner then helped the parents prepare certain estate plan documents, and the parents executed those documents in October 2004. Although these estate plan documents are not

included in the record on appeal, the petitioner represents, and the respondent does not dispute, that they include wills that bequeath the parents' assets to the petitioner and his family to the exclusion of the parents' other children. The documents include the Broneslaw J. Stompor Living Trust, of which the petitioner is a co-trustee. That same year, the parents also gave the petitioner powers of attorney to act as their agent.

In October 2007, the respondent filed a petition in the probate division, on the parents' behalf, pursuant to RSA 506:7 (2010), seeking to determine the legality of certain acts of the petitioner and requesting, among other things, an accounting of the petitioner's handling of all of the parents' funds either personally or as a trustee of his father's living trust. In June 2009, the respondent successfully moved to amend his petition to allege that, in 2004, the petitioner, as the parents' fiduciary, exercised undue influence over the parents when they lacked the capacity to understand the estate plan documents that gave the petitioner and his family exclusive inheritance rights to the parents' assets to the exclusion of the parents' other children. The respondent sought to have the petitioner removed as the parents' fiduciary and to void all actions taken in his fiduciary capacity. The parents passed away during the late summer of 2009.

In February 2010, while his petition was still pending, the respondent sought disclosure from the Attorney of any information he had regarding his contact with the parents in connection with the challenged 2004 estate plan. The petitioner objected, arguing that the attorney-client privilege prohibits disclosure of any documents the Attorney has relating to his consultations with the parents. Thereafter, the court granted the parties' assented-to discovery motion allowing the Attorney to submit, for *in camera* review, any files he had "concerning [the parents'] estate plan[ ] documents signed in 2004." The court reviewed the file and held a hearing. At the December 1, 2011 hearing, the Attorney appeared and objected to disclosure of his file on the ground that, with the possible exception of the 2004 letter from the petitioner, ****1281** its contents are subject to the attorney-client privilege.

***738** Subsequently, the court issued an order allowing disclosure of the Attorney's file to the parties. The court ruled that, pursuant to *Stevens v. Thurston,* 112 N.H. 118, 289 A.2d 398 (1972), the Attorney's entire file was discoverable because it was relevant to a dispute among the decedents' children and to whether the petitioner unduly influenced the parents' decisions regarding their estate plan. After being denied an interlocutory appeal, the petitioner filed this petition for writ of certiorari challenging the trial court's ruling. We accepted the petition and stayed the court's disclosure order pending resolution of this proceeding.

The petitioner argues that the attorney-client evidentiary privilege prohibits disclosure of the Attorney's file and that no exceptions to the privilege apply. He further contends that this case does not involve an at-issue waiver or a compelling need that would allow for disclosure of the Attorney's file. The petitioner also argues that his 2004 correspondence with the Attorney is protected by the attorney-client privilege because he wrote to the Attorney on the parents' behalf. Finally, the petitioner maintains that the trial court erred because the Attorney's file is not responsive to the discovery order.

[1] **[2]** We review a trial court's decisions on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard. *Desclos v. S. N.H. Med. Ctr.,* 153 N.H. 607, 610, 903 A.2d 952 (2006). We will not disturb the trial court's order absent an unsustainable exercise of discretion. *Id.* To meet this standard, the petitioner must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. *See id.*

[3] "The 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." *Hampton Police Assoc. v. Town of Hampton,* 162 N.H. 7, 15, 20 A.3d 994 (2011) (quotation omitted). New Hampshire Rule of Evidence 502 essentially codifies the common law attorney-client privilege. *Id.* Under Rule 502(b), "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," including communications between the client and his lawyer. This privilege continues after the death of the client, *see Stevens,* 112 N.H. at 119, 289 A.2d 398, and may be claimed by the personal representative of a deceased client as well as the person who was the lawyer or the lawyer's representative at the time of the communication, "but only on behalf of the client," *N.H. R. Ev.* 502(c).

Rule 502(d), however, sets forth five categories of communications that are not privileged. Applicable here is Rule 502(d)(2), which excepts ***739** from the privilege "a

communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction." Although the purpose of the attorney-client privilege is to encourage full disclosure of information between an attorney and his client by guaranteeing the inviolability of their confidential communications, *Riddle Spring Realty Co. v. State,* 107 N.H. 271, 274, 220 A.2d 751 (1966), the basis for the exception in Rule 502(d)(2) is that "all reason for assertion of the privilege disappears" when the privilege is being asserted not for the protection of the testator or his estate but for the protection of a claimant to his estate, ****1282** *Stevens,* 112 N.H. at 119, 289 A.2d 398. This is so because the best way to protect the client's intent lies in the admission of all relevant evidence that will aid in the determination of his true will. *Id.* As the United States Supreme Court has noted, "[t]he general rule with respect to confidential communications is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs"; "[t]he rationale for such disclosure is that it furthers the client's intent." *Swidler & Berlin v. United States,* 524 U.S. 399, 405, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (quotation and ellipsis omitted).

[4] Here, the parties claim through the same deceased clients. If the respondent is successful in proving that the petitioner unduly influenced the parents, the 2004 estate plan documents that bequeathed to the petitioner and his family all of the parents' assets will be voided. *Cf.Stevens,* 112 N.H. at 119, 289 A.2d 398 (noting in will contest that, if defendants were successful, they, rather than plaintiff, would be representatives of testator). The question, therefore, is whether the Attorney's file is relevant to an issue between the parties. *N.H. R. Ev.* 502(d)(2). In order to be relevant, the Attorney's file must have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *N.H. R. Ev.* 401.

[5] **[6]** **[7]** The respondent alleges that, in 2004, the petitioner unduly influenced the parents to leave all of their assets to the petitioner and his family at a time when the parents lacked the capacity to understand what they were signing. To invalidate a will on the ground of undue influence, there must be evidence sufficient to permit the inference that the testator was misled or coerced into making the will as it was made. *Bartlett v. McKay,* 80 N.H. 574, 574, 120 A. 627 (1923). It must appear that the alleged influence amounts "to force and coercion, destroying free agency, and not merely the influence of affection, or merely the desire of gratifying another; but it must appear that the will was obtained by this coercion." *Id.* at 574–75, 120 A. 627 (quotation omitted). "Undue influence to avoid a will must be of a kind that subjugates ***740** the mind of the testator to that of the person seeking to control it, so as to destroy the free agency of the testator at the time the will is made." *Id.* at 575, 120 A. 627 (quotation omitted).

[8] We have reviewed the Attorney's file and agree with the trial court that the file is relevant to the issues between the parties. The Attorney's file relates to the parents' intentions regarding their estate plan prior to the time the respondent alleges that they were unduly influenced by the petitioner and were incompetent to understand what they were signing. Thus, the file is relevant to determining whether the petitioner unduly influenced the parents at the time they executed their estate plan in 2004 and to ascertaining whether the 2004 estate plan documents reflect the parents' true intent. *See Remien v. Remien,* 1996 WL 411387, at *3 (N.D.Ill.1996) (ordering production, under similar exception, of deceased father's letters to his attorney, which related to father's intention regarding disposition of his stock in corporation, because they were relevant to assessment of whether son's actions at time of stock redemption frustrated or fulfilled father's wishes); *In re Texas A & M–Corpus Christi Foundation,* 84 S.W.3d 358, 360–61 (Tex.App.2002) (allowing discovery of information, under similar exception, from attorneys who assisted decedent with estate and trust matters prior to the gift at issue because it was relevant to decedent's longstanding intentions to make ****1283** gift and to her mental acumen shortly before gift was made).

[9] Relying upon *Gould, Larson, Bennet, Wells v. Panico,* 273 Conn. 315, 869 A.2d 653 (2005), the petitioner argues that the exception in Rule 502(d)(2) is limited to cases in which the attorney's work includes *executed* estate plan documents, regardless of whether the attorney's work is relevant to the issues in the case. In *Gould,* the Connecticut Supreme Court held that "when the communications between a decedent and his attorney do not result in an executed will, the communications do not fall within the exception to the attorney-client privilege and thus are confidential." *Gould,* 869 A.2d at 655. Connecticut's exception to the attorney-client privilege, however, applies to "communications, by a client to the attorney who drafted his will, in respect to that

document and transactions between them leading up to its execution," *id.* at 657 (emphasis omitted), and thus, is more limited than our exception, which allows for disclosure of "communication[s] relevant to an issue between parties who claim through the same deceased client." *N.H. R. Ev.* 502(d)(2). Given that Connecticut's exception is narrower than ours, we find *Gould* inapplicable.

Our conclusion that the Rule 502(d)(2) exception is not limited to attorney-client communications that culminate in executed estate plan documents is supported by the decisions of other courts in states that have ***741** adopted an exception similar to ours. *See Ervesun v. Bank of New York,* 99 N.J.Super. 162, 239 A.2d 10, 14 (1968) (finding that, by adopting exception, legislature intended to depart from earlier rule that disallowed attorney from testifying to circumstances surrounding execution of earlier wills superseded by probated will); *Tanner v. Farmer,* 243 Or. 431, 414 P.2d 340, 342–43 (1966) (concluding that, by applying exception in more recent case, court overruled earlier case disallowing testimony of attorney who had prepared two unexecuted wills). Accordingly, because the Attorney's file is relevant to an issue between parties who claim through the same deceased client, we hold that the trial court did not unsustainably exercise its discretion in allowing the file to be disclosed to the parties under Rule 502(d)(2).

In light of our holding that the Attorney's file is subject to disclosure pursuant to the exception in Rule 502(d)(2), we need not address the petitioner's arguments regarding whether there was an at-issue waiver of the attorney-client privilege or a compelling need for disclosure.

[10] The petitioner next argues that the 2004 correspondence between him and the Attorney is protected by the attorney-client privilege. He contends that he contacted the Attorney on the parents' behalf as prospective clients and "[a]n expectation of privacy was ... evident." Assuming, without deciding, that the attorney-client privilege protects communications between a prospective client, or a representative of a prospective client, and an attorney, and that the petitioner is entitled to claim the privilege on the parents' behalf, we find that these communications are also discoverable under Rule 502(d)(2).

As discussed above, the respondent alleges that the petitioner unduly influenced the parents to execute the 2004 estate plan documents when they were not competent to understand them. As with the Attorney's file, the correspondence between the petitioner and the Attorney in 2004 is relevant to the evaluation of the undue influence allegation and the determination of whether the 2004 estate plan documents reflect the parents' true intent. *Cf. Stevens,* 112 N.H. at 119, 289 A.2d 398; *In re Texas A & M–Corpus Christi Foundation,* 84 S.W.3d at 360 (finding discovery sought relevant to evaluating mental acumen of ****1284** deceased at time gift was made). Accordingly, we conclude that the trial court did not unsustainably exercise its discretion in allowing disclosure of the 2004 correspondence between the petitioner and the Attorney.

The petitioner further contends that the trial court erred by expanding upon the assented-to discovery order. He maintains that the discovery order related only to estate plan documents signed in 2004 and that the ***742** Attorney's file, which includes communications the Attorney had with the parents in 2001 and 2002 does not "pertain to" the executed 2004 documents.

[11] Trial courts enjoy broad discretion in determining the limits of pretrial discovery. *See N.H. Ball Bearings v. Jackson,* 158 N.H. 421, 429, 969 A.2d 351 (2009). Here, the court reviewed the Attorney's file and found it relevant to the issues in this case, and, based upon our review of the file, we agree. Accordingly, to the extent that the trial court may have expanded the scope of its initial assented-to discovery order, we find no error by the trial court.

Finally, the petitioner filed a motion seeking to correct certain misstatements made by his counsel at oral argument. The respondent objects. Because our ruling today does not rely upon any of the alleged misstatements, we decline to rule on the petitioner's motion as it is moot.

Affirmed.

DALIANIS, C.J., and HICKS, LYNN and BASSETT, JJ., concurred.

All Citations

165 N.H. 735, 82 A.3d 1278

End of Document

1 Am. Jur. Trials 1 (Originally published in 1964)

American Jurisprudence | December 2023 Update

Trials

Lawrence V. Hastings *

Interviewing the Client

TABLE OF CONTENTS

Article Outline
Research References

ARTICLE OUTLINE

I Basic General Interview
§ 1 Function of the client interview
§ 1.5 Ascertaining existence of conflicts of interest
§ 2 The defense interview
§ 3 The mentally unbalanced client
§ 4 Number of interviews
§ 5 Educating the client on the law
§ 6 Time and place of interview; record
§ 7 Persons present
§ 8 Attitude of counsel
§ 9 The possibility of losing the case
§ 10 Interviews-in-depth
§ 11 Scope of questions
§ 12 Handling inconsistencies, contradictions, and omissions
§ 13 Prior injuries and claims
§ 14 Manner of questioning
§ 15 Manner of questioning—Chronological sequence
§ 16 Manner of questioning—Obtaining answers that review the past
§ 17 Checklist of questions
§ 18 Final instructions
II Interview as to Injury
§ 19 In general
§ 20 Defense inquiries
§ 21 Physical and mental condition
§ 22 Physical and mental condition—Functional or organic disabilities
§ 23 Physical and mental condition—Neurosis
§ 24 Loss of time; impairment of earning capacity
§ 25 Medical and nursing expenses
§ 26 Pain and suffering
§ 27 Pain and suffering—Variations in the threshold of pain

§ 28 Checklist of questions
§ 29 Concluding the interview
Research References

I. Basic General Interview

§ 1. Function of the client interview

[Cumulative Supplement]

The importance of client interviews in trial preparation and technique can hardly be overestimated. The most important and obvious function of the initial interview with a client is to obtain information that will allow the attorney to determine whether there is a case at all and to start the investigation rolling. Once it is determined that the client does have a case, the information gathered during the client interviews is used as a basis for almost every phase of trial practice, from the preparation of the retainer to the recovery of judgment. It is used in settlement negotiations as well as in taking depositions and in other discovery proceedings. It is used in drawing pleadings, in making a trial brief, in selecting the jury, and in the examination of the client at the trial. It is used again in the questioning of witnesses and in the cross-examination of the adverse party.

For these reasons the interviews with the client should be both accurate and exhaustive. No facts should be assumed or considered so insignificant that they are excluded from discussion at the interviews. The client who suddenly makes some unexpected disclosure while giving testimony, either on the opponent's deposition or at the trial itself, is an all too familiar source of embarrassment to the trial lawyer. Counsel should know in advance exactly what his client will say on the stand and how he will say it—both on direct and on cross-examination. Preparedness of this kind can be gained only from a penetrating and dispassionate examination of the client during the interview.

CUMULATIVE SUPPLEMENT

Cases:

Defendant was not soliciting legal advice or providing information that his attorney might use in crafting his defense, as would be required for attorney-client privilege to be applicable, where defendant asked his lawyer, while defendant was in jail awaiting trial for armed bank robbery, to forward a letter to defendant's cousin, in which letter defendant instructed cousin to provide a false alibi for defendant. U.S. v. Williams, 698 F.3d 374 (7th Cir. 2012).

The rationale for the existence of attorney-client privilege during initial consultation with attorney, regardless of whether attorney is retained is compelling, because no person could ever safely consult an attorney for the first time with a view to his employment if the privilege depended on the chance of whether the attorney after hearing his statement of the facts decided to accept the employment or decline it. Barton v. U.S. Dist. Court for Central Dist. of Cal., 410 F.3d 1104 (9th Cir. 2005); West's Key Number Digest, Witnesses 199(1).

Agreement between assignee of patent rights, initial patent licensee, and subsequent licensee to retain common counsel and inclusion of initial licensee and assignee in disputed communications indicated joint client relationship existed among assignee, initial licensee, and subsequent licensee which protected their communications under joint privilege in patent infringement action against amusement park owners, despite owners' contention that disputed communications occurred after termination of joint privilege; since there was joint relationship among parties at time documents were prepared for litigation, waiver would have required consent of these parties, and thus, even if subsequent licensee waived its own attorney-client privilege, its unilateral waiver did not relinquish joint privilege for initial licensee and assignee. Magnetar Technologies Corp. v. Six Flags Theme Park Inc., 886 F. Supp. 2d 466 (D. Del. 2012).

During in camera review, district court upheld corporate defendants' claim of attorney-client privilege regarding defendants' communications with corporate lawyers if primary purpose of communication appeared to be a request or transmission of legal

advice, even if there were some incidental business advice discussed. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A. U.S. v. Davita, Inc., 301 F.R.D. 676 (N.D. Ga. 2014).

E-mail prepared by in-house counsel, discussing procedures for terminating contract to provide support services for customer, was communication from attorney, for purposes of determining whether attorney-client privilege precluded its use in breach of contract action brought by second customer under Nevada law, even though copy of e-mail obtained by second customer and sought to be suppressed, was forwarded from one non-legal employee to another. Premiere Digital Access, Inc. v. Central Telephone Co., 360 F. Supp. 2d 1168 (D. Nev. 2005); West's Key Number Digest, Witnesses 199(2).

Law firm and its partner, who determined that they could jointly represent supervisor and employer against third-party's sexual harassment charges based on only a "thumbnail sketch" from a "brief recitation" by employer's human resources manager, without any "independent study" and without speaking to supervisor directly, did not adequately discharge their professional obligations to form their own reasoned opinion and to fully advise their clients with respect to implications of the common representation, despite supervisor's compromised candor, and so they were disqualified from representing employer in supervisor's own subsequent sexual harassment lawsuit against employer as well as in the companion cases of two of her co-workers. Code of Prof Respons, Canon EC 5-15, 5-16, DR 5-105(C), N.Y.McKinney's Judiciary Law App. Felix v. Balkin, 49 F. Supp. 2d 260 (S.D.N.Y. 1999); West's Key Number Digest, Attorney and Client 21.5(4).

For attorney-client privilege to attach to communication, it must be (1) communication (2) made between privileged persons (3) in confidence (4) for purpose of obtaining or providing legal assistance for client; "privileged persons" include client, attorneys, and any of their agents that help facilitate attorney-client communications or legal representation. Dempsey v. Bucknell University, 296 F.R.D. 323 (M.D. Pa. 2013).

No attorney-client relationship arises for purposes of the attorney-client privilege if a person consults an attorney for nonlegal services or advice in the attorney's capacity as a friend, rather than in his or her professional capacity as an attorney. Cal. Evid. Code §§ 950, 951, 954. Palmer v. Superior Court, 2014 WL 6662053 (Cal. App. 2d Dist. 2014).

An attorney bears two distinct ethical duties to a client: (1) a duty of loyalty, whereby an attorney devotes his or her entire energies to his client's interests, and (2) a duty of confidentiality, which fosters full and open communication between client and counsel. Havasu Lakeshore Investments, LLC v. Fleming, 2013 WL 3034731 (Cal. App. 4th Dist. 2013).

In camera inspection was not necessary or permitted to determine whether documents on attorney-client privilege log were actually privileged, where clients met their burden to support a prima facie claim of attorney-client privilege. Cal. Evid. Code § 954. Bank of America, N.A. v. Superior Court of Orange County, 212 Cal. App. 4th 1076, 2013 WL 151153 (4th Dist. 2013).

Attorney's telephone discussion with former potential client after client received letter advising client that attorneys were declining to take client's medical malpractice case and advising client to obtain other counsel and to take action to avoid missing the statute of limitations on her personal claim, wherein attorney purportedly made comments that neither client nor her son had good case and that doctor was or seemed to be a "nice guy," did not revive any duty attorneys had toward client to take her case or to advise her further on case, for purposes of client's breach of fiduciary duty claim, where purported comments made by attorney were consistent with position taken in letter. Camarillo v. Vaage, 105 Cal. App. 4th 552, 130 Cal. Rptr. 2d 26 (4th Dist. 2003), review denied, (Apr. 16, 2003); West's Key Number Digest, Attorney and Client 112.

An attorney must refrain from any conduct that compromises his undivided loyalty to a client. This duty of loyalty serves to protect the client's trust and confidence in his attorney. An attorney in private practice may not sue his client without first withdrawing from representation. Likewise, an attorney-employee may not sue his client-employer unless the attorney-client relationship is first severed. In addition, even if a statutory right to sue exists in favor of an attorney, suits by an attorney against a former client may be subjected to severe restrictions or even completely prohibited. Santa Clara County Counsel Attys. Assn. v. Woodside (1993, 6th Dist) 12 Cal App 4th 1543, 15 Cal Rptr 2d 898, 93 CDOS 770, 93 Daily Journal DAR 1418, 142 BNA LRRM 2489, review gr (Cal) 93 Daily Journal DAR 612993 Daily Journal DAR 6129.

First Amendment did not protect attorneys' television advertisements that used logo of pit bull with spiked collar and "pit bull" in telephone number; the logo and phone number did not convey objectively relevant information about the attorneys' practice, but were intended to convey an image about the nature of the lawyers' litigation tactics. U.S.C.A. Const.Amend. 1; West's F.S.A. Bar Rule 4-7.2(b)(3, 4). The Florida Bar v. Pape, 918 So. 2d 240 (Fla. 2005), reh'g granted, (Jan. 27, 2006) and cert. denied, 126 S. Ct. 1632, 164 L. Ed. 2d 335 (U.S. 2006); West's Key Number Digest, Attorney and Client 32(9).

Social conversation or "consultation": Lawyer-client privilege was inapplicable with respect to certain communications between murder defendant and a practicing lawyer, which lawyer was a family friend and represented defendant in then-pending negligence case, given that, during conversation between defendant and lawyer at defendant's home, defendant never asked for any legal advice and lawyer never gave any legal advice, defendant did not "consult" lawyer with purpose of obtaining legal services, and fact that lawyer replied "sure" when defendant asked him if he was defendant's lawyer did not establish that privilege existed. West's F.S.A. § 90.502(1)(b), (2). State v. Branham, 952 So. 2d 618 (Fla. Dist. Ct. App. 2d Dist. 2007); West's Key Number Digest, Witnesses 200.

An attorney-client relationship can be created through preliminary consultations, even though the attorney is never formally retained and the client pays no fee. Bays v. Theran (1994) 418 Mass 685, 639 NE2d 720.

An attorney-client relationship was created between the plaintiff and the attorney who thereafter was retained by the defendant where: (1) the plaintiff communicated with the attorney by mail and telephone with a view to possibly retaining him; (2) the plaintiff and the attorney discussed various aspects of a potential suit against the defendant; and (3) the attorney counselled the plaintiff concerning some of the basic legal considerations involved in such a suit. Bays v. Theran (1994) 418 Mass 685, 639 NE2d 720.

"Published" attorney: Web site for attorney's law office, which represented that attorney was a member of an "elite percentage" of attorneys who have been "published" in series of reports of decisions of federal Courts of Appeals, was inherently misleading, and thus, Disciplinary Hearing Commission (DHC) was not required to consider extrinsic evidence of whether the public was actually misled, when determining whether attorney had violated professional conduct rules prohibiting lawyers from making false or misleading communications. State Bar Rules, Ch. 2, Rule 7.1. North Carolina State Bar v. Culbertson, 627 S.E.2d 644 (N.C. Ct. App. 2006), appeal dismissed, review denied, 633 S.E.2d 819 (N.C. 2006); West's Key Number Digest, Attorney and Client 32(9).

Putative client had a reasonable belief that attorney was acting as his attorney in a sexual harassment matter when he first met with attorney, and thus, an attorney-client relationship existed, even though attorney later refunded $500 of $1,500 "investigative retainer" and no formal written fee agreement was executed at that time, where attorney advised client that he had "a good claim, highly winnable" against his former employer and that he had three years from the date of his resignation to bring the lawsuit, and attorney obtained client's personnel folder from employer and met with client a month later to discuss case. In re Disciplinary Action Against McKechnie, 2003 ND 22, 656 N.W.2d 661 (N.D. 2003); West's Key Number Digest, Attorney and Client 64.

Partner waived any objection he might have had to opposing party's counsel, where partner waited almost seven months before he filed his motion to disqualify counsel. V.T.C.A., Government Code Title 2, Subtitle G App. A–1, Disciplinary Procedure Rule 1.09(b). Buck v. Palmer, 379 S.W.3d 309 (Tex. App. Corpus Christi 2010), review granted, judgment rev'd on other grounds, 55 Tex. Sup. Ct. J. 1408, 2012 WL 3800830 (Tex. 2012).

The phoney client: Evidence was sufficient to establish that defendant's acts constituted one scheme or continuing course of conduct so as to support aggregated theft conviction; over 10-month period, defendant told seven different attorneys story that he and coworker had been injured while working on oil rig, that coworker was comatose, that coworker's wife also needed representation, that employer had offered settlement, that he needed further surgery, and that he needed money to care for his wife and their four children, defendant always requested large sums of money and disappeared after receiving money, and defendant used same alias with several attorneys and often mentioned similar characters in his accounts. V.T.C.A., Penal

Code § 31.03(a), (b)(1). Johnson v. State, 187 S.W.3d 591 (Tex. App. Houston 14th Dist. 2006), petition for discretionary review refused, (May 24, 2006); West's Key Number Digest, Larceny 65.

[Top of Section]

[END OF SUPPLEMENT]

§ 1.5. Ascertaining existence of conflicts of interest

[Cumulative Supplement]

CUMULATIVE SUPPLEMENT

Cases:

Parties' son did not have a disabling "pecuniary interest" in the parties' estate so as to warrant disqualifying son from representing his father in divorce action; while all children might have an expectancy in their parents' estate, no child had a pecuniary right to his or her parents' estate, and a pecuniary interest, without more, did not create a confidential or fiduciary relationship requiring disqualification. Liapis v. Dist. Ct., 282 P.3d 733, 128 Nev. Adv. Op. No. 39 (Nev. 2012).

Testator's mother waived her objection to opposing counsel's representation of testator's daughter during probate proceedings; daughter's interests were materially adverse to mother's interests inasmuch as mother had consistently maintained that, pursuant to tribal law, she was entitled to all real property and businesses located within Native American tribal territory that were to pass to daughter under testator's will, and, although mother was not named party in any proceeding, she and her attorney actively participated in litigation for over one year before filing motion to disqualify, with full knowledge of potential conflict of interest involving daughter's attorney. In re Estate of Peters, 124 A.D.3d 1266, 2015 WL 25469 (4th Dep't 2015).

Disqualification of former employees' counsel due to alleged conflict of interest related to representation against employer in state court action was not warranted on motion for conditional class certification under Fair Labor Standards Act (FLSA) in action against employer. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b); N.Y.Rules of Prof.Conduct, Rule 1.7. Spagnuoli v. Louie's Seafood Restaurant, LLC, 20 F. Supp. 3d 348, 23 Wage & Hour Cas. 2d (BNA) 293 (E.D. N.Y. 2014) (applying New York law).

Attorney's prior representation of Lummi Tribe, in United States' and Indian tribes' action against State of Washington concerning off-reservation treaty right fishing, during which prior representation the usual and accustomed fishing places for Lummi Tribe in certain area were established, was substantially related to attorney's representation of Tulalip Tribes in later subproceeding of same action, as required for attorney to be disqualified based on conflict of interest arising out of prior representation, given that attorney, while representing Tulalip Tribes, questioned whether Lummi Tribe had usual and accustomed fishing places in the area at all. U.S. v. Washington, 18 F. Supp. 3d 1123 (W.D. Wash. 1987).

California's professional conduct rules for attorneys allows waiver of concurrent conflicts of interest by informed written consent. Cal.Prof.Conduct Rule 3–300(C). Lennar Mare Island, LLC v. Steadfast Ins. Co., 105 F. Supp. 3d 1100 (E.D. Cal. 2015).

Information and knowledge acquired by attorney through his prior representation of insurer and its clients was highly likely to be used to the disadvantage of insurer, and thus attorney was disqualified under Idaho rule of professional conduct, governing duties to former clients, from representing insured in action against insurer for breach of contract and bad faith; attorney had worked extensively and closely with insurer's representatives he sought to depose in insured's action, attorney learned confidential information about such things as insured's coverage determinations, claims processing, training, litigation, and settlement strategies, and attorney had previously discussed a related law suit implicated in insured's action with insurer's adjusters and upper management. Idaho R. Prof. Conduct 1.9(c). Vega v. GEICO Choice Insurance Company, 645 F. Supp. 3d 987 (D. Idaho 2022).

Under Maryland law, substantial relationship did not exist between counsel's alleged prior representation of insurer in third-party automobile and lead-paint tort cases and her current representation of insureds in action seeking declaration that insurer had no duty under commercial general liability (CGL) policy to defend insureds in underlying action seeking damages for injuries sustained as result of exposure to lead paint in insureds' residential rental property, and thus disqualification of insureds' counsel was not warranted, absent factual nexus between counsel's earlier representation and her present representation. Md.Rule 16-812, Rules of Prof.Conduct, Rule 1.9. Pennsylvania Nat. Mut. Cas. Ins. Co. v. Perlberg, 819 F. Supp. 2d 449 (D. Md. 2011).

Under New Mexico law, as predicted by district court, statute authorizing treble damages when "attorney is guilty of deceit or collusion or consents thereto with intent to deceive the court, judge, or party" applied only in the context of judicial proceedings, and thus did not support claim in which partner of real estate development partnership contended that attorney who represented partnership deceived him about representing partnership's managing partner and managing partner's adverse interests and that attorney colluded with managing partner to withhold material information from partner. New Mexico Statutes § 36-2-17 (1978). Richter v. Van Amberg, 97 F. Supp. 2d 1255 (D.N.M. 2000); West's Key Number Digest, Attorney and Client 26.

"House counsel" for the mob: In racketeering prosecutions, a conflict of interest arises if counsel acts as "house counsel" for an organized crime family for two reasons: (1) the attorney's loyalties may be divided between the client and the payor, and (2) the government may use evidence that the attorney acts as "house counsel" to establish the existence of a criminal enterprise, and evidence tending to incriminate the attorney would prejudice the defendant. Restatement (Third), The Law Governing Lawyers § 134(1). U.S. v. Pizzonia, 415 F. Supp. 2d 168 (E.D. N.Y. 2006); West's Key Number Digest, Criminal Law 641.5(.5).

Under the "hot potato doctrine," it is impermissible for counsel to drop a client "like a hot potato" in order to represent a more remunerative or favored client where there is a conflict of interests between the clients. Rules of Prof.Conduct, Rule 1.9, 42 Pa.C.S.A. In re Rite Aid Corp. Securities Litigation, 139 F. Supp. 2d 649 (E.D. Pa. 2001); West's Key Number Digest, Attorney and Client 20.1.

Pennsylvania professional conduct rule did not disqualify law firm, which formerly represented corporation and former chief executive officer (CEO), from representing corporation after ceasing to represent CEO when corporation's and CEO's interests conflicted, where corporation was primary client, CEO's representation was through corporation's representation, law firm notified CEO he might need to seek other counsel, and law firm did not take position adverse to CEO but rather CEO's position became adverse to corporation's. Rules of Prof.Conduct, Rule 1.9, 42 Pa.C.S.A. In re Rite Aid Corp. Securities Litigation, 139 F. Supp. 2d 649 (E.D. Pa. 2001); West's Key Number Digest, Attorney and Client 21.5(3).

Chapter 7 trustee's failure, for more than a year after commencement of bankruptcy case, to file motion to disqualify attorneys from representing fraudulent transfer defendants, based on their prior representation of debtor-corporation in substantially related matter, did not result in waiver of trustee's right to claim disqualification, where trustee filed motion to disqualify prior to commencement of fraudulent transfer avoidance proceeding, after her attempts at mediation with fraudulent transfer defendants failed, and where trustee, in attempting to resolve her claims against defendants without resulting to litigation, had raised her concerns about attorneys' possible conflicts of interest and never indicated any intent to waive such conflicts. In re Cabe & Cato, Inc., 524 B.R. 870 (Bankr. N.D. Ga. 2014).

Circuit court abused its discretion in disqualifying counsel from representation of criminal defendant in circuit court proceedings, based on counsel's previous representation of co-defendant in district court, in case in which defendant was convicted at district court level but appealed to circuit court, where there was no proof that interests of defendant and co-defendant were adverse for purposes of attorney's representation, and attorney represented that defendant had made knowing and intelligent waiver of any conflict. Rules of Prof.Conduct, Rules 1.6, 1.7, 1.9. Samontry v. State, 2012 Ark. 105, 387 S.W.3d 178 (2012).

Duty owed to former husband by attorney with whom he had consulted prior to retaining other counsel was coextensive with the duty attorney owed to a former client under the Rules of Professional Conduct; former husband was a prospective client under the Rules when he consulted with attorney, and as a result of that communication, attorney was prohibited from using or revealing information learned in her meeting with former husband. Rules of Prof.Conduct, Rules 1.9(c), 1.18(b). Sturdivant v. Sturdivant, 367 Ark. 514, 241 S.W.3d 740 (2006); West's Key Number Digest, Attorney and Client 32(13).

Mere fact that attorney's arguments on behalf of personal representative charged with probating decedent's holographic will in state happened to be consistent with the interests of the sole devisee did not prejudice decedent's pretermitted children, and thus, attorney's disqualification based on conflict of interest was not warranted; attorney's actions reflected conscientious legal services consistent with duties of counsel for a personal representative in an ancillary probate in that he gave notice to the children and adequately advised the court of issues regarding devisee's status as a common-law wife in foreign country and effect of that status on the property in the state. Rules of Prof.Conduct, Rule 1.7. Craig v. Carrigo, 340 Ark. 624, 12 S.W.3d 229 (2000); West's Key Number Digest, Attorney and Client 21.5(1).

Under California law, automatic disqualification rule did not apply in consumers' class action against consumer reporting agencies (CRAs), alleging violations of federal and state credit reporting laws, where conflict was manufactured by faulty settlement terms, not inherently opposing interests between class representatives and absent class members, and, once settlement agreement was vacated on appeal, conflict was no longer ongoing and did not call settling counsel's loyalty into question. White v. Experian Information Solutions, 993 F. Supp. 2d 1154, 87 Fed. R. Serv. 3d 1200 (C.D. Cal. 2014), as amended, (May 1, 2014) (applying California law).

Attorney who was partner with law firm representing consumer had acquired "confidential information" material to cosmetics company as result of his former representation of company in prior products liability and class action cases, thus warranting disqualification of attorney under California law in consumer's putative class action against company alleging company defrauded consumers by marketing and advertising its products as being free of animal testing; attorney's contributions to company's defense in prior cases had spanned course of six years, totaled 336 hours, and amounted to over $100,000, attorney had previously had close working relationship with company's lead counsel, and attorney's involvement in prior cases had been substantial and exposed him to confidences not part of public record. Cal.Prof.Conduct Rule 3–310(E). Beltran v. Avon Products, Inc., 867 F. Supp. 2d 1068 (C.D. Cal. 2012) (applying California law).

At the time attorneys entered into engagement agreement with client in underlying matter, continuing attorney-client relationship existed between attorneys and adverse party, as would support determination that attorneys' representation of client violated professional conduct rule prohibiting attorney from simultaneously representing adverse clients absent informed consent, rendering engagement agreement unenforceable; attorneys' agreement with adverse party provided that representation would continue for the length of agreed-to general employment matters, and agreement did not contain language reserving to attorneys the right to decline work requested by adverse party, but rather it was an agreement governing a continuing engagement involving occasional work. Cal. Civ. Code § 1667; Cal. R. Prof. Conduct 3–310(A)(2), 3–310(A)(1), 3–310(C)(3). Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc., 6 Cal. 5th 59, 237 Cal. Rptr. 3d 424, 425 P.3d 1 (Cal. 2018).

The joint nature of attorneys' prior representation of husband and wife in formulating estate plan including marital trust was insufficient to avoid disqualification of the attorneys from representing the trustee of the marital trust in its dispute with wife's estate administrator over estate tax liability, since the attorneys were asserting on behalf of husband's representatives that the documents they prepared during the joint representation should be interpreted in a manner that would substantially reduce the value of wife's estate or her trust, thereby harming her interests, absent evidence that wife had retained independent counsel to advise her in formulating the estate plan, or that the attorneys disclosed the potential conflicts inherent in the joint representation or obtained wife's consent before proceeding with the representation. Cal. Evid. Code § 962; Cal. R. Prof. Conduct 3-310(E); Cal. R. Prof. Conduct 3-310(C) (1989). Fiduciary Trust International of California v. Superior Court, 218 Cal. App. 4th 465, 2013 WL 3942592 (2d Dist. 2013).

An attorney generally may not serve as both class representative and counsel for the class, as there would be an irreconcilable conflict of interest because the attorney might stand to gain much more in fees than any class member's individual recovery. Apple Computer, Inc. v. Superior Court, 126 Cal. App. 4th 1253, 24 Cal. Rptr. 3d 818 (2d Dist. 2005); West's Key Number Digest, Attorney and Client 21.5(1).

Dual representation: Husband and wife gave informed consent to dual representation, and, thus, marital settlement agreement (MSA) prepared by a single attorney acting only as scrivener to formalize parties' agreement was enforceable, even though attorney told parties he would add standard MSA provisions to terms they had already agreed to, absent any indication of misrepresentation, fraud, or overreaching, where attorney twice advised parties of his potential conflict of interest, advised them to obtain independent counsel, and told them he would not render legal advice, the added provisions were never disputed, and

parties signed written waiver of conflict of interest. In re Marriage of Egedi, 88 Cal. App. 4th 17, 105 Cal. Rptr. 2d 518 (2d Dist. 2001); West's Key Number Digest, Husband and Wife 281.

Trial court did not abuse its discretion in personal injury action brought by restaurant patron who allegedly contracted a food-borne illness by concluding that out-of-state attorney's consultation with restaurant's counsel concerning the case, including his recommendation of an expert witness, created a conflict of interest that would prevent attorney from representing patron; restaurant's counsel altered her theory of the case and shaped her trial strategy based on attorney's suggestions, attorney's responsibilities to restaurant and patron would create a situation of divided loyalties if attorney were to represent patron, and attorney could not effectively impeach expert he recommended. Col. R. Prof. Conduct 1.7(a) Liebnow by and through Liebnow v. Boston Enterprises Incorporated, 2013 CO 8, 296 P.3d 108 (Colo. 2013).

Attorney's conduct when he aided client, who was also his mother, in creating limited liability company (LLC) on behalf of client and using power of attorney to transfer client's property to LLC and then to himself violated rule of professional conduct governing existence of concurrent conflict of interest due to attorney's failure to obtain informed consent; attorney did not discuss or explain transfers to client, informed consent required attorney to explain to client why representing her posed a conflict of interest and to facilitate a conversation about the risks and alternatives available for her estate and financial choices, and attorney's failure to provide such options to client was particularly unprincipled given obvious benefits he obtained by his violation of rule. Idaho R. Prof. Conduct 1.7(a). Idaho State Bar v. Smith, 513 P.3d 1154 (Idaho 2022).

Even assuming that attorney believed that he could diligently represent debtor in his current Chapter 13 case, despite conflict of interest arising from fact that attorney was still owed a fee for his representation of debtor in prior, unsuccessful Chapter 13 case, attorney should have obtained debtor's informed consent and waiver of this conflict of interest. Ill.Rules of Prof.Conduct, Rule 1.7(b)(4). In re Maldonado, 483 B.R. 326 (Bankr. N.D. Ill. 2012) (applying Illinois law).

Client's waiver of concurrent conflict of interest that arose when clients employed attorney to draft agreement memorializing terms of sale and purchase of business that clients had independently negotiated was valid; plain language of conflict waiver adequately informed client that by signing the waiver he was consenting to attorney's dual representation, and client failed to explain what he did not understand when he signed waiver. Van Kirk v. Miller, 869 N.E.2d 534 (Ind. Ct. App. 2007); West's Key Number Digest, Attorney and Client 21.10.

Term "another client," as used in rule of professional conduct prohibiting an attorney from representing two clients when representation would be directly adverse to "another client," meant another current client, such that no concurrent conflict of interest existed to warrant disqualification of appointed defense counsel, who worked for adult public defender's office, due to fact that other attorneys in public defender's office had previously represented three of state's witnesses on unrelated matters. I.C.A. Rule 32:1.7(a)(1). State v. McKinley, 860 N.W.2d 874 (Iowa 2015).

Attorney did not satisfy his obligation, under rules of professional conduct, to make full disclosure, to first two siblings/legatees, of implications of common representation and of advantages and risks involved as to representation of three siblings/legatees in will contest; attorney relied on daughter of third sibling/legatee to draft affidavit of representation which first two siblings/legatees signed without benefit of advice of counsel, and affidavit did not disclose implications of common representation and advantages and risks involved. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rule 1.7(b), LSA-R.S. foll. 37:222. In re Hoffman, 883 So. 2d 425 (La. 2004); West's Key Number Digest, Attorney and Client 44(1).

Disqualification of wife's counsel was not warranted in pending divorce action, though husband, about one year before he filed the action, had placed a telephone call to the law firm at which wife's counsel worked and had spoken to someone, for about ten minutes, about husband's situation with wife; husband provided mere speculation that wife's counsel was the person he had spoken to, and wife's counsel stated that under office protocols, a call from a prospective client would have been forwarded to a scheduling secretary who would have screened the call for conflict information, and, if appropriate, would have scheduled an appointment for the prospective client to speak with the attorney. Butler v. Romanova, 2008 ME 99, 953 A.2d 748 (Me. 2008); West's Key Number Digest, Attorney and Client 21.5(1).

Dual representation did not materially limit representation of either client, and therefore attorneys in different offices of the same law firm simultaneously representing business competitors in prosecuting patents on similar inventions, without informing them or obtaining their consent to the simultaneous representation, did not constitute an actionable conflict of interest, where

there was no allegation that claims in applications were altered or narrowed, that client confidences were disclosed or used in any way to either clients' advantage, or that either application was delayed. S.J.C.Rule 3:07, Rules of Prof.Conduct, Rule 1.7(a)(2). Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, 473 Mass. 336, 42 N.E.3d 199 (2015).

Under Missouri law, dual representation that occurred when attorney, who was employed both as Chapter 13 debtor's bankruptcy counsel and as a "home mortgage consultant" with lender, arranged to refinance debtor's residential loan with lender presented such an inherent and impermissible conflict of interest that it could not be waived; no attorney could have reasonably believed that his representation of debtor might not be adversely affected by his simultaneous role as lender's agent, the conflicting loyalties were further exacerbated by the fact that attorney earned a commission from the transaction, so that alternatives otherwise available to debtor might have been foreclosed, and so this sort of dual representation had such an "unavoidable appearance of impropriety," particularly in the bankruptcy context, that it could not be waived. V.A.M.R. 4, Rules of Prof.Conduct, Rule 4-1.7(b). In re McGregory, 340 B.R. 915, 55 Collier Bankr. Cas. 2d (MB) 1480, Bankr. L. Rep. (CCH) P 80476 (B.A.P. 8th Cir. 2006) (applying Missouri law); West's Key Number Digest, Attorney and Client 21.5(6).

Communications between trustee and certificateholders in residential mortgage-backed securities (RMBS) trusts regarding repurchase demands were protected from discovery under the common interest privilege of New York law, in trustee's breach of representations and warranties action against sponsor, even if trustee and certificateholders were at odds on some issues, where the communications were in furtherance of trustee and the certificateholders' legal strategy to put back defective loans to the sponsor of the RMBS trusts, and the communications were related to anticipated litigation against sponsor. ACE Securities Corp. v. DB Structured Products, Inc., 40 N.Y.S.3d 723 (Sup 2016).

Attorney's representation of his ex-wife in action to recover fees brought against her by her former counsel in divorce action was a conflict of interest, and thus his disbarment was warranted on basis of professional misconduct, where at no time during course of fee action did attorney or ex-wife's counsel of record ever fully disclose to her the attorney's own financial, business, property, or personal interests, which reasonably affected exercise of his professional judgment on her behalf. 22 NYCRR 1200.20(a). In re Brandes, 292 A.D.2d 129, 740 N.Y.S.2d 406 (2d Dep't 2002); West's Key Number Digest, Attorney and Client 21.5(1).

Defendant was not entitled to disqualification of plaintiff's attorney based merely on counterclaim of malicious prosecution that was asserted against him; although defendant alleged existence of conflict of interest between plaintiff and his attorney, something more than affirmation of defendants' attorney, who had no personal knowledge of matter, was required to justify drastic action of disqualification. Cerqueira v. Clivilles (1995, 1st Dept) 213 AD2d 202, 623 NYS2d 580.

Law firm's joint representation of mother, father, and minor child in personal injury action arising from automobile accident, after owner and operator of second vehicle involved in accident asserted counterclaim alleging that mother was negligent in her operation of father's vehicle at time of accident, violated either ethical rule requiring attorney to preserve client confidences or rule requiring attorney to represent client zealously, warranting law firm's disqualification from continuing to represent either mother, father, or child in action, given that law firm heard confidences of all three plaintiffs and that pecuniary interests of mother, as potentially negligent operator of vehicle, and of father, as vehicle's owner, conflicted with those of child, who could seek recovery against her parents in such capacities for her injuries. McKinney's Vehicle and Traffic Law § 388; N.Y.Ct.Rules, § 1200.24 [DR 5-105]. Dorsainvil v. Parker, 14 Misc. 3d 397, 829 N.Y.S.2d 851 (Sup 2006); West's Key Number Digest, Attorney and Client 21.5(1).

Importance of preserving client confidences and secrets requires that all doubts be resolved in favor of attorney disqualification in a subsequent representation, but since disqualification interferes with a party's right to retain counsel of his choice, and since disqualification motions are often utilized as a tactical tool, motions to disqualify an attorney are subject to a high burden of proof. Code of Prof.Resp., DR 4-101, DR 5-108, McKinney's Judiciary Law App. First Hudson Financial Group, Inc. v. Martinos, 11 Misc. 3d 394, 812 N.Y.S.2d 767 (Sup 2005); West's Key Number Digest, Attorney and Client 21.20.

A lawyer is prohibited from using confidential information that he has obtained from a client against that client on behalf of another one. Rules of Prof. Conduct, Rules 1.6, 1.7, 1.9. Continental Resources, Inc. v. Schmalenberger, 2003 ND 26, 656 N.W.2d 730, 156 O.G.R. 57 (N.D. 2003); West's Key Number Digest, Attorney and Client 32(13).

Attorney's conduct relating to dual representation of juvenile, in juvenile court proceeding in which juvenile was charged with aggravated arson, while attorney was also representing juvenile's maternal grandparents in child custody/dependency proceedings involving the juvenile, whom the grandparents had adopted years before, violated professional responsibility rule prohibiting conduct prejudicial to administration of justice; dual representation deprived juvenile of competent, independent counsel in juvenile court proceeding. Code of Prof.Resp., DR 1-102(A)(5). Cincinnati Bar Assn. v. Lukey, 110 Ohio St. 3d 128, 2006-Ohio-3822, 851 N.E.2d 493 (2006); West's Key Number Digest, Attorney and Client 42.

In proceeding by trust beneficiary seeking removal of trustee, who had been attorney for beneficiary's father and was executor of father's estate, trustee's counterclaim, which sought recovery of debts owed by beneficiary to the trust and to father's estate, was substantially related to law firm's prior representation of beneficiary on other matters, supporting disqualification of another firm lawyer from representing trustee on the counterclaim; prior representations concerned beneficiary's estate planning and property interests. Rules of Prof.Conduct, Rule 1.7, 1.9, 1.10. Wynveen v. Corsaro, 2017-Ohio-9170, 106 N.E.3d 130 (Ohio Ct. App. 8th Dist. Cuyahoga County 2017), appeal not allowed, 152 Ohio St. 3d 1467, 2018-Ohio-1795, 97 N.E.3d 502 (2018).

Counsel's representation of defendant charged with multiple offenses in connection with an allegedly fraudulent investment scheme would not violate his duty to former client, who was a government witness and unindicted co-conspirator, and whom counsel represented during the grand jury's investigation in same matter and currently represented in related civil suits, which had been stayed, and in ongoing Securities and Exchange Commission (SEC) investigation; the former client gave his informed consent to the representation in writing, and counsel represented that he would not provide defendant's other attorney with any confidential information he obtained through his representation of former client or otherwise violate his ethical duties to both former client and defendant. U.S.C.A. Const.Amend. 6; R.I.Sup.Ct.Rules, Art. V, Rules of Prof.Conduct, Rule 1.9(a). U.S. v. Caramadre, 892 F. Supp. 2d 397 (D.R.I. 2012) (applying Rhode Island law).

Counsel who represented multiple heirs in will contest had a conflict of interest that warranted disqualification from action; there were five wills involved in will contest, heirs represented by disqualified counsel changed their relative positions regarding which will was valid and should be probated, and divergence of objectives regarding will to be probated created conflict of interest in that he could not advocate validity of different wills. In re Estate of Jones, 154 S.W.3d 582 (Tenn. Ct. App. 2004), appeal denied, (Dec. 6, 2004) and cert. denied, 125 S. Ct. 1836, 161 L. Ed. 2d 724 (U.S. 2005); West's Key Number Digest, Attorney and Client 21.5(1).

Attorney represented workers' compensation carrier alone, not employer, and, thus, joint client rule of privilege was inapplicable to communications between carrier's attorney and employer. Rules of Evid., Rule 503(b)(1)(C). In re XL Specialty Ins. Co., 373 S.W.3d 46 (Tex. 2012).

Vendor demonstrated existence of implied attorney-client relationship between vendor and prospective purchaser's attorney, which raised presumption that confidences and secrets were imparted to attorney, as ground for disqualifying attorney from representing purchaser on claims against vendor arising out contract for deed, on basis of conflict of interest; attorney-client relationship with vendor focused on contract for deed, which was same or substantially related matter as attorney-client relationship with purchaser, attorney held conversations with vendor regarding contract for deed and controversy between purchaser and vendor, he rendered legal advice to vendor regarding contract for deed, he advised vendor of his hourly rate, amount of time he had spent on services for her, and total amount of time he expected to spend for resolution of issues, and vendor told attorney that she believed he was her attorney. Tex. R. Prof. Conduct 1.09. Hendricks v. Barker, 523 S.W.3d 152 (Tex. App. Houston 14th Dist. 2016).

For purposes of disqualification motion predicated on an alleged conflict of interest, attorney's representation of Texas Windstorm Insurance Association (TWIA) in consolidated lawsuits against TWIA by hurricane claimants including city was not substantially related to his prior representation of city's present counsel when the latter had been pursuing windstorm insurance claim against TWIA on behalf of county in connection with same hurricane, nor was there a reasonable probability of the sharing of confidential client information. ; State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App. A, Art. 10, § 9, Rules of Prof.Conduct, Rule 1.09(a)(2, 3). In re Texas Windstorm Ins. Ass'n, 417 S.W.3d 119 (Tex. App. Houston 1st Dist. 2013).

County appraisal district was not entitled to disqualification of opposing lawyer who had, for almost twenty-two years, represented the appraisal district in ad valorem tax disputes as outside counsel, even though cases in which lawyer was presently representing clients involved valuation issues similar to those at issue in prior representation, where issues to be litigated were not related to the facts in any prior case in which lawyer represented appraisal district, lawyer had no confidential information

regarding valuation of his clients' properties, and all information in appraisal district's files was discoverable. State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App. A, Art. 10, § 9, Rules of Prof.Conduct, Rule 1.09. In re Drake, 195 S.W.3d 232 (Tex. App. San Antonio 2006); West's Key Number Digest, Attorney and Client 21.5(2).

Where no actual conflict exists or is foreseeable, an attorney working as in-house counsel for an insurer will ordinarily represent both the interests of the insured and the insurer; however, where actual conflict exists or is likely to arise, the attorney's allegiance is to the insured because of an insurer's duty to provide a defense in good faith. Spratley v. State Farm Mut. Auto. Ins. Co., 2003 UT 39, 78 P.3d 603 (Utah 2003); West's Key Number Digest, Attorney and Client 21.5(5).

Law firm's exposure to confidential client communications, while representing former in-house counsel in their wrongful discharge suit against insurance company, did not require disqualification of law firm from the suit; former in-house counsel were entitled to seek the advice of counsel to prosecute their claim against insurance company, and order of disqualification was inappropriate because any attorney hired by former in-house counsel would be disqualified when they received enough information to prosecute suit. Spratley v. State Farm Mut. Auto. Ins. Co., 2003 UT 39, 78 P.3d 603 (Utah 2003); West's Key Number Digest, Attorney and Client 19.

Counsel's failure to obtain from father waiver of conflict of interest that resulted from counsel's joint representation of father and stepmother was not ineffective assistance in termination of parental rights proceedings; although counsel may have violated rule regarding conflicts, it did not automatically constitute ineffective assistance, father did not adequately establish actual conflict of interest or that he did not waive any conflict, there was evidence that father knew he had better chance of reunification with children if his wife was not residing with him, but he chose to remain with her, and so father made decision to present joint defense with stepmother. U.S.C.A. Const.Amend. 6. State ex rel. V.H., 2007 UT App 1, 154 P.3d 867 (Utah Ct. App. 2007); West's Key Number Digest, Infants 205.

Attorney who had retainer agreement with husband and wife in uncontested divorce did not conduct a reasonable inquiry into the conflict of interest presented by his representation of wife in response to husband's motion to set aside property settlement agreement and disqualify attorney, lacked a reasonable basis to believe no conflict existed, and, therefore, was liable for sanctions based on representations in statements and pleadings that were not well grounded or made in good faith; on its face the retainer agreement established an attorney-client relationship with husband, the attorney, or his firm, also represented husband in the preparation of his will, and the attorney was not reasonable in his continued representation of wife or in his objection to the motion to disqualify him. West's V.C.A. § 8.01-271.1. Vinson v. Vinson, 41 Va. App. 675, 588 S.E.2d 392 (2003); West's Key Number Digest, Attorney and Client 113.

Personal representative of driver's estate was "former client" of counsel appointed by insurance company to defend estate and driver's parents in wrongful death action, and thus, counsel could not continue to represent only the parents by seeking to remove representative without representative's waiver of the conflict of interest; although personal representative stated that counsel did not represent him, that statement was expression of representative's frustration that counsel was not communicating with him, counsel entered formal notices of appearance in the wrongful death action on behalf of the estate, and counsel acted for estate when they continued to participate in the action after parents were dismissed. RPC 1.9. Harris v. Griffith, 413 P.3d 51 (Wash. Ct. App. Div. 1 2018).

For purposes of rule of professional conduct governing conflicts of interest and generally prohibiting attorney from representing a client if representation of that client will be directly adverse to another client, law firm's representation of former employees in their wrongful-termination actions against former employer was not "directly adverse" to its prior representation of other former employees in previous wrongful-termination actions against former employer; all former employees alleged same wrongful-termination claims, and law firm was not acting as advocate against its former clients. Rules of Prof.Conduct, Rule 1.7(a). State ex rel. Verizon West Virginia, Inc. v. Matish, 740 S.E.2d 84 (W. Va. 2013).

[Top of Section]

[END OF SUPPLEMENT]

§ 2. The defense interview

The considerations in interviewing the client apply whether the client is the claimant in the case or the person against whom recovery is sought. Where the client is the defendant, his attorney must not confine the interview to obtaining defensive information. The objective of the interview should be to obtain all the facts, whether favorable or unfavorable from the defense standpoint. Furthermore, counsel should evaluate the settlement possibilities of the case as well as its successful defense.

The interview of the defendant by his attorney usually does not take place until after the matter has been placed in the hands of the attorney for the plaintiff and the latter has completed his investigation and preliminary interviews. Indeed, the plaintiff's attorney may not commence his action until shortly before the period of limitation expires or until after negotiations with an insurer have broken down, at which time many important details may have faded from the defendant's memory. The defendant is likely to be hazy as to details; and information obtained from him during the interview must ordinarily be verified by and supplemented with data from police reports, insurance records, and the like.

§ 3. The mentally unbalanced client

[Cumulative Supplement]

Every attorney, sooner or later, will run into the client who is mentally ill or one who merely likes to file claims on the flimsiest evidence. The "crackpot" who's going to sue so-and-so for everything he is worth, et cetera, often falls in the latter category. The client may appear to be perfectly normal at first, and it may take a good deal of acuity to arrive at the conclusion that he is not all he seems.

The attorney should be on the alert for the possibility of a client fitting into this mentally unbalanced category when the client shows signs of over-enthusiasm for his side, paints his story as all-white, exaggerates every aspect of the case in his favor, gives contradictory reports, or is obsessed with distorted fears. The mentally ill person will often respond to questions with excessive emotion, displaying great hatred or suspicion.

Although there is no clinical test to determine the borderline cases, the attorney should be aware of this type of client. The mentally ill person may have a perfectly legitimate claim, but it may be necessary to refer either the client or members of his family to other people—for instance, to a psychiatrist or to a minister or priest. A case cannot be successfully prosecuted on the basis of lies, distortions, or half-truths. If the case is lost, this type of client may even turn around and sue the attorney for malpractice.

CUMULATIVE SUPPLEMENT

Cases:

Contractual capacity: Evidence in action to determine validity of attorney's lien on client's personal injury settlement was sufficient to support findings that client was capable of executing a valid contract with attorney while in hospital, despite her testimony that she was on medications and was suffering emotional trauma; client's friend testified that client appeared to have clear mind, and client's uncle testified that client was not coerced, that he and other family members asked client several times if she wanted attorney to represent her, and that client repeatedly responded that wanted to hire attorney. Lee v. Daniel, 350 Ark. 466, 91 S.W.3d 464 (2002); West's Key Number Digest, Attorney and Client 192(2).

Issue of unconscionability, as well as client's claims that so-called "bonuses" or "gifts," as well as retainer agreement itself, violated attorney disciplinary rules against self dealing, et cetera, could not be resolved without determining capacity of 80 year old client, what she was advised, and whether she understood ramifications of revised agreement which provided for 40% contingent legal fee. Lawrence v. Miller, 48 A.D.3d 1, 853 N.Y.S.2d 1 (1st Dep't 2007); West's Key Number Digest, Attorney and Client 147.

Law firm was entitled to be relieved as attorney where client continually questioned firm's work, blamed firm for adverse decisions, made verbal threats against firm, and insisted that firm pursue legal theories and arguments at trial that were directly

contrary to law and law firm's professional judgment. Bankers Trust Co. v. Hogan (1992, 1st Dept) 187 AD2d 305, 589 NYS2d 338.

[Top of Section]

[END OF SUPPLEMENT]

§ 4. Number of interviews

The number of interviews that will be needed to handle a case for a given client depends on the nature and complexity of the litigation. The litigation may be so involved that interviews with the client are almost continuous. At the same time, counsel should avoid having to recontact the client for information neglected during the first interview; in this regard, the checklist of questions included in this article [1] should prove helpful and useful, whether the client is the claimant or defendant.

§ 5. Educating the client on the law

[Cumulative Supplement]

At some point during the interviews, most attorneys will describe in layman's language the area of law involved in the client's case and from time to time will go into the more important legal problems to be faced. Although many attorneys caution against overeducating the client on the legal aspects of his case, a brief statement as to what must be done and what must be shown is considered essential.Such instructions are of great value in (1) alerting the client to the most effective factual presentation of his case, (2) building confidence in the attorney, (3) insuring that the client's view of his case is neither too optimistic nor too pessimistic, and (4) illustrating to the client the relationship between the questions asked him and the importance of his answers thereto and the client's case as a whole. In this regard, the attorney should remember that the client is not versed in legal terminology, so that the attorney should not explain the law as if he were writing a legal brief, but should translate his ideas into simple words and short sentences.

CUMULATIVE SUPPLEMENT

Cases:

Communications between members of a presidential task force on the automobile industry and another member, who was also an attorney, were protected from discovery by attorney-client privilege, in employees' ERISA action against Pension Benefit Guaranty Corporation (PBGC), where attorney acted in a legal capacity in responding to legal questions asked by task force members, and provided his legal opinion on potential liability surrounding various task force proposals. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq. U.S. Department of Treasury v. Pension Benefit Guaranty Corporation, 249 F. Supp. 3d 206 (D.D.C. 2017).

[Top of Section]

[END OF SUPPLEMENT]

§ 6. Time and place of interview; record

[Cumulative Supplement]

A client should be interviewed as soon as possible after the occurrence giving rise to the claim. He should be questioned in the privacy of the attorney's office whenever possible, since counsel is better able to control the interview and is in a position to prevent interruptions. He also will have secretarial assistance available to transcribe the conversation in shorthand where it is deemed necessary. At times, however, it will be necessary to interview the client in another place such as his home or his

office—for example, where the client is ill or confined to his home or is pressed by business considerations. Although there are advantages to interviewing the client in his home (since he will probably be relaxed in familiar surroundings), interviewing the client in his office or place of work is not recommended because of the possibility of many interruptions over which the attorney has no control. This is especially true of interviews made during regular business hours.

It is desirable in many cases to have a tape recorder or other recording device in operation, so that a permanent and accurate record of the interview can be kept, in addition to preparing written memoranda.[1] Some attorneys use tape recorders as a precautionary measure against charges of malpractice.[2] Recording devices are especially useful where the client must be interviewed at his home, in a hospital, or some other place where the attorney's office facilities are not available. Recording devices may be used in place of a stenographer where, because of the nature of the client's problem, the presence of a third person might operate as an inhibiting force.

The client should not be interviewed in a place or under conditions likely to make him tense or ill at ease. The seating arrangements, lighting, et cetera, should suggest a relaxed and informal atmosphere. In warm weather, the office should, if possible, be air-conditioned. The chairs should be comfortable and not hard or stiff. Special attention should be given to furniture arrangement (see Figure 1). The room in which the interview is conducted should be well-lighted, but not glaringly bright. Direct sunlight should be controlled by the use of venetian blinds and draperies. Of course, the attorney should have his office initially decorated with these considerations in mind for the sake of his own comfort, and an office decor that has been designed to give a feeling of quiet ease will do much to rid a client of any feelings of nervousness or tension.[3]

The reception room of the attorney's office should project this same sort of feeling.[4]

Figure 1 gives an idea of the seating arrangement and lighting desirable in an attorney's office.

CUMULATIVE SUPPLEMENT

Cases:

None of documents listed in privilege log of insureds under financial and professional services indemnity policy were protected from disclosure to their insurer pursuant to attorney-client privilege, as insureds failed to establish requisite elements of privilege; furthermore, insurer demonstrated it was either a joint client or an allied party with a common legal interest in communications such that it held a shared attorney-client privilege with insureds for limited purpose of insureds' defense in underlying matters. MapleWood Partners, L.P. v. Indian Harbor Ins. Co., 295 F.R.D. 550 (S.D. Fla. 2013).

In camera inspection was not necessary or permitted to determine whether documents on attorney-client privilege log were actually privileged, where clients met their burden to support a prima facie claim of attorney-client privilege. Cal. Evid. Code § 954. Bank of America, N.A. v. Superior Court of Orange County, 212 Cal. App. 4th 1076, 2013 WL 151153 (4th Dist. 2013).

[Top of Section]

[END OF SUPPLEMENT]

§ 7. Persons present

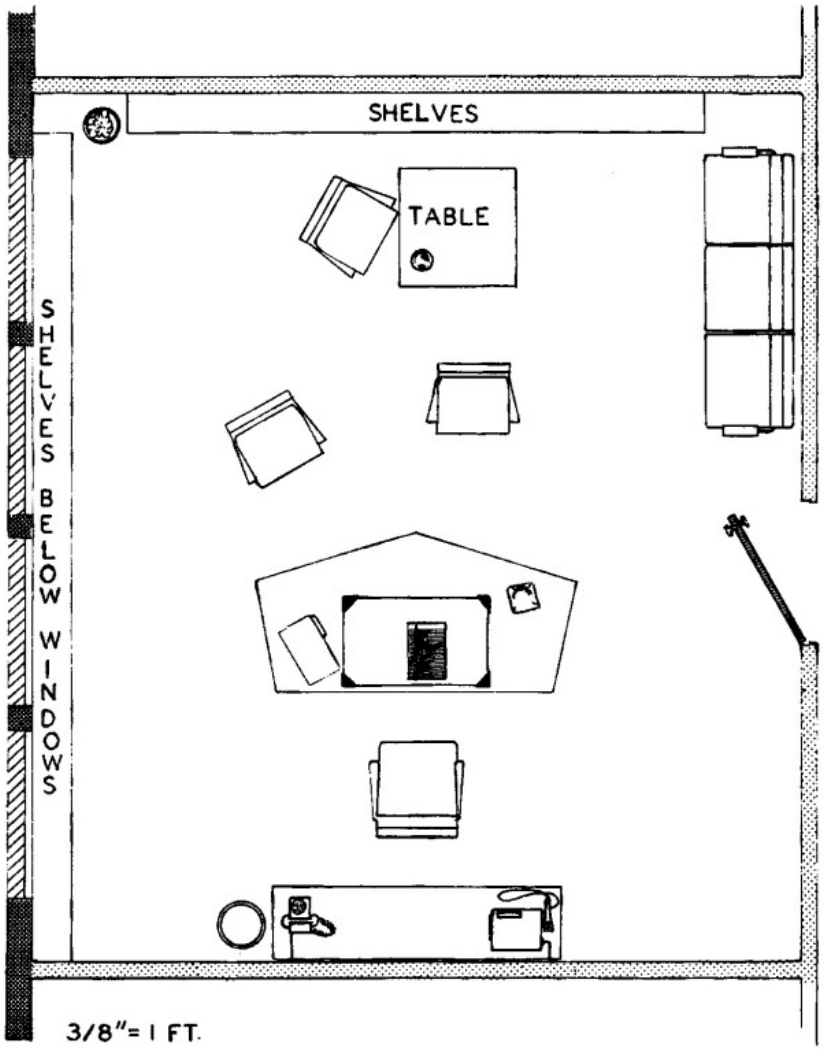
[Cumulative Supplement]

A client interview should not be conducted in the presence of a third person with the exception of those cases where it is absolutely necessary, such as where it is necessary to have a secretary present to transcribe the conversation or where an interpreter is necessary because of the client's difficulty in either understanding or expressing himself in English. Third persons disrupt the attorney-client relationship and tend to inhibit the full disclosure essential to a satisfactory interview. Moreover,

counsel should bear in mind that the presence of third persons may prevent a later claim—needed to protect a client—that the attorney-client interview constituted a privileged communication between the attorney and his client. [1]

Figure 1. Floor Plan of Office Where Clients Are To Be Interviewed.

Note that the client is seated facing the lawyer, and that the windows are to the left. In this way, their faces are illuminated, but neither is subjected to glare. As many people are made uncomfortable by a door located behind them, the client is seated so that the door (on right) is visible to him at all times. Extra chairs are desirable.



Where the presence of a secretary is felt to be necessary, the attorney should explain to the client that the secretary is sworn to the same secrecy as the attorney. This is especially true where the conversation is of a highly confidential nature. If the conversation is of a highly intimate and embarassing nature, it may be necessary to exclude the secretary, at least initially, in order to gain the client's confidence. As noted previously, a tape recorder may be used in the absence of a secretary. In subsequent interviews where a secretary is necessary, care should be taken that the client sees the secretary who was present initially and not another.

Where the attorney represents more than one client, it may be necessary to interview his clients jointly. However, at times where there is more than one client, such as a husband and a wife involved in the same accident, it may be advisable to initially interview each client separately, tactfully explaining that this is to prevent one client from being subconsciously influenced by the narration of the other client, so that a clear and concise account may be had and so that any discrepancies in their respective stories may be ironed out subsequently within the presence of both or all of the clients.

If a client is a minor, there may also arise the necessity of having a third person present, usually the minor's parent or guardian. It may be necessary to caution the adult present not to supply the child with words, so as to let the minor narrate the event in his own manner.

CUMULATIVE SUPPLEMENT

Cases:

Plaintiff and its third-party litigation funding sources shared no common legal interest, as required to assert common interest doctrine to prevent disclosure of legal strategies shared with the funders who had agreed to advance to plaintiff costs for trademark misappropriation suit, and thus, documents lost whatever attorney-client privilege they might otherwise have had, where there was no legal planning with funders to insure compliance with the law, litigation was not to be averted as it was well underway at time documents were shared, and plaintiff was looking for money from prospective funders, not legal advice or litigation strategies, while funders were interested only in profit. Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014).

Common interest doctrine: Described as an extension of the attorney client privilege, the common interest doctrine applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest; in this context the communications between each of the clients and the attorney are privileged against third parties, and it is unnecessary that there be actual litigation in progress for this privilege to apply. Hanson v. U.S. Agency for Intern. Development, 372 F.3d 286, 64 Fed. R. Evid. Serv. 823 (4th Cir. 2004); West's Key Number Digest, Witnesses 199(2).

A defense contractor's internal investigation into whether the contractor had defrauded the United States government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq was protected by the attorney-client privilege, even if the investigation was undertaken as part of a mandatory compliance program, rather than for the sole purpose of obtaining legal advice, where a primary purpose of the investigation was to obtain or provide legal advice. Fed.Rules Evid.Rule 501, 28 U.S.C.A. In re Kellogg Brown & Root, Inc., 756 F.3d 754, 38 I.E.R. Cas. (BNA) 1109 (D.C. Cir. 2014).

In homeowners' action seeking to remediate contamination at site of their home that allegedly flowed from company's property, company's communications regarding such matters as scheduling, acquiring babysitters, and identifying to which homeowners to give gift cards were not related to legal purpose, and thus attorney-client privilege did not apply to such communications. Schaeffer v. Gregory Village Partners, L.P., 78 F. Supp. 3d 1198 (N.D. Cal. 2015).

E-mail sent by chief executive officer (CEO) to human resources manager and employer's attorney, with attached internal documents consisting of job posting for chief financial officer (CFO) position and job applicant's resume, and return e-mail containing manager's response to CEO, were not protected from disclosure by attorney-client privilege, where e-mails were not to or from attorney, did not divulge substance of any legal advice or request legal advice, and were not sent to provide factual information for future legal advice. Bernstein v. Mafcote, Inc., 43 F. Supp. 3d 109 (D. Conn. 2014).

The attorney-client privilege applies in the corporate context and protects confidential communications made by company employees to company lawyers, acting as such. United States ex rel. Barko v. Halliburton Company, 75 F. Supp. 3d 532 (D.D.C. 2014), order vacated on other groiunds, 2015 WL 4727411 (D.C. Cir. 2015).

Evidence regarding consumer complaints about resort marketing group's telemarketing efforts post-filing of suit was not privileged under common interest doctrine, in suit brought against group and cruise lines for alleged violations of Telephone Consumer Protection Act, where such evidence did not involve privileged communications between attorney and client or attorney work product prepared in anticipation of litigation. Telephone Consumer Protection Act of 1991, § 227, 47 U.S.C.A. § 227; Fed. R. Civ. P. 26. Charvat v. Valente, 82 F. Supp. 3d 713 (N.D. Ill. 2015).

The "joint defense privilege," which protects 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, is not an independent basis for privilege but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party. U.S. v. Agnello, 135 F. Supp. 2d 380 (E.D. N.Y. 2001), aff'd, 16 Fed. Appx. 57 (2d Cir. 2001); West's Key Number Digest, Witnesses 199(2).

Attorney-client privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client. Wultz v. Bank of China Ltd., 304 F.R.D. 384, 90 Fed. R. Serv. 3d 1302 (S.D. N.Y. 2015).

The attorney-client privilege applies to (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice. Scott v. Chipotle Mexican Grill, Inc., 103 F. Supp. 3d 542 (S.D. N.Y. 2015).

Communications between counsel for university, where defendant was a faculty member, and company that provided equipment and related software and services were made pursuant to the common interest doctrine and were therefore privileged and not discoverable by defendant in his prosecution for honest services fraud and bribery offenses; both university and company had a legal interest in the investigation of defendant's alleged misappropriation of their proprietary information, there was also a clear chance that they would become co-litigants against defendant, and their disclosures were in the course of formulating a common legal strategy regarding defendant's alleged misconduct. U.S. v. Zhu, 77 F. Supp. 3d 327 (S.D. N.Y. 2014).

Dog owner failed to demonstrate that third-party with whom she had an online social networking conversation had a common interest in owner's putative class action against dog treat manufacturer regarding treats that allegedly made her dog sick and required him to be euthanized, that owner and third-party had agreed to a joint defense effort or litigation strategy, and that their communications were made pursuant to such agreement, as required for the conversation to be protected from disclosure under the common interest privilege exception to general rule that attorney-client privilege was waived upon disclosure of privileged information with a third party, where dog-owner class had not be certified and dog owner did not argue or provide any support to court that would have permitted a finding that third-party was actually a member of the putative class. In re Milo's Kitchen Dog Treats Consol. Cases, 2015 WL 1650963 (W.D. Pa. 2015), supplemented, 2015 WL 2341220 (W.D. Pa. 2015).

Joint defense privilege shields some communications between co-defendants made outside of their counsel's presence, but only if communications were pursuant to specific instructions of their counsel. John B. v. Goetz, 879 F. Supp. 2d 787 (M.D. Tenn. 2010).

Crime-fraud exception to privilege: In order to conduct an in camera review to determine applicability of the crime-fraud exception to attorney-client privilege, there must be a showing of a factual basis adequate to support a good faith belief by a reasonable person that in camera review may reveal evidence to establish the exception; court must make a discretionary decision focusing initially only on evidence presented by the party requesting in camera review, and then court may consider other available evidence then before the court. Royal Surplus Lines Ins. v. Sofamor Danek Group, 190 F.R.D. 463 (W.D. Tenn. 1999); West's Key Number Digest, Witnesses 223.

Co-client was entitled to invoke attorney-client privilege in order to protect communications made in litigation in which it was also represented by law firm, regardless of whether co-client was sender or recipient of the communication, and other client that law firm also represented could not waive privilege unilaterally. In re Fundamental Long Term Care, Inc., 515 B.R. 874 (Bankr. M.D. Fla. 2014).

Confidential information that client shared with attorney that he consulted to represent him in pending arbitration proceeding was protected by attorney-client privilege, notwithstanding the presence of another attorney when this confidential information was shared, an attorney who, while representing client in past, played no role in representation of client in arbitration proceeding, as being outside his area of practice; other attorney had sought to secure competent representation for client in arbitration proceeding, and requisite common legal interest existed among parties. In re Whitcomb, 575 B.R. 169 (Bankr. S.D. Tex. 2017).

Developer and city did not have any common interest in the creation of a legally defensible environmental impact report (EIR) supporting developer's application, and thus city and developer waived the attorney-client privilege and the protection of the attorney-client work-product doctrine for all communications they disclosed to each other before city approved the project and

those communications were subject to disclosure under the California Environmental Quality Act (CEQA), although common-interest doctrine potentially applied to communications after the issuance of the EIR; while developer's primary interest in the environmental review process was to obtain a favorable EIR, city's interest was not to issue a favorable EIR but rather was to carry out an environmental review and to issue an EIR revealing the project's impacts. Cal. Pub. Res. Code § 21167.6(e); Cal. Evid. Code §§ 952, 954; Cal. Civ. Proc. Code § 2018.030. Citizens for Ceres v. Superior Court, 217 Cal. App. 4th 889, 2013 WL 3450201 (5th Dist. 2013).

Not every communication between client and attorney falls within the attorney-client privilege. State v. Jose V., 157 Conn. App. 393, 116 A.3d 833 (2015), certification denied, 317 Conn. 916, 2015 WL 4641508 (2015).

Four documents that corporation shared with third-party joint venturer and another third-party entity, two of which contained e-mails involving corporation's in-house counsel, joint venturer's in-house counsel, joint venturer's employees, and employee of other entity, and two of which contained e-mails involving corporation's in-house counsel, corporate employee, joint venturer's employee, and other entity's employee, were protected by attorney-client privilege, common interest doctrine, and co-client or joint client doctrine, under Florida law, in shareholders' suit against corporation for breach of contract, where these e-mails all contained legal advice related to earn-out provision in subject stock purchase agreement, corporation and entity shared same counsel, and corporation and joint venturer had each agreed to pay 50% of earn-out to shareholders. Fla. Stat. Ann. § 90.502. Kirsch v. Brightstar Corporation, 68 F. Supp. 3d 846 (N.D. Ill. 2014) (applying Florida law).

Under Florida law, the attorney-client privilege extends to the client's in-house counsel and agents. In re Fundamental Long Term Care, Inc., 489 B.R. 451 (Bankr. M.D. Fla. 2013) (applying Florida law).

Communications between insurer's officer and other employees, executives and/or attorneys within insurer were not primarily or predominantly of a legal character, and thus were not subject to attorney-client privilege in insured's bad faith action against insurer, notwithstanding that officer was a licensed attorney who acted as both in-house counsel and in generally handling insured's claim under title insurance policy; although officer thought it evident that insurer would likely have to engage in litigation against other parties to protect insured's and/or insurer's interests, documents involved standard claims activities and were not made to facilitate rendition of legal services. Rules of Evid., Rule 503. Anastasi v. Fidelity Nat. Title Ins. Co., 134 Haw. 400, 341 P.3d 1200 (Ct. App. 2014).

Drafts of letter prepared by insurer's outside counsel and ultimately sent to insured's officer, who was sued along with insured and other officers of insured in underlying suit by former employee, were protected from disclosure by attorney-client privilege, under Illinois law, where drafts were prepared by lawyers for their client in pursuit of providing legal services in connection with coverage investigation. Slaven v. Great American Insurance Co., 83 F. Supp. 3d 789 (N.D. Ill. 2015) (applying Illinois law).

Two tiers of corporate employees qualify as the control group whose communications are entitled to attorney-client privilege: (1) top management who have the ability to make a final decision; and (2) employees who advise top management in a particular area such that a decision would not normally be made without their advice or opinion, and whose opinion forms the basis of any final decision made by those with actual authority. Sup.Ct.Rules, Rule 201(b)(2). Doe v. Township High School Dist. 211, 2015 IL App (1st) 140857, 34 N.E.3d 652 (Ill. App. Ct. 1st Dist. 2015).

Joint defense agreement executed by client and law firm which drafted client's trust agreement and served as trustee of that trust, as used by client and law firm to defend against criminal charges for conspiracy to defraud the Internal Revenue Service and various trust violations, did not bar client's action against law firm for breach of trust, theft, and attorney malpractice; joint defense agreement did not preclude parties from pursuing claims against each other, and although it prohibited the use of shared materials against each other, it did not prohibit the use of materials from other sources, and nothing indicated that client needed to disclose privileged communications in order to prove his claims. Trial Procedure Rule 26(B)(5)(a). Price v. Charles Brown Charitable Remainder Unitrust Trust, 27 N.E.3d 1168 (Ind. Ct. App. 2015).

Burden of proof on claim of privilege: A claim of privilege can be defeated by proof by a preponderance of the evidence, including the communication or material claimed to be privileged, that the privilege has been waived or that the communication or material is either outside the scope of or not germane to the privilege or falls within a specified exception to the privilege. Rules of Evid., Rules 104(a), 1101(c). Stidham v. Clark, 74 S.W.3d 719 (Ky. 2002); West's Key Number Digest, Witnesses 184(1).

Communications between witness and his attorney were not intended to be disclosed to third parties, and, thus, were "confidential," such that they were protected by attorney-client privilege, for purposes of determining whether witness and medical malpractice defendant were entitled to mandamus relief compelling trial court to vacate its order in underlying medical malpractice action compelling witness to answer certain deposition questions posed by plaintiff; witness's affidavit made clear that attorney told witness that all their conversations were privileged, and, thus, witness had a reasonable expectation that his discussions with attorney before the deposition were confidential. Neb.Rev.St. § 27-503(2). State ex rel. Stivrins v. Flowers, 273 Neb. 336, 729 N.W.2d 311 (2007); West's Key Number Digest, Witnesses 205.

Former Russian politician did not have a common interest with his public relations firm, as required under New York law for communications between the two to fall within common interest rule extending the attorney-client privilege to protect the confidentiality of communications passing from one party to the attorney for another party; public relations firm was not a party to any of former Russian politician's various lawsuits, so had no need to develop a common litigation strategy in defending those suits, and firm's mere desire for former politician to win a lawsuit was an interest insufficient to prevent waiver of attorney-client privilege. Egiazaryan v. Zalmayev, 2013 WL 945462 (S.D. N.Y. 2013) (applying New York law).

For purposes of attorney-client privilege, a joint-client representation begins when the co-clients convey their desire for representation and the lawyer consents. R.C. § 2317.021(A). MA Equip. Leasing I, L.L.C. v. Tilton, 2012-Ohio-4668, 980 N.E.2d 1072 (Ohio Ct. App. 10th Dist. Franklin County 2012).

When the client is a corporation, attorney-client privilege extends to communications between its attorney and agents or employees authorized to act on the corporation's behalf. 42 Pa.C.S.A. § 5928. Red Vision Systems, Inc. v. National Real Estate Information Services, L.P., 2015 PA Super 5, 108 A.3d 54 (2015).

A corporation's attorney-client privilege is not limited to counsel's communications with the corporate "control group," i.e., upper-level, but can extend to communications with certain other low-level employees as well. Youngs v. Peacehealth, 316 P.3d 1035 (Wash. 2014).

[Top of Section]

[END OF SUPPLEMENT]

§ 8. Attitude of counsel

[Cumulative Supplement]

Like other professional roles, the role of the attorney engaged in interviewing a client calls for a blend of detachment and interest. As a detached listener, he disciplines himself to control any overt evidence that his feelings are affected by what the client says. Yet he must exhibit a capacity for empathy, for being able to enter understandingly into the experience of the client. This composite attitude is like the "detached concern" that is the principal component of the physician's attitude in relation to his patients. Like the physician, the attorney requires sustained discipline to learn this attitude, since it is in such thoroughgoing contrast to normal behavioral patterns.

The attorney should adapt his technique of interview to the various types of clients—those that are loquacious, shy, defensive, et cetera. Thus, if the client is the talkative type, the attorney should let him tell his own story initially without interruption. The attorney in a protracted interview, may be tempted from time to time to voice his personal opinions or sentiments in response to the client's remarks, but this merely invites defensive remarks or inhibits the interview altogether. Again, an attorney will sometimes express some sentiment or opinion without being aware that he is doing so. What the attorney regards as guidance, the client may take as a reflection on his intelligence or knowledge. The spontaneous flow of the interview is thus halted, while the client tries to maintain his self-esteem. Where inconsistencies in the client's story must be brought to his attention, it is best done by directing some further question, rather than by pouncing upon some illogical answer or irrational conclusion.

The goal of the lawyer during an interview is to acquire an intellectual and emotional understanding of the problems facing his client. This involves not only restraining the expression of his own prejudices and feelings, but also the ability to create an atmosphere of tolerance so that the client will totally divulge all necessary information.

Counsel's attitude must be all the more judicious and sympathetic where his client is the defendant. To many, the process of being sued is a new and terrifying experience. A client who appears for the interview may have just received a sharp if not threatening letter from opposing counsel or have been served with a complaint declaring him to be reckless, wanton, careless, and dangerous, and demanding damages in an astronomical amount. Such a client should be assured that the statements in the complaint are merely allegations drawn up by opposing counsel, which the other side hopes to be able to prove. He should be encouraged to let the lawyer assume the burden of worrying about the case.

CUMULATIVE SUPPLEMENT

Cases:

A trial court's inherent authority to control the proceedings (Calif. Code Civ. Proc., § 128, subd. (a)(5)) includes the right to remove counsel in certain situations. However, the court's power to disrupt the critical relationship between attorney and client is narrow, with all doubts resolved in favor of denial of a motion to remove counsel. The involuntary removal of any attorney is a severe limitation on a defendant's right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed. The relationship between the public defender and his or her client is no less inviolable than if counsel has been retained. Zepeda v. Superior Court (1992, 2nd Dist) 7 Cal App 4th 829, 9 Cal Rptr 2d 261, 92 CDOS 5506, 92 Daily Journal DAR 8617.

[Top of Section]

[END OF SUPPLEMENT]

§ 9. The possibility of losing the case

Sooner or later the client will want to know how much he will have to pay if the case is lost. If the client is insured, he should be told that his insurance will cover the damages up to the limits of the policy, but that he may be held liable for that amount of the judgment that is in excess of the limits of the policy. If he is not insured, he should be advised of how the judgment will affect him, and to what extent he will be protected by exemption statutes. The client should be told that the precise outcome of the case cannot be predicated with certainty, but that a more definite opinion on the client's defensive position will be forthcoming as the litigation develops. The plaintiff-client should also be informed of the costs involved, which may be payable even though he loses the case.

§ 10. Interviews-in-depth

To be of value, a client interview must have both scope and depth. The depth of the interview may be thought of as varying along a scale. At one end of the scale are mere descriptive accounts, which allow little more than a tabulation of "Yes" or "No" responses. At the other end are those reports which set forth all of the client's physical or emotional or psychological involvement. A major task of the attorney, then, is to diagnose the level of depth on which the interview is proceeding at any particular time and to shift the level toward that end of the scale which he finds appropriate to the given case. If he is successful, he gains a better understanding of the client and his problems and is better equipped to determine the client's motivations and to perceive discrepancies and inaccuracies in his story. It also permits the attorney to distinguish between casual expressions of opinion and fully supported statements of fact.

To achieve depth in an interview, an attorney usually finds it necessary to assist the client in self-exploration and to probe for responses. Several techniques have been found helpful in this regard.

One method is simply to restate a fact or reaction that has been implied or expressed by the client. It will not do to say merely "What do you mean by that?" or "Could you explain that a little better?" for such questions are generally taken to mean that the client is being asked to explain his response on the same plane that characterized his initial response. Repeated questions of this nature, whether artful or genuine, tend to frustrate the client and reflect unfavorably on the discernment and perceptiveness of the attorney. Probing questions must be more subtle, must pick up the client's thought where he left it, and must constantly search out reasons and motivations, whether conscious or unconscious.

Another method of achieving an interview-in-depth is to suggest comparisons between the situation or event in question and parallel experiences which the client is known or can be presumed to have had. Such comparisons, properly used, help clients to tell of matters that may otherwise be beyond their powers to report. Thus, if a factual situation concerns matters of distance, the client can be asked if the distance was as long as a football field, the length of an automobile, the length of his arm, or some other distance of which the client would have knowledge. In the same manner, if the facts involve time, the client can be asked whether the time was as long as it takes a traffic light to change, as long as it takes to cross a street, et cetera. If pain and suffering are involved, the client may be asked if he has ever had a broken arm or a toothache. If so, was the pain that he suffered as a result of the injury similar to the pain of the toothache or the broken arm. In this way the client can give the attorney a more concise answer on the facts of his present case.

§ 11. Scope of questions

[Cumulative Supplement]

The information to be obtained from the client during the first interview should be confined at the outset to determining whether the client has a prima facie case or defense. This is ordinarily dependent on the nature of his problem. Naturally, the questions to be asked in a tax matter are different than those to be asked when the client wants to evict a tenant. Nevertheless, certain specific questions should be asked of any client, whatever his problem, because there is certain information that an attorney must have to represent a client, no matter what the nature of the case. After full information has been obtained on the question of whether the client has a prima facie case, the questioning may turn to factual information determinative of the proper forum for the suit, itemization of damages, and the like.

These questions should, so far as possible, be exhaustive in scope, and in this regard various checklists will prove useful. [1] Leading questions must from time to time be put to the patient.

Counsel should bear in mind, however, that checklists (and leading questions) tend to be self-limiting and do not always give the client an opportunity to express himself fully. Indeed, one of the defects of the client-interview system is that the *attorney* takes the lead. The client plays a more or less passive role. Information of great value may not be disclosed, because the direction given the interview by counsel leads away from it.

From time to time during an interview, counsel must be prepared to make use of "nondirective" questions. This approach gives the client an opportunity to express himself about matters of central significance to him, rather than those presumed to be important by the interviewing attorney. And it allows the responses of the client to be placed in their proper context, rather than forced into a framework considered appropriate by counsel. Lastly, this approach forces the client to articulate his claim and express his injuries, and so permits an evaluation of the client as a potential witness.

This nonspecific phase of the interview necessarily requires the use of unstructured questions which are intentionally couched in such terms that they invite the client to refer to virtually any aspect of the situation or to report any of a range of responses. Thus, counsel might ask:

What stood out especially during the hearing? *or*

What impressed you most about your treatment in the hospital?

In giving his answers to questions of this kind, the client provides a rough guide to the comparative significance of various elements in his case and focuses immediate attention on what may well be the focal point of the litigation.

CUMULATIVE SUPPLEMENT

Cases:

When attorney acts in dual capacity and executes business documents in his capacity as business-person, privilege does not apply to such documents. Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, 230 F.R.D. 398 (D. Md. 2005); West's Key Number Digest, Witnesses 200.

Communications between attorney and his client are privileged if they are made in private for purpose of obtaining legal services; however, privilege only applies if lawyer is providing legal advice or services, and will not protect disclosure of nonlegal communications where attorney acts as business or economic advisor. Fox v. Massey-Ferguson, Inc., 172 F.R.D. 653 (E.D. Mich. 1995), order aff'd, 91 F.3d 143 (6th Cir. 1996).

[Top of Section]

[END OF SUPPLEMENT]

§ 12. Handling inconsistencies, contradictions, and omissions

[Cumulative Supplement]

The interview should take place at a time when all the facts are still fresh in the mind of the client. Every attempt should be made to fix the facts firmly in his mind. The client should be warned that he will probably be subjected to a rigorous cross-examination at the trial, and that the tension and chips-down atmosphere prevailing in the courtroom are infinitely more conducive to confusion and lapses of memory than the comparative quiet and calm of the law office during the interview. Inconsistencies or contradictions in the client's story should be thoroughly discussed and, if possible, explained.

The client should be encouraged to speak frankly and to withhold nothing. He should be advised that no attorney can represent him adequately unless all the facts are at the attorney's disposal. The client should be informed that the attorney will not be prepared for trial unless he has every pertinent scrap of information, including that which may be unfavorable or even embarrassing to the client. To encourage the client to speak candidly and without reservation, reassurance should be made that any information given by the client to his attorney is always held in strictest confidence. He may be told also that communications between a client and his attorney are privileged and cannot be drawn from the attorney by the other party.

CUMULATIVE SUPPLEMENT

Cases:

Attorney may not be sanctioned under Rule 11 solely because his client's testimony was viewed by court as not credible, unless it was incredible as matter of law and attorney filed post-trial memorandum espousing his client's position, although under some circumstances, attorney may have affirmative obligation to investigate facts supporting client's representations. Silverman v. Mutual Trust Life Ins. Co. (In re Big Rapids Mall Assocs.) (1996, CA6 Mich) 98 F3d 926, 29 BCD 1189, CCH Bankr L Rptr ¶ 77171.

[Top of Section]

[END OF SUPPLEMENT]

§ 13. Prior injuries and claims

Clients commonly tend to omit any reference to previous injuries or to their prior claims experience. They may have forgotten about it or they may consider it of no importance. Sometimes they will, for a number of reasons, unconsciously suppress the facts. Such clients should be questioned fully on these matters [1] and should be warned that insurance companies maintain an index bureau that keeps complete records of persons who have sought compensation on insured claims or injuries. Nevertheless, despite the admonition to a plaintiff to the effect that insurance companies have "index bureaus" and other sources at their ready disposal, it is still found frequently that a client inadvertently or otherwise will fail to recount all prior injuries, afflictions, or claims. Furthermore, in the experience of most plaintiff's attorneys, this single factor is one of the most important in producing a poor result for a plaintiff—in other words, when he is pounced upon during cross-examination with evidence of claims which he may have previously denied.

For the protection of the attorney in the event of a subsequent malpractice claim against him for an alleged bad result in the case, as well as for other reasons, it is suggested that the claimant be given a printed form that would specifically call for him to list each and every claim, injury, or infirmity known to him; and also to list all doctors and hospitals where he has ever been treated in the past, along with dates and the reasons for seeing the doctors. This form can be taken home by the client and completed at his leisure. It should then be signed, dated, and returned to the attorney for his file and future reference.

§ 14. Manner of questioning

The client interview should be conducted in an informal manner, with every attempt being made to put the client at ease. The questioning may begin immediately; but if the client feels strongly about the matter, most attorneys will let him get the story off his chest, telling it in his own words, and with as few interruptions as possible. Then the questioning will begin, going over the matter again, item by item.

§ 15. Manner of questioning—Chronological sequence

The questioning is usually done in chronological order, as this is the way the event is retold at the trial. If the questioning is conducted in this manner, the recorded transcript of the interview may be used later to determine appropriate questions to ask the client on direct examination at the trial.

This system also gives the attorney a chance to detect a failure of the client to tell the whole story. Any unexplained gap in the chronological sequence of events may indicate either a deliberate or an unintentional omission.

Use of legal terminology in questioning should, of course, be avoided as much as possible since the client will probably not be familiar with such language.

§ 16. Manner of questioning—Obtaining answers that review the past

In questioning his client, the attorney should carefully distinguish between facts reported through the process of self-examination (introspection) and facts reported through the process of reviewing past events (retrospection). Self-examination involves the client's present responses to the event, whereas reviewing past events—the more valuable and reliable fact-finding tool—involves the recollection by the client of his responses at the time of the event in question. Counsel should therefore frame his questions to elicit responses of a retrospective nature. For example:

Q.

When you saw the other driver cross the center line, do you recall thinking about taking some precautionary measure?

A.

Now that you mention it, I remember thinking that I should pull off onto the shoulder of the highway.

Questions of this nature encourage detailed responses from the client by helping him recall his immediate reactions rather than reconsider the situation and report his present reactions to it. If the client is not questioned in this matter, much of the complexity and depth of his original reaction may be lost, either because he does not recall his experience vividly or because he assumes the interviewer seeks his current opinion. Moreover, many clients have a tendency to respond primarily to the interview situation rather than to recall the event in question. Often a client will unconsciously stress what he believes the attorney would like to hear from him or what the attorney might find impressive.

The attorney can encourage retrospection by simply referring to the event under discussion, by beginning his questions with such phrases as "thinking back over the accident" or "as you recall the conference," and by making it clear that he is interested in past response. This should be done at the beginning of the interview, when it serves to focus the client's attention on what he experienced and helps to establish a pattern for the interview.

§ 17. Checklist of questions

This checklist of questions is designed to obtain the general essential information concerning the claim of any client no matter what the nature of his problem. The attorney should make copies of these questions that should be checked in interviewing every client. For clients whose cases involve personal injuries, see the checklist of questions at § 28.

a. *Background of Client Generally*

□ 1. What can I do for you?

□ 2. Has any other attorney been consulted?

This should be one of the first questions asked a client, because if counsel finds another attorney is involved in the case, he may wish to resolve the ethical questions before proceeding with the interview.

□ 3. Is your request for advice being sought on the recommendation of another person? If so, what is that person's name and address?

□ 4. What is your full name?

The circumstances may suggest inquiry into the possible use of assumed names or aliases by the client. See questions §§ 58 et seq..

□ 5. What is your business address and telephone number?

□ 6. What is your home address and telephone number?

For the right to cross-examine a witness as to his place of residence, see 37 A.L.R. 2d 737.

□ 7. What is your Social Security number?

□ 8. What is your race, religion, and nationality?

Questions pertaining to the client's race, religion, or nationality arise in the selection of the jury (72 A.L.R. 2d 905) and in the opening and closing arguments to the jury (78 A.L.R. 1438). See also Am. Jur., Trial §§ 497, 498.

□ 9. Are you an American citizen? If not, of what country are you a citizen?

b. *Occupational Status*

□ 10. What is your occupation?

□ 11. What is the nature of your work?

It may be necessary to obtain very detailed information as to the nature of the client's occupation; such information is necessary in litigating claims for Workmen's Compensation, Social Security, and other federal benefits, insurance matters, and the like.

□ 12. What is the name and address of your present employer?

□ 13. Are you self-employed?

□ 14. If so, what is the nature of your business?

□ 15. How long have you been employed by your present employer?

□ 16. What was the nature of your employment for the past ten years, and who was your employer or employers?

□ 17. Is the client a partnership, corporation, association, or club? [1]

If a corporation, it may be necessary to obtain full information as to the date of incorporation, principal stockholders, names of officers and directors, et cetera.

□ 18. If so, what is its full legal name?

□ 19. Did you use a trade name or fictitious name? If so, what was it?

□ 20. If a partnership, what are the names of the partners? [2]

If a partnership, it may be necessary to determine whether it is a full or limited partnership, date of formation, authority of partners, et cetera.

□ 21. What position do you hold in the firm?

The questioning should develop the nature of the client's duties, functions, and authority, where appropriate. And, in many cases, counsel must determine the client's income and find out if it has in any way been affected by the controversy in question.

c. ***Financial Status***

□ 22. Did you file an income tax return in any year during the past five years? [3]

□ 23. If so, for which years?

□ 24. Do you have copies of these income tax returns? If not, what person, firm, or organization has copies?

□ 25. What was your gross income for the last year and for each of the previous four years?

□ 26. What was your net taxable income for each of these years?

□ 27. How many exemptions did you claim in your tax return for each of these years?

□ 28. What is your gross income thus far for this year?

d. ***Age***

□ 29. What is the date of your birth? Where were you born? [4]

□ 30. Is a birth certificate or other evidence of birth available? [5]

Attorneys will sometimes ask clients to mail to them photostatic copies of birth certificates and similar documents. Whether such a request should be made depends on the nature and extent of the legal work done for the client.

□ 31. If the client is not of legal age, who is his legal guardian? [6]

Counsel should bear in mind that if the client is not of legal age, his legal guardian or next friend will of necessity have to sign the pleadings. Counsel must therefore consider a separate interview with the guardian. At this time further questions should be asked to determine whether the guardian has ever been legally appointed, whether he has any adverse interest in the matter, whether he is financially able to assume responsibility, et cetera. If the client is not of legal age and is a defendant, guardian ad litem possibilities will have to be explored also.

□ 32. If the client is an infant, with whom does he reside?

□ 33. If the client is a minor, does he understand the nature and obligation of an oath? [7]

It is essential that a child offered as a witness have sufficient sense of responsibility as to understand the obligation of an oath. No precise minimum age can be fixed at which children are disqualified for this reason.

e. ***Marital Status***

□ 34. Are you married or single?

□ 35. If married, when were you married and what is the full name and address of your spouse (including wife's maiden name)? [8]

□ 36. [If a married woman] What was your maiden name?

□ 37. Is a marriage certificate or other document proving marriage available?

For proofs concerning common-law marriages, see Common-Law Marriage, 3 Am. Jur. Proof of Facts 269. For proof of a valid ceremonial marriage, see Marriage, 7 Am. Jur. Proof of Facts 622. For information as to where to write for marriage records, see Am Jur 2d Desk Book, Document No. 182.

□ 38. Do you have any divorce or annulment history? Are you separated from your husband or wife? [9]

Since most lay people are not sure of the meaning of "annulment," the attorney should explain this term to the client when asking this question.

□ 39. Is this your only marriage? Have you remarried?

For presumption as to validity of second marriage, see 14 A.L.R. 2d 7. For remarriage of surviving spouse, or possibility thereof, as affecting action for wrongful death of deceased spouse, see 87 A.L.R. 2d 252.

□ 40. If previously married, how many times?

If the client has been previously married, the attorney should question the client on the name (names) of the spouse; date of marriage; place of marriage; termination of such marriage; names, ages, and addresses of any children born of such marriage; whether marriage was terminated by death or divorce; and if so, either the date of death or the name of court and last known address of spouse divorced and the date of divorce.

□ 41. If divorced, are you now paying alimony?

For proofs concerning alimony, see Alimony, 1 Am. Jur. Proof of Facts 421.

□ 42. Do you have any children? If so, what are their names and ages?

□ 43. Do the children live with you? If not, where do they live and with whom?

□ 44. Are any of your children adopted or foster children? [10]

□ 45. Have you ever applied for adoption of children? If so, when, where, and to whom?

f. ***Property***

□ 46. Do you own your own home?

For proofs concerning community property, see Community Property, 3 Am. Jur. Proof of Facts 299. See also, "Judgment in personal injury action by one spouse as res judicata against or for other spouse, where cause of action was community property,", 6 A.L.R. 2d 472.

□ 47. How long have you lived at your present address?

□ 48. Have you maintained a permanent residence elsewhere?

□ 49. If so, where, and for how long?

□ 50. Do you own any other realty?

□ 51. If so, in what county or state is it located?

g. ***Military Record; Education and Health Background***

□ 52. Were you in military service?

Evidence of or comment on military service, or lack thereof, is permissible in a proper case (9 A.L.R. 2d 606).

□ 53. If so, what was your serial number and branch of service?

□ 54. Were you given any special citations or honors? What were the circumstances? What type of discharge did you receive? Were you honorably discharged?

Honorable or dishonorable discharge from army or navy may be admissible on the question of character or reputation (9 A.L.R. 2d 606).

□ 55. Are you a high school or college graduate? If so, what school or college did you attend? What degrees did you obtain?

□ 56. What special training and experience for work, business, or a profession do you have?

□ 57. Have you been in good physical and mental health during the past fifteen years? [11]

h. ***Name***

□ 58. Have you ever used an assumed name?

If the client has used an assumed name, the attorney should question him as to the name, the dates on which such name was used, and the reason therefor. For change of child's name in adoption proceeding, see 53 A.L.R. 2d 927.

□ 59. Have you ever been known by any other names or aliases? If so, what were the circumstances? Was your name legally changed?

This line of questioning may not be advisable in every case. However, in some instances the background of the client will suggest inquiring into the possible uses of aliases and assumed names, in civil as well as criminal cases. Such information is of significance in divorce and alimony matters, child custody and support cases, adoption proceedings, naturalization and deportation proceedings, Social Security benefit proceedings, and the like.

□ 60. [If the client is a woman] Are you using a different married name from the one you used when the accident happened? [When the death occurred, et cetera.] [12]

It may be highly desirable for plaintiff's counsel, where the widow is a beneficiary in a wrongful death case, to try to keep from the jury the fact that she has since remarried.

i. ***The Claim Generally***

□ 61. What is your account of the transaction or occurrence?

□ 62. How did the claim arise?

Permit the client to tell the story in his own way, describing the events in chronological sequence. It should be transcribed verbatim, if possible.

□ 63. On what date did the injury or claim arise?

This question is of particular importance in determining whether the period of limitations has expired or is soon to expire. See Am. Jur., Limitation of Actions §§ 113 et seq.. For time from which statute of limitations begins to run against action for wrongful death, see 174 A.L.R. 815. For time when limitation period begins to run against cause of action or claim for contracting disease, see 11 A.L.R. 2d 277.

□ 64. On what day of the week did the claim arise? What was the time of day? Was it a holiday?

It may also be advisable to follow up these questions with other questions on weather conditions, amount of daylight, et cetera. For proofs concerning weather conditions, see Rain and Other Weather Phenomena, 10 Am. Jur. Proof of Facts 49. For weather reports and records as evidence, see 34 A.L.R. 2d 1249.

j. ***Damages and Expenses***

□ 65. What was the extent of injury or damage?

The client may be advised that he may seek actual or compensatory damages for any loss or injury sustained, and that such damages include all direct pecuniary loss—such as expenses incurred, time lost, injury to business—and pain and suffering. As to proof of damages, see Damages, 3 Am. Jur. Proof of Facts 491. For questions pertaining to personal injuries, see § 27. See also, Methods of Proving Damages in Personal Injury Cases, by Albert Averbach, The Practical Lawyer Vol. 4 No. 5 p. 46.

□ 66. Do you feel that the act of the other party was reckless or particularly malicious?

It should be explained to the client that occasionally, as in actions for malicious prosecution or in actions under a guest statute, a malicious or grossly negligent act must be shown in order to recover. But in most cases malice or recklessness need not be shown to establish ordinary damages, and are important only in connection with punitive damages. The client may be told that punitive damages are damages assessed solely on account of the wanton, reckless, malicious, or oppressive character of the acts complained of. See Am. Jur., Damages §§ 265 et seq..

□ 67. Were your expenses minimized by some benefit from some other source, such as your own insurance coverage? [13]

□ 68. Can an itemized list of injuries be made? Can a list be made of all losses or expenses incurred?

The client should be questioned regarding all his expenses, even though he may have been compensated from some collateral source. Many clients do not even think of claiming as expenses items for which they made no actual outlay.

□ 69. Was any attempt made to mitigate or lessen the damages (that is, to minimize the extent of the harm done)? [14]

It may be explained to the client that mitigation of damages is a term used in reference to the duty of the person injured by the wrongful act or omission of the adverse party to take all such measures as are reasonable under the circumstances to reduce or lessen the loss resulting from the defendant's act. He should be advised, however, that his opponent cannot lessen the damages by showing that the client received benefit from some "collateral source" such as his insurance coverage.

k. ***Position of Adverse Party***

□ 70. What are the basic contentions of the other party?

The client should be asked about specific contentions of the adverse party, since "specifics" are easier for the layman client to understand.

□ 71. Does he claim that your conduct or negligence caused the accident?

□ 72. Does he claim that you broke your contract or refused or failed to do what you were supposed to do under its terms?

□ 73. Is there a possibility that the adverse party will attempt to make some claim against you?

□ 74. Have you notified your insurance company or turned any summons or other papers over to your insurance company? [15]

Frequently a client will state that he has submitted a statement in proof of loss to an insurance company, as this is a common requirement of many insurance policies. However, in the great majority of cases the insured has not been held rigidly to such statements, and justification has been found to permit him considerable latitude to explain, modify, or even flatly contradict them.

□ 75. Have you made any demand on the adverse party for payment or other relief?

l. ***Legal Action Taken***

□ 76. Has any legal action as yet been taken in this case?

□ 77. Have you been served with a subpoena or summons or other legal notice?

If the client does not have the legal notice in his possession at the time of the interview, he should be instructed to mail or bring it to the attorney's office as soon as possible, so that it may be examined to determine whether it is proper in content and form. See Am. Jur., Process §§ 8 et seq..

□ 78. From which court did the notice issue, and in what county or state was it served on the client?

Subpoenas ordinarily run to the boundaries of the state, but statutes often limit the power of particular courts to issue subpoenas in counties other than the county in which the court sits. See Am. Jur., Process §§ 7, 52, 54. For sufficiency of designation of court or place of appearance in original civil process, see 93 A.L.R. 2d 376.

□ 79. Was the notice served on you personally? If not, was it served on some member of your family or [*if the client has domestic help*] someone in your household? [16]

□ 80. On what date was the process or other paper served on you?

m. ***Insurance***

□ 81. Do you have insurance on the claim involved?

□ 82. If so, has a claim been made against the insurance company for payment? Is a copy of the policy available? How long have you had the insurance?

When the defendant is covered by liability insurance, and the insurance lawyer will have control of the litigation, unless there are some conflicts of interest between the defendant and the insurer, separate counsel may not be either necessary or desirable. For proof of bad faith of liability insurer in failing to accept compromise offer, see Insurance, 6 Am. Jur. Proof of Facts 420. For proof of failure of insured to attend trial as relieving insurer of liability under policy, see Insurance, 6 Am. Jur. Proof of Facts 440. See also, Privilege of communications or reports between liability or indemnity insurer and insured, 22 A.L.R. 2d 659.

n. ***Costs Involved***

□ 83. Are you aware of the cost of filing papers and in proceeding to trial?

Counsel should outline to the client the many steps that must be taken to bring the case to trial and estimate the costs involved. He should mention such matters as taking statements of witnesses, investigating the case, filing fees, et cetera, and should disclose the approximate cost of each necessary step.

□ 84. Are you aware of the usual attorneys' fees in such cases?

If the nature of the case warrants it, the attorney should show the client the local schedule of minimum fees if the local jurisdiction has adopted one. For proof of reasonable value of legal services, see Attorneys' Fees, 1 Am. Jur. Proof of Facts 236. See also, Promoting Clients' Acceptance of Lawyers' Fees, by John W. Bebout, The Practical Lawyer Vol. 4 No. 6 p. 11.

□ 85. Do you know that the court costs may be disproportionate to the amount recoverable? Will you consider an offer to settle the case?

At this point, the client should be advised to weigh the costs he will incur if he proceeds to a settlement as against the costs that will be incurred by proceeding to trial. For award of cost to defendant on causes of action where claims of some, but not all, of coplaintiffs were successful, see 68 A.L.R. 2d 1058. See also Evaluating The Case—Whether to Settle or Try It, by Forrest S. Smith, Defense LJ Vol. 1, p. 71.

o. ***The Adverse Party, Generally***

□ 86. What is the full name of the person on the other side? Is that person an adult man or woman or a person under legal age?

□ 87. Is more than one person involved on the other side? If so, how many are involved, who are they, and in what way are they involved in your case?

For right of defendant, in action for personal injury, property damage, or death, to bring in new parties as cross defendants to his counterclaim or the like, see 46 A.L.R. 2d 1253. See also what law governs as to proper plaintiff in contract action (62 A.L.R. 2d 486), right of defendant sued jointly with another or others in action for personal injury or death to separate trial (174 A.L.R. 734), right of defendant in action for personal injury or death to bring in joint tortfeasor for purpose of asserting right of contribution (11 A.L.R. 2d 228), change in party after statute of limitations has run (8

A.L.R. 2d 6), right of defendant to bring in third person asserted to be solely liable to plaintiff (168 A.L.R. 600), and contribution between negligent tortfeasors at common law (60 A.L.R. 2d 1366).

□ 88. Do you know the name of the attorney representing the other side? What is it?

□ 89. What is the address and telephone number of the person [or persons] on the other side?

□ 90. Where is he employed and what is the nature of his work?

□ 91. Is he related to you by blood or marriage? [17]

This question is designed not only to determine the existence of a family relationship that might bar the claim, but also as an aid in discovering collusive claims.

□ 92. What is his age?

If the adverse party is a minor, counsel should obtain information as to the parents or guardian of the child. See Am. Jur., Infants §§ 3, 113 et seq.; Am. Jur., Guardian and Ward §§ 5 et seq..

□ 93. Is he alive and in good health?

In many states, under a so-called "deadman's statute," a party in interest is disqualified from giving testimony against a lunatic or the estate of a deceased person. See Am. Jur., Witnesses §§ 214 et seq.. The survival of the opposing party may also be relevant in determining whether any claim at all exists, since even under modern practice certain types of claims may die with the death of the defendant. For proof of statements of deceased (as against objection of hearsay), see Deceased, Conversations and Transactions with, 4 Am. Jur. Proof of Facts 241.

p. ***Adverse Party's Recognition of Liability***

□ 94. Are you aware of any admissions or statements made by the adverse party? [18]

□ 95. If so, to whom were they made?

□ 96. What were the circumstances?

□ 97. Has our opponent offered to pay your expenses?

Evidence of payment, or offer or promise of payment, of medical and similar expenses of an injured party by the opposing party is inadmissible, at least for the purpose of establishing negligence on the part of the party making the payment or offer. However, in some cases such evidence has been held admissible on the ground that the payment or offer or promise of payment was accompanied by an admission of liability, or the surrounding circumstances indicated such an admission, see 20 A.L.R. 2d 293. For admissibility of evidence that defendant in negligence action has paid third persons on claims arising from the same transaction or incident as plaintiff's claim, see 20 A.L.R. 2d 304. For admissibility in evidence of receipt of third person, see 80 A.L.R. 2d 915.

q. ***Adverse Party's Property and Finances***

□ 98. What property does he own? Is he a home owner?

□ 99. What is his general financial status? Can you estimate his annual income?

□ 100. Does he have personal property holdings?

□ 101. Is the adverse party a corporation, partnership, association, or club?

□ 102. If so, what is its address? Where does it do business? [19]

□ 103. What are the names of the principal officers or partners?

□ 104. If a corporation, what is the state of incorporation?

□ 105. Do you know whether the adverse party has insurance covering the claim?

For pretrial examination or discovery to ascertain from defendant in action for injury, death, or damages the existence and amount of liability insurance and the insurer's identity, see 41 A.L.R. 2d 968. For admissibility of evidence, and propriety and effect of questions, statements, comments, et cetera, tending to show that defendant in personal injury or death action carries liability insurance, see 4 A.L.R. 2d 761. See also, Discovery of Auto Liability Insurance Under the Federal-Rules, by Richard D. Schiller, Notre Dame Lawyer, Vol. XXXIV No. 1 pp. 78–89; Personal Injury Commentator (1959) p. 203; A Re-Appraisal of Discovery Procedure Permitting Disclosure of Auto Liability Insurance Limits, by Mark O. Roberts, Defense L. J. Vol. 5 p. 29.

□ 106. Has the adverse party attempted any settlement negotiations?

□ 107. Do you know whether he has been involved in any similar controversies? [20]

r. *Witnesses*

□ 108. Are there third persons whose direct knowledge of the facts would support your claim? What are their names and addresses?

□ 109. Is there any reason why these people would not serve as witnesses on your behalf?

□ 110. Do you know of any persons who might be helpful as witnesses? What are their names and addresses?

□ 111. Are you aware of anyone who might be particularly harmful as a witness?

□ 112. If so, can you give his name and address?

□ 113. Do you know of any reason why any witness might be biased or prejudiced?

□ 114. Is there any family relationship between you and any of the witnesses for either side?

The relationship of a witness to a party or interested person may be shown on cross-examination as bearing on the question of possible bias. See Am. Jur., Witnesses §§ 625, 630, 716. For relationship between party and witness as giving rise to or affecting presumption or inference from failure to produce or examine witness, see 5 A.L.R. 2d 893.

s. *Documents and Records*

□ 115. Do you have evidence to contradict the contentions of the other party?

□ 116. Do you have any documents or other written evidence to support your claim?

For proofs concerning unavailability of primary evidence, see Best and Secondary Evidence, 2 Am. Jur. Proof of Facts 467. For privilege of custodian, apart from statute or rule, from disclosure, in civil action, of official police records and reports, see 36 A.L.R. 2d 1318. What are official records within purview of 28 USC § 1733, making such records or books admissible in evidence, see 50 A.L.R. 2d 1197. See also Use of Accident Reports at Trial, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 66.

□ 117. Has the document ever been altered in any way?

For elements of proof on alteration of an instrument, see Alteration of Instruments, 1 Am. Jur. Proof of Facts 482. For proof of alteration, see Alteration of Instruments, 1 Am. Jur. Proof of Facts 479. For mutilations, alterations, and deletions as affecting admissibility in evidence, see 142 A.L.R. 1406 (books of account), 28 A.L.R. 2d 1443 (public records). See also Effect of Mutilation or Alteration of Books of Account, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 92.

□ 118. Do you have any proof of the genuineness and authenticity of the document?

□ 119. How old is the document?

For proofs concerning ancient documents, see Ancient Documents, 1 Am. Jur. Proof of Facts 523. For admissibility in evidence of ancient maps and the like, see 46 A.L.R. 2d 1318. See also Proof of Ancient Documents, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 79.

□ 120. Was it witnessed or sworn to by a notary public?

If the writing is at least thirty years old, and if it was produced from proper custody and is otherwise free of suspicion it may be used at the trial even though it was not attested by subscribing witnesses.

□ 121. Can the document be brought to my office for examination?

□ 122. Are photostatic or carbon copies available?

For carbon copies of letters or other written instruments as evidence, see 65 A.L.R. 2d 342. For photographic representation or photostat of writing as primary or secondary evidence within best evidence rule, see 72 A.L.R. 2d 308. See also Microfilms in Evidence, by Robin B. Herman, Trial Lawyers Guide (1959) p. 181; Copies of Originals, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) §§ 115 et seq.

□ 123. If you cannot recall all the details of the transaction or occurrence, is there any writing or memorandum available from which you could refresh your memory? [21]

Writings or memoranda may be used by a party to assist and refresh his memory in a proper case. However, a witness may not resort to memoranda to refresh his memory unless it is shown that he needs the aid of the memoranda to recall the facts to his mind.

□ 124. How is the writing or memorandum prepared? Who prepared it?

□ 125. Do you have business records in support of your claim?

For what constitutes books of original entry within rule as to admissibility of books of account, see 17 A.L.R. 2d 235.

□ 126. If so, were these entries made in the regular course of business?

□ 127. How were these records kept, and who kept them? [22]

It may be explained to the client that a business record, when competent, stands in place of the person who made the entry. It may be pointed out to him that in jurisdictions which have enacted the Uniform Business Records as Evidence Act or similar statutes, any writing or record, whether in the form of an entry book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event is admissible as evidence thereof if made in the regular course of business at the time of the event or within a reasonable time thereafter.

□ 128. Can you produce documentary evidence of your expenses?

□ 129. Do you have any photographs of the scene of the accident?

For proof concerning photographs as evidence, see Photographs as Evidence, 9 Am. Jur. Proof of Facts 147.

□ 130. Do you know if anyone else has any photographs of the scene of the accident? If so, who?

t. ***Adverse Party's Documents and Records***

□ 131. Does the adverse party have in his possession any documents or other written evidence bearing on the case?

□ 132. If so, what is the nature of the document and how is it relevant? [23]

The client may be told that the adverse party may be compelled to produce certain documents in his possession in a proper case.

□ 133. Would these documents or writings be helpful or detrimental to your case?

u. ***Criminal Record***

□ 134. Have you ever been in serious trouble with the police?

If so, what were the circumstances? Any arrests? [24]

□ 135. What was the nature of the offense? When and in what court was the offense prosecuted? Were you convicted or acquitted?

Many courts continue to apply the rule excluding a previous conviction offered in a civil action as evidence of the facts on which it was based. And there is little doubt as to the inadmissibility of a conviction that is in the process of appeal. However, an increasing number of decisions have approved the admission of such evidence, especially where it is admitted only as prima facie evidence, subject to rebuttal. See 31 A.L.R. 261; 18 A.L.R. 2d 1287. See also, right to show in civil case that party or witness refused to testify on same matter under claim of privilege in previous criminal proceeding (2 A.L.R. 2d 1297), conviction or acquittal as evidence of facts on which it was based in civil action (31 A.L.R. 261; 18 A.L.R. 2d 1287), right of witness whose credibility has been impeached by evidence of previous conviction, charge of crime, or arrest, to assert innocence or to explain or show circumstances (166 A.L.R. 211), and admissibility of evidence as to other offense as affected by defendant's acquittal of that offense (86 A.L.R. 2d 1132).

□ 136. If convicted, what sentence was imposed? Were you paroled or pardoned?

See "Pardon as affecting impeachment by proof of conviction of crime.", 30 A.L.R. 2d 897.

□ 137. Were you convicted or acquitted in any criminal prosecution growing out of the occurrence we are now discussing?

□ 138. Have you ever been cited for contempt or charged with perjury?

□ 139. Is the adverse party likely to raise any questions as to your character, conduct, or habits?

The habits or conduct of a party may bear on the credibility of the testimony given at the trial, particularly where they are fraudulent or criminal. See Am. Jur., Witnesses §§ 674 et seq.. For proof of general reputation in community or in place of employment, business or a profession, see Character and Reputation, 3 Am. Jur. Proof of Facts 179.

v. ***Prior Civil Litigation***

□ 140. Have you been involved either as plaintiff or as defendant in any previous claims or law suits?

For proof concerning former testimony, see Former Testimony, 5 Am. Jur. Proof of Facts 229. For cross-examination of plaintiff in personal injury action as to his previous claims or actions, see 69 ALR2d 593. For identity of subject matter or of issues as condition of admissibility in civil cases of testimony or deposition in former proceeding of witness not now available, see 70 A.L.R. 2d 494. For mode of proof of testimony given at former examination, hearing, or trial, see 11 A.L.R. 2d 30. For binding effect upon party litigant of testimony of his witnesses at a former trial, see 74 A.L.R. 2d 521.

□ 141. Have you ever made a claim under the workmen's compensation or longshoremen's laws of any state or of the federal government?

□ 142. What was the nature of the case in which you had a previous claim or law suit?

□ 143. Who was the adverse party in the previous litigation?

□ 144. Who was the attorney who handled the case for you at that time?

The client should be told that he will in all probability be rigorously cross-examined as to previous injuries, claims, or actions of a similar nature to show that his present physical condition is not the result of the accident sued on, or to discredit him as a witness or lay foundation for his impeachment. The client should be cautioned that the existence of a previous injury may greatly reduce the damages assessed against the defendant. 69 A.L.R. 2d 593.

□ 145. What was the outcome of the case?

w. *Statements and Admissions*

□ 146. Have you made any statements or admissions to the adverse party or to a third person? If so, did the admissions coincide with the occurrence or were they made at some other time or place? [25]

In some jurisdictions, admissions by a party as to a tort occurring during his absence have been held admissible on the ground that they were against the interests of the person making them, even though the admission was not based on personal observation or knowledge. 54 A.L.R. 2d 1072.

□ 147. If you made an admission, to whom was it made and what was the nature of the admission?

Careful notation should be made of any circumstances showing coercion or duress in the manner of obtaining the admission or statement. See Am. Jur., Evidence §§ 542 et seq.. For proof of telephone conversations, see Conversations, 3 Am. Jur. Proof of Facts 388. For memorandum of telephone conversation as admissible in evidence, see 167 A.L.R. 405. See also Telephone Conversations, by Irving Goldstein. Trial Lawyers Guide (1958) p. 405.

□ 148. Did you make any statement to anyone in proof of your loss?

Frequently a client will state that he has submitted a statement in proof of loss to an insurance company, as this is a common requirement of many insurance policies. However, in the great majority of cases the insured has not been held rigidly to such statements, and justification has been found to permit him considerable latitude to explain, modify, or even flatly contradict them (58 A.L.R. 2d 432). For denial of liability as waiver of proofs of loss required by insurance policy, see 49 A.L.R. 2d 161.

□ 149. If you were present and a statement was made by someone else, did you keep silent? If so, why did you keep silent?

A party's silence may be regarded as a tacit admission when a statement is made by another in his presence regarding the accident (70 A.L.R. 2d 1102). For proof of failure to reply to oral accusation or statement as admission by conduct, see Admissions, 1 Am. Jur. Proof of Facts 165. See also Admissions Through Silence, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 74.

□ 150. Have you been interviewed by the adverse party or anyone representing him? When and where did the interview take place? Who interviewed you?

In some states, legislation forbids or limits the subsequent use of statements given or made by injured parties near the time of the injury. For statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, see 73 A.L.R. 2d 12.

□ 151. Have you made any statement that is not consistent with the account of the incident that you have given me today?

□ 152. Can you remember your exact language?

□ 153. Was your statement or admission ever reduced to writing and signed?

If the statement or admission was made to a representative of an insurance company, the name of the representative and the company should be obtained, and the client should be fully questioned as to the time, the place, and circumstances. See Am. Jur., Evidence §§ 542 et seq..

□ 154. Have you or anyone else obtained any written statements from anyone with regard to this accident?

x. *Releases*

□ 155. Were you asked to sign a release or other instrument affecting the liability of the adverse party?

□ 156. Did you sign this instrument? If so, what were the circumstances?

□ 157. Did anyone make any representation or make any statement or put any pressure on you to sign any release or settle your claim? [26]

A client who has executed a release or compromise of a cause of action sometimes feels that he was unduly pushed or fraudulently induced into making the agreement. In this situation there are several courses open to him. He may sue on the original cause of action and, when the release is tendered as a defense, assert its invalidity; he may begin an equity action to set aside or reform the release or compromise agreement; or he may affirm the agreement and bring an action to recover the damages he suffered.

□ 158. What offer or inducement was made to obtain your signature? Were you paid? If so, how much?

□ 159. Do you know whether you were paid by check or draft? If so, was it cashed? If necessary, could you pay back the money or offer to pay it back?

The client may be told that it is possible to avoid the effect of the release or other compromise, and that an action may be brought to cancel or rescind where good grounds exist, but that ordinarily he must first return the money paid him in connection with its execution. See 134 A.L.R. 6. The timeliness of the offer to return the money is a factor in many cases (53 A.L.R. 2d 753), as is the return of interest (53 A.L.R. 2d 749).

□ 160. Are you prepared to take an oath before giving testimony at the trial?

A witness who does not act on religious or other proper convictions may be committed for contempt in refusing to be sworn or to affirm. See Am. Jur., Witnesses §§ 125–128, 551.

§ 18. Final instructions

At the conclusion of the interview, the client should be asked to bring in any evidence discussed during the interview. The client should be urged to keep a complete and accurate record of all expenditures arising in the case. He should be told that if he remembers any further facts, he should report to the attorney.

It is helpful to ask the client to keep a brief diary of the manner in which his injury affects his daily life, particularly in relation to its impairment of his avocational skills and enjoyment of life. (See the checklist of questions, § 28, as to specific types of questions concerning the impairment of avocational skills and enjoyment of life.) Keeping a daily or weekly record will enable a client to recall specific instances of physical impairment or disability.

At this time, also, the client should be instructed that all negotiations concerning the case are to be conducted by the attorney, and that any settlement offers the client might receive should be referred to the attorney.

The client should be further advised not to give any interviews or statements without the attorney's knowledge, and never to discuss the claim with anyone except a representative of his own attorney's office. He should divulge no information whatsoever, not only with respect to settlement offers, but with respect to any other information that others may attempt to obtain. He has secured counsel for his representation and he should permit his counsel to act in his behalf in all matters having to do with his claim. He should be advised to tell any investigator that, under advice of counsel, he is not permitted to discuss his claim with

anyone except his own lawyer, but that he can give the investigator the name of his attorney so that the investigator can deal directly with the attorney with respect to any information desired.

A written agreement should then be prepared retaining the attorney for the client and fixing any fee that is agreed on. (See Setting the Fee, 1 Am. Jur. Trials 93§ 34.) This agreement should include any authorization necessary from the client for the examination of papers by the attorney.

The client should read the transcript of the interview to check its accuracy and completeness, and then be asked to sign it.

II. Interview as to Injury

§ 19. In general

This division takes up methods and techniques used in interviewing a client specifically with respect to personal injuries. The final section offers a comprehensive checklist of questions for reference in such an interview.

In accident cases the plaintiff's attorney must obtain, during the initial interview with the client, a detailed description and enumeration of the client's injuries. This interview is commonly close in point of time to the event leading to the injuries, and the plaintiff's recollection of the extent of injury and pain and suffering involved will be comparatively fresh in his mind. It is at this time that a complete and graphic record should be obtained regarding these all-important items of damages. Of course, such information should be compared, as the case proceeds to trial, with medical records, police reports, and other objective data that will be available at later stages of the case. It should be noted that it is important to keep up to date with the client's physical state, since the injuries may still be developing at the time of the initial client contact, and may increase during the pretrial period.

In the initial interview the plaintiff's attorney should evaluate the client's claim of injury in the light of his present physical condition. The client should be warned that his claim must be consistent with his present ability to engage in physical activities. He should be told that the other side may keep him under observation, or even take surveillance movies of him, in order to compromise or weaken the case at the trial level. [1] Unwise discussion of his injuries with others should be discouraged. If the client has had prior injuries for which he has, successfully or unsuccessfully, sought compensation, this fact should be discussed, as it will no doubt be brought out at the trial. See questions concerning discussions with or statements made to others and prior claims experience in § 28.

§ 20. Defense inquiries

Seldom can defense counsel obtain accurate and complete information from his client regarding the nature and extent of the plaintiff's injuries. For the most part defense counsel's data as to the plaintiff's injuries will be compiled from information supplied by investigators, by examination of medical and other reports, by interviewing witnesses, and by the intelligent use of discovery procedures.

Nevertheless, the defendant's attorney should ask his client every question that the client will be in a position to answer as to the extent of the plaintiff's injuries. He should determine the plaintiff's appearance immediately after the accident and should ask about any remarks made by the plaintiff concerning his condition. He should ask the defendant whether the plaintiff appeared to be in pain, whether he lost consciousness, and whether he was able to remain upright. He should find out whether the plaintiff was taken to the hospital, whether he accepted or refused treatment, and whether there were external signs of bleeding. Many similar questions are suggested by the checklist appended to this division. [1]

§ 21. Physical and mental condition

Any claim for personal injuries requires a determination of the effect of such injuries on the plaintiff's present physical and mental condition. By comparing the client's present condition with his prior physical and mental condition or by determining whether there has been an aggravation of a previously existing condition, [1] the attorney may estimate the amount of compensation that may properly be claimed on behalf of his client.

The permanency of the injuries, as reflected in the probable future physical and mental condition, should receive consideration, since this factor is of importance on the issue of damages. With regard to whether or not an injury is permanent in nature, the attorney should remember that most jurisdictions do not require a plaintiff to risk dangerous or uncertain surgical or medical procedures. [2]

§ 22. Physical and mental condition—Functional or organic disabilities

The initial medical reports often disclose little as to possible functional or organic disabilities, particularly where the prognosis for recovery from an injury was good. Indeed, it is not unusual for a nonspecialist to report that he can find no cause for a patient's symptoms. Such a report should not be conclusive insofar as the attorney is concerned, especially where there is a possibility that an injury to the central nervous system may be involved. Nothing less than an exhaustive examination by a specialist, such as a neurologist, should rule out the possibility of organic injury in such a case. Injuries to the brain are not unusual where there are no external symptoms of injury.

Since recovery is not limited to organic injury, but includes injury resulting in a functional impairment, the attorney should, in the absence of evidence of organic injury, conduct the client interview so as to be able to evaluate functional aspects of the condition. He should bear in mind that even a minor physical injury may bring on a functional disability, or aggravate a pre-existing one, although no trace of the physical injury remains. The fact that there appears to be a strong desire for gain in the client's claim, or that the physical aspects of the injury do not seem to bear out the degree of disability or pain, should not lead him to a conclusion that the claim is unworthy since the motivations may be unconscious and the disability and pain entirely real to the client. [1]

§ 23. Physical and mental condition—Neurosis

Although the attorney cannot close his eyes to a known fraudulent claim, he must recognize that elements of malingering or exaggeration are sometimes present in cases of neurotic illness arising out of trauma, and that an impairment of function may develop into a severe neurosis [1] or even a psychosis. [2] Obviously, the final psychiatric evaluation must be left to the medical expert, but the attorney should endeavor during the client interview to evaluate the gravity of a functional condition by questioning the client carefully concerning its effect on his efficiency and enjoyment of life.

Where head injuries are claimed, the client should be questioned on possible loss of consciousness. Retrograde amnesia will often blank out the victim's memory so that he cannot remember the impact or even the events preceding the impact. [3] An estimate of the length of time the client was unconscious may be made by inquiring about his first recollection upon regaining consciousness—whether this occurred at the scene of the accident, while being transported to the hospital, or at the hospital.

§ 24. Loss of time; impairment of earning capacity

A natural and probable consequence of a personal injury is absence from one's business [1] or occupation during treatment and convalescence. Such absence usually results in loss of earnings or income. Where the injury is disabling to some degree, it is probable that there will be a diminution of earning capacity, if not an entire loss. A careful evaluation of this item of damage is usually subject to exact proof: the court will require that mathematical exactness be pursued by the attorney in presenting such evidence to the court and jury.

Inquiry should be made of the client as to his place of employment at the time of the injury; the amount of his salary; his prospects of advancement; special training, skills, or education; amount of time lost from work; loss of pay or income; present salary and place of employment; and similar matters tending to show loss of time and impairment of earning capacity. Loss or impairment of avocational skills should be inquired into, not only from the viewpoint of monetary loss, but from the viewpoint of loss or impairment of life enjoyment.

Counsel should bear in mind that an injured party is entitled to be compensated for losses suffered due to absence from his business or occupation. Through various forms of insurance programs or from some other collateral source, it is possible that the money that would ordinarily be lost is partially or wholly recovered. Consequently, in actual fact the injured person may

not suffer any loss in his business or occupation in the long run. Usually, recovery of such compensation, in whole or in part, from a collateral source will not operate to mitigate the damages recoverable from the person causing the injury. [2]

§ 25. Medical and nursing expenses

Necessary and reasonable medical expenses, such as expenditures for medicine, hospitalization, and care and nursing, may be recovered in a personal injury action. Also recoverable is the expense of necessary medical attendance and nursing that is reasonably certain to be incurred in the future. [1] In determining what are necessary medical expenses, it need only be shown that the services for which such expenses were incurred seemed necessary in the light of the circumstances as they then appeared.

The attorney should not be concerned too greatly with the reasonableness of such expenses in his interview with the client. Proof of reasonableness is usually made through expert witnesses, including the witness who rendered the services. However, there are cases holding that an expert is not necessary to prove the reasonableness of medical bills. [2] These cases have held that there is a rebuttable presumption that medical bills are reasonable—in other words, the medical bills alone are prima facie proof of their reasonableness. This factor, from an expense standpoint, is frequently important, since one may not wish to call a particular doctor, either for tactical reasons or, perhaps, because the bill involved is smaller than the cost of having to bring the medical witness into court to testify as to his bill. This is a significant consideration in cutting down expenses in the trial of a case.

Among the items on which the client should be questioned are hospital expenses, nursing home expenses, X-ray and laboratory expenses, ambulance expenses, physicians' and nurses' bills, cost of medicines and special appliances, expenses of physical therapy, dental expenses, and future medical expenses reasonably certain to be incurred.

§ 26. Pain and suffering

At some point during the interview of a client in a personal injury case his attention should be directed to the subject of pain and suffering, since this is a recoverable item of damages. Personal injury victims are notoriously inept at describing the nature and effect of pain. A client may describe the pain suffered from his injury in general terms, such as "bad," but such general terminology is not sufficiently meaningful to a juror who has not experienced the same pain. As a result each juror will have his own conception of the severity of the pain suffered, and his assessment of damages will naturally be in accord with his personal opinion.

The necessity of using meaningful and descriptive terminology must be emphasized to the client. A plaintiff who describes a head pain as the sensation of having the top of his head blown off or of having his head squeezed in a vise, gives each juror a yardstick to measure the damages to be awarded. A pain in a nerve may be vividly described as a sensation of burning or as having needlelike or shocklike qualities. It may cause tears to come to the eyes, it may be such that even the lightest touch cannot be endured, or it may be likened to sandpaper being rubbed over the skin.

If the pain results in some disability or difficulty in the body's function, it should be discussed. For example the pain of a torn ligament in the leg may prevent walking; an adhesion in a wound may prevent bending or stooping; and a broken or loosened tooth may prevent eating solid foods.

However, the attorney must not place himself in the position where he is suspected of having coached his client in the use of an apt word or phrase. The jury might suspect this if an illiterate or unintelligent witness uses language not in keeping with his vocabulary limitations. The same suspicion might result from having the witness describe pains in different parts of his body with the same phrase, as, for example, where he describes a pain in his arm as a jabbing, shocklike pain, and then uses that phrase in describing the pain in his head or in his foot. The opposing attorney, if he suspects coaching, may well ask the client whether the apt word or phrase was suggested to him by his attorney. Even if the client's answer is negative, the jury will be quick to assess the situation in the light of the entire testimony, and to question whether that testimony is in keeping with the use of the particular word or phrase.

Recognizing the effectiveness of the apt word or phrase, the attorney should not be satisfied in his interview with his client until he has literally forced the client to cudgel his mind and his imagination for a word or phrase that graphically describes what he is trying to get across to the court and jury.

In his interrogation of his client the attorney must attempt to bring to light how frequently pain is experienced. It is important for the client to be able to testify whether he suffers the pain weekly, daily, or hourly. How steadily the pain continues during the times when it is present should be determined, as well as what can be done or is being done to relieve it. The necessity of taking an expensive drug, for instance, should certainly be brought out.

Reference should be made to the article Damages in Volume 3 of Am Jur Proof of Facts for a thorough treatment of the facts subject to proof in recovering damages for personal injuries. In this respect particular attention is called to Proofs 27–31, dealing with testimony of a plaintiff in regard to particular minor symptoms, such as headaches, nausea and vomiting, dizziness, chills and shivering, or weakness. The checklists or "Elements of Damages" contained in proofs, throughout Proof of Facts, relating to particular personal injuries should also be examined. [1]

§ 27. Pain and suffering—Variations in the threshold of pain

It is commonly assumed that pain is a universal torment suffered whenever personal injuries are incurred, and that some injuries cause more pain than others. And it is known that some injuries set off a compensatory mechanism that results in what is known medically as "shock," a condition that operates mercifully to prevent the injured person from experiencing pain.

It is not as widely known, however, that the same injury does not cause the same pain to different persons. The location of the pain is usually the same, but the intensity of the pain differs from person to person. It has been established that the threshold of pain varies—it may be high in one person and low in another, though both suffer from the same injury. An injury causing slight pain to one person may be excruciating to another. In questioning a client, therefore, counsel must attempt to determine whether the client's threshold of pain is relatively high or relatively low. It should not be assumed that a relatively slight injury causes little or no pain.

The possibility that the client may distort the amount of pain suffered should not be overlooked during the interview. For example, a woman seeking to emphasize her femininity may intentionally or unintentionally exaggerate her claim as to the degree of pain she experienced. Others, in an attempt to show courage in the face of adversity, will make precisely the opposite claim. Such a client may be told that it would be unfortunate if a proper claim for pain and suffering were overlooked because of misdirected bravado.

To aid in determining whether a distorted claim of pain is being offered, the attorney should consider asking the client for his reactions to pains that are recognized as being relatively minor, such as the pain involved in a hypodermic injection or in the taking of a blood sample. This procedure may enable counsel to determine whether the client's reactions to pain vary from the norm, and assist him in determining the actual pain suffered in the case of a client who feels that minimizing his symptoms is the manly thing to do.

§ 28. Checklist of questions

This checklist of questions is designed to obtain the general, essential information concerning the claim of a client where a personal injury is involved. For the checklist of questions to be asked any client, no matter what the nature of his problem, see §§ 17a– x.

a. *Injuries and Treatment Generally*

□ 1. What did your injuries consist of?

□ 2. Did you injure your head? If so, did you lose consciousness? How long were you unconscious?

See various proofs relating to amnesia, Amnesia, 1 Am. Jur. Proof of Facts 510; cerebral concussion, Brain Injury, 2 Am. Jur. Proof of Facts 700; epilepsy from brain injury, Epilepsy, 4 Am. Jur. Proof of Facts 704; skull injuries, Skull Injuries, 10 Am. Jur. Proof of Facts 642.

□ 3. Did you sustain any fractures or dislocations? If so, where were the fractures or dislocations? Did the fracture extend into a joint? If so, what joint?

See various proofs relating to fractures, Fractures, 5 Am. Jur. Proof of Facts 253; jaw and facial fractures, Jaw and Facial Fractures, 6 Am. Jur. Proof of Facts 558.

□ 4. Did you sustain any internal injuries? If so, what injuries?

See various proofs relating to bladder injuries, Bladder Injuries, 2 Am. Jur. Proof of Facts 550; gall bladder rupture, Gall Bladder, 5 Am. Jur. Proof of Facts 399; intestinal injuries, Intestinal Injuries, 6 Am. Jur. Proof of Facts 456; kidney injuries, Kidney Injuries, 6 Am. Jur. Proof of Facts 618; liver rupture, Liver Injuries, 7 Am. Jur. Proof of Facts 289; spleen injuries, Spleen Injuries, 11 Am. Jur. Proof of Facts 93.

□ 5. Did you strain or sprain any part of your body?

See various proofs relating to back and neck sprain and strain, Back Injuries, 2 Am. Jur. Proof of Facts 308; hernia, Hernia, 5 Am. Jur. Proof of Facts 703; muscle strain, Muscle and Tendon Injuries, 8 Am. Jur. Proof of Facts 209.

□ 6. Did you sustain any dental injuries? If so, what injuries?

For proof of various dental injuries, see Dental Injuries, 4 Am. Jur. Proof of Facts 315.

□ 7. When were your injuries first determined?

□ 8. What physician or physicians diagnosed your injuries?

b. ***Medical or Laboratory Tests***

□ 9. Were your injuries confirmed by medical or laboratory tests? [1]

□ 10. Were samples taken of your blood and urine? [2]

□ 11. Were you given an electrocardiogram? [3]

An electrocardiogram (EKG) is a tracing of the contractions of the heart muscle and is made by means of an electric current.

□ 12. Did you undergo a neurological examination? A psychiatric examination? Was an electroencephalogram taken? [4]

An electroencephalogram (EEG) is a tracing of the electrical currents developed in the cortex by brain action.

□ 13. Was your hearing tested? Was an audiogram made?

An audiogram is a chart showing variations in the acuteness of a person's hearing. For proof concerning tests for ear injuries, see Ear Injuries, 4 Am. Jur. Proof of Facts 561.

□ 14. Was your eyesight tested? Was a perimeter used in this test?

A perimeter is an instrument producing a tracing which shows the condition of the person's eyes. For proof concerning tests for eye injuries, see Eye Injuries, 5 Am. Jur. Proof of Facts 1.

□ 15. What X-rays were taken?

The following is a checklist of different kinds of X-rays and should be consulted for possible use during the client interview:

Encephalogram: An X-ray of the brain.

Myelography: An X-ray of the spinal and subarachnoid space.

Pneumoencephalogram: An X-ray of the brain after injection of air or gas into spaces of ventricles.

Pyelogram: An X-ray of the kidney and ureter.

Radiograph: An X-ray picture.

Skiagraph: An X-ray picture.

Ventriculogram: An X-ray of the head following removal of cerebral fluid from ventricles and replacement by air.

For proof concerning X-rays generally, see X-rays, 11 Am. Jur. Proof of Facts 741.

For admissibility of X-ray report made by a physician taking or interpreting X-ray pictures, see 6 A.L.R. 2d 406.

□ 16. Were you given an electromyogram?

An electromyogram (EMG) is a tracing showing electrical response of contracting muscles to determine location and extent of nerve lesion.

□ 17. When did you undergo any of the above tests? Where?

□ 18. What were the results of such tests? Who was in charge of them?

c. *Treatment*

□ 19. Where were you treated for your injuries?

□ 20. What treatment was given you?

All aspects of treatment and therapy should be brought out during the interview. However, since the client will not have all information, and may be unfamiliar with technical terminology, the hospital and medical records compiled in his case should be used during the interview. (Information with respect to treatment and therapy is necessary to show the seriousness of the injuries, and the extent of pain and suffering, and is essential in laying the foundation for proving loss of earnings or income, reasonableness of medical expenses, and the like.) This will usually be covered in a second or subsequent interview, since it is rare that the attorney has examined and has available the client's hospital and medical records before his first interview.

□ 21. Do you know the name of the doctor or nurse who treated you?

□ 22. Are you still receiving treatment? What type of treatment?

□ 23. How long were you confined to bed in the hospital? After you left the hospital, but before you returned home, were you given special treatment in a nursing or rest home?

□ 24. How long were you confined to your home? Did you require a nurse or special care or treatment at this time?

d. *Status at Time of Injury*

□ 25. Were you unconscious after the accident? How long?

□ 26. What do you remember when you first came to?

□ 27. Were you able to get up by yourself?

□ 28. Where were you?

□ 29. Do you remember the blow or the impact?

□ 30. Do you remember what you were doing prior to the impact?

The attorney should carefully note the client's answer to these questions. In most cases, where there is unconsciousness as a result of a blow to the head, the victim will not be able to remember the impact. He may also be unable to remember the events preceding the impact, this being one of the effects of retrograde amnesia.

□ 31. What is the last thing you remember doing before losing consciousness?

e. ***Aftermath of Injury***

□ 32. How were you taken to the hospital [or other place of treatment]?

□ 33. Do you remember the trip?

□ 34. Did you bleed from the nose, ears, or mouth?

□ 35. Did any clear fluid escape from your nose or ears?

Some evidence of the extent of the injury and internal head damage is indicated where there has been bleeding from the nose, ears, or mouth, and particularly where there is an escape of clear fluid—usually cerebro-spinal fluid—from the nose or ears.

f. ***Discussions With or Statements to Others***

□ 36. With whom have you discussed your injuries?

For proof of foundation for admission of conversations, see Conversations, 3 Am. Jur. Proof of Facts 382.

□ 37. Where can such individuals be reached?

□ 38. When and where did you discuss the injury?

□ 39. What did you say?

For inability of person making utterance to recollect and narrate facts to which it relates as affecting its admissibility as part of res gestae, see 7 A.L.R. 2d 1324.

□ 40. What were you told?

Counsel must determine whether the client, in discussing his case with others, has in any way compromised or jeopardized the case. The questioning should also lead to persons who can support the client's claims as to disability, pain and suffering, et cetera.

□ 41. Have you signed any statements detailing the extent of your injuries?

□ 42. If so, when and where were such statements signed?

□ 43. What were the circumstances?

□ 44. Do you have a copy of the statement with you?

□ 45. If not, where may a copy be found?

□ 46. What did the statement say?

□ 47. Do you know of any statement signed or approved by anyone else concerning your injuries? By whom?

g. ***Prior Claims Experience***

□ 48. Have you had any prior accident in which you claimed damages or sought compensation? [5]

Unless the attorney has complete information concerning prior injuries involving claims, it will be possible for opposing counsel to bring out such information and achieve a strategic advantage. The court and jury will be left with the impression that such information was deliberately withheld by the plaintiff, and will tend to type the client as evasive or as "accident-prone." Hence, an attorney must become fully informed as to his client's past with respect to prior injuries involving claims, whether successful or not. This serves not only to protect his client's interests against surprise attack in the courtroom, but also helps the attorney to determine for himself the merits of his client's claim.

□ 49. Did litigation arise out of such claim?

□ 50. In what court was the trial held?

□ 51. When was this?

□ 52. Who represented your legal interests?

□ 53. Have you ever collected insurance on account of personal injuries?

□ 54. From whom? For what? When? How much did you collect?

h. ***Prior Physical and Mental Condition***

□ 55. Prior to your injury, had you suffered from any serious illness, accident, or disease? Did you ever sustain any prior injuries to the region or regions of the body that you injured in this accident?

□ 56. Did you ever sustain any prior injuries to the general surrounding area?

□ 57. What are the names and addresses of all the doctors you have consulted during the ten years preceding your injury and the reasons therefor?

□ 58. Prior to this present injury, did you have any trouble or disorder relating to your heart? Nerves? Nervous system? High blood pressure? Diabetes? Ulcer? Sprain or strain of any part of your body?

□ 59. Are you aware of any prior congenital condition or anomaly in the area injured?

For proof of good health prior to injury through testimony of plaintiff, see Damages, 3 Am. Jur. Proof of Facts 675. For proof of disability prior to injury through testimony of plaintiff, see Damages, 3 Am. Jur. Proof of Facts 681.

□ 60. Have you ever applied for medical benefits to the Veterans Administration?

Information should be obtained as to the client's branch of service, serial number, and type of discharge. Counsel should determine the nature of the complaint, whether it was service-connected or nonservice connected, and whether the client was hospitalized in a service hospital or a civilian hospital. Full information is necessary in order to make later examination of the VA medical records.

□ 61. Where were you living at the time?

□ 62. Were you employed? If so, where?

□ 63. Had you lost time from work because of illness or accident on previous occasions? How much time? When?

□ 64. Had you fully recovered when your present claim arose?

□ 65. Did your accident aggravate or make any past condition worse? How? [6]

□ 66. Did your past condition require hospitalization? What was the name of your physician at the time?

□ 67. What hospitals have you been in, either as an in-patient or out-patient, during your life? What were the reasons for hospitalization?

□ 68. What treatment did your prior hospitalization require?

□ 69. When did such treatment begin and end?

It is important that the attorney be informed on all the facts concerning his client's past physical and mental condition. The client should be told that he cannot recover for some disability for which the defendant was in no way responsible, but that he can recover where a past condition is aggravated by the negligence of the defendant. An attorney who does not have all the facts will not be prepared to explain aggravation when his opponent produces evidence of prior condition.

□ 70. Have you ever suffered from mental illness or a nervous condition? If so, when? Where?

□ 71. Have you ever been treated or confined to an institution for a nervous or mental illness?

□ 72. If so, when, where, and for how long?

□ 73. Who treated or examined you?

□ 74. Have you ever been treated or confined for alcoholism or for use of or addiction to drugs or narcotics?

For proof of illegal use of drug, see Criminal Drug Addiction and Possession, 13 Am. Jur. Proof of Facts 455. For proofs relating to drunkenness, see Intoxication, 6 Am. Jur. Proof of Facts 469. For use of drugs as affecting competency or credibility of witness, see 52 A.L.R. 2d 848.

□ 75. If so, when, where, and for how long?

□ 76. Who treated or examined you?

□ 77. Have you ever had fainting spells, blackouts, epilepsy, or fits?

□ 78. Have you ever had any prior physical examination? By whom? When? With what result?

□ 79. Have you ever received a disability rating for any prior accident, personal injuries, or sicknesses? If so, what was the rating?

i. ***Present Physical Condition***

□ 80. What is your present physical condition?

For judicial notice of diseases or similar conditions adversely affecting human beings, see 72 A.L.R. 2d 554.

□ 81. Have you sustained any injury or illness since the date of the accident alleged in this cause?

□ 82. Have you been in any accident—since the date of the accident alleged in this cause—which you believe did not result in any personal injury to yourself?

□ 83. Do you still feel pain from your injuries?

□ 84. What is this pain like?

For detailed questions as to pain and suffering, see questions §§ 200 et seq..

□ 85. Are you able to walk about freely?

□ 86. If not, how restricted are your movements?

□ 87. Is it necessary to wear a truss or use crutches or similar appliances?

For admissibility in evidence of braces, crutches, or other prosthetic or orthopedic devices used by injured party, see 83 A.L.R. 2d 1271.

□ 88. Are you still receiving treatments on account of your injuries?

□ 89. What type of treatment?

□ 90. From whom? How often?

□ 91. Are you working?

□ 92. Has there been any change in your occupation or duties as a result of your accident?

An injured person may recover for negligence resulting from loss of time and earnings and for any loss or diminution of his earning capacity. See Am. Jur., Damages §§ 88 et seq. and questions §§ 134 et seq., on impairment of vocational skill or proficiency.

j. ***Permanency of Injuries***

□ 93. Are any of your injuries permanent?

Injuries resulting in a lasting impairment to health are subject to compensation, whether they result in partial or complete disability in health, mind, or person. The possibility that a surgical operation may reduce the effect of such injury should not be overlooked, though most jurisdictions will not tell a person to undergo a serious or dangerous operation in order to minimize damages. Am. Jur., Damages §§ 39–75. For proof of extent, severity, and duration of injuries through testimony of plaintiff, see Damages, 3 Am. Jur. Proof of Facts 689.

□ 94. What are these permanent injuries?

□ 95. Who says they are permanent?

□ 96. What reasons does he give?

□ 97. Has any doctor assigned a disability rating to you, either on a temporary or permanent basis, as a result of your injury? If so, what is this rating?

k. ***Scars or Disfigurement***

□ 98. Have you been scarred or disfigured as a result of the accident?

□ 99. If so, where?

□ 100. Have you been advised that plastic or other kinds of surgery will eliminate or greatly reduce such scars or disfigurement?

For various proofs concerning restoration in connection with scars or disfigurement, see Plastic Surgery, 9 Am. Jur. Proof of Facts 375 and Lacerations, 7 Am. Jur. Proof of Facts 26.

□ 101. By whom?

□ 102. Would this be an extensive and serious operation?

□ 103. Do you intend to have [or have you had] such an operation?

□ 104. Will you consent to have [or have you had] pictures taken of your scars or disfigurements?

For proof of medical photographs, see Photographs as Evidence, 9 Am. Jur. Proof of Facts 205.

l. ***Loss of Time, Earnings, or Profits Generally***

□ 105. Were you employed at the time of the accident?

For proof of prospective earning capacity—or of its loss—of student or trainee in action for personal injury or death, see 15 A.L.R. 2d 418. See also, Damages for Infant's Lost Earning Capacity, by S. Lindenbaum, Trial Lawyers Guide (1960) p. 121.

□ 106. Where were you employed at the time of the accident?

□ 107. What were your duties?

□ 108. How long had you worked there?

□ 109. What was your salary at the time of the accident?

For earnings (including overtime) for workers in selected industries, see Am Jur 2d Desk Book Document No. 148. For earnings and hours of manufacturing production workers, see Am Jur 2d Desk Book Document No. 149. For conclusiveness of records, or lack thereof, of Social Security Board respecting wages paid by employer, see 6 A.L.R. 2d 954. For admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in an action for personal injury or death, see 81 A.L.R. 2d 733.

□ 110. Have you had any special training or education? What?

□ 111. What were your prospects for advancement at the time you were injured?

□ 112. How long were you away from your work? What were the number of days and what were the exact dates of each day lost?

m. ***Loss of Wages***

□ 113. What was your total wage loss?

In computing the total wage loss, it is not necessary in most jurisdictions to deduct compensation from collateral sources, such as receipts of compensation from accumulated employment leave, Workmen's Compensation, sick leave, and vacation time. This should be explained to the client who otherwise may be reluctant to reveal such collateral sources of compensation.

□ 114. Were you paid any wages during your absence?

□ 115. How much?

n. ***Compensation From Other Sources***

□ 116. Did you receive disability payments?

□ 117. Did you receive Workmen's Compensation, unemployment insurance, sick benefits, or other forms of compensation? [7]

□ 118. What and how much?

o. ***Present Occupational Status***

□ 119. Was a substitute hired to do your work?

The cost of hiring a substitute during the incapacity of the injured person is a pertinent item of damages in a proper case. See Am. Jur., Damages § 141. As to the cost of hiring a substitute or assistant during incapacity of an injured person as an item of damages in action for personal injury, see 37 A.L.R. 2d 364.

□ 120. What are your present duties?

□ 121. What are your present wages?

□ 122. Are your duties more menial, or your wages less, than at the time of the accident?

For proof of loss of earning capacity—past and prospective earnings, see Damages, 3 Am. Jur. Proof of Facts 618. For proof of present value of future loss or impairment in earning capacity through testimony of actuary, see Damages, 3 Am. Jur. Proof of Facts 647.

□ 123. If so, was this change brought about as a result of your accident or injuries?

An injured person may recover for loss or diminution of earning capacity during his life expectancy. Evidence that he has no education or fitness for a pursuit different from that in which he was engaged at the time of injury is admissible. Hence, counsel should make inquiry into the client's fitness for other types of work. See Am. Jur., Damages § 93. For proof of loss or impairment of earning capacity through the testimony of an employment expert, see Damages, 3 Am. Jur. Proof of Facts 641.

p. ***Self-Employment***

□ 124. Were you in business for yourself? Give details.

□ 125. How much of your working time was devoted to this business?

□ 126. What was your average income from this business?

□ 127. Was the income from this business the result of your personal effort and skill, or was it derived from the employment of capital or the labor of others?

□ 128. If from both sources, which was predominant?

Loss of profits should not be confused with loss of earnings. Earnings are the fruit or reward of labor; profits represent the net gain made from an investment or from prosecution of some business after payment of all expenses incurred. Usually recovery is not allowed for loss of business or profit from invested capital or the labor of others, no matter how prominent the injured person's part therein or how essential it was to its successful operation. Nevertheless, loss of profits may sometimes be shown on the issue of a business or professional man's earning capacity, and a well-recognized exception has grown under which evidence of business "profits" or income, within the limits of the rules of proximate cause and the requirement of certainty, may be considered as furnishing some contribution toward establishment of a standard of calculation of such damages, if it appears that they were dependent mainly on the personal elements supplied by the claimant. See Am. Jur., Damages §§ 88, 98.

□ 129. How long were you absent from this business?

□ 130. Who ran it while you were gone?

□ 131. What did it cost to hire this person?

□ 132. What was the income from this business during your incapacity?

□ 133. How much of a loss resulted from such incapacity? [8]

q. ***Impairment of Vocational Skill or Proficiency***

□ 134. Is your work such that skill or proficiency is required?

□ 135. What particular skill?

□ 136. How was skill acquired?

□ 137. How long does it take the average person to acquire it?

□ 138. Were you considered skilled in your occupation?

□ 139. How skilled?

□ 140. To what extent was this skill reflected in your salary or position?

□ 141. How long did it take you to develop this skill?

□ 142. Was this skill affected by your injury? How and why?

A plaintiff may be compensated for his diminished capacity to earn money as a result of his injury. This does not require that any loss of earnings have actually occurred. An immediate drop in wages need not be shown, but disadvantage in the economic market, because the plaintiff no longer can use skills at which he had previously been proficient, should be shown. Damages, 3 Am. Jur. Proof of Facts 730.

□ 143. To what extent are you able to do your former work?

□ 144. Would it be possible to attain your former skill despite your injury?

□ 145. Have you tried? With what result?

□ 146. How much of your former skill can you hope to regain?

□ 147. In what length of time?

□ 148. How has this affected your earnings or salary?

□ 149. What is the best salary you can hope for in the future if you try to follow your former occupation?

r. ***Impairment of Avocational Skills and Enjoyment of Life***

□ 150. Did you have some skill not used in your work? Are you skilled in such activities as photography, playing a piano or other instrument, woodworking or painting?

Not all courts permit the recovery of compensation for impairment or loss of a skill not used by the plaintiff for economic gain. Those that permit recovery do so on the ground that the plaintiff should be made whole for any interference with his enjoyment of life. If such skills are used or have been used for some indirect pecuniary benefit that is subject to measurement, this may be inquired into and appropriate compensation granted therefor. See Damages, 3 Am. Jur. Proof of Facts 738. See also, Proof of Loss of Enjoyment as Element of Damage, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 161.

□ 151. How did you acquire this skill?

□ 152. How often do you make use of this skill?

□ 153. For what purpose?

□ 154. Have you been able to follow this activity since receiving your injury?

□ 155. What effect will your injury have on your enjoyment of life? Will you be able to follow your avocation in the future?

□ 156. Did you derive any economic gain, directly or indirectly, from your skilled activity?

□ 157. Prior to the accident or occurrence, did you engage in any sports, games, or active physical pastimes, such as hunting or fishing? Golf or tennis? Swimming, skiing, or bowling? Hiking or gardening? Were you fond of dancing?

□ 158. How have your injuries affected your enjoyment of such activities?

□ 159. Are you embarrassed by scars or other disfigurements from your injuries so as to prevent or limit your taking part in such activities?

□ 160. Have your injuries interfered with your usual recreations, such as reading and playing cards? Do they interfere with your hobbies? Do they prevent you from listening to the radio or watching television?

□ 161. Have your injuries interfered in any way with your attending, as a spectator, such sports as baseball, football, basketball, or hockey?

□ 162. Have your injuries prevented or limited your traveling or motoring activities?

s. *Hospital Expenses*

□ 163. Have you received a bill for hospital care?

□ 164. From whom and in what amount?

□ 165. Has this bill been paid?

The expense incurred for hospital care and treatment and for ambulance service is recoverable when the expense results from defendant's wrongful act. Evidence of charges for hospital bills and of their reasonableness, are admissible, whether paid for by plaintiff or furnished gratuitously by another. For proof of necessity and reasonableness of medical expenses, see Damages, 3 Am. Jur. Proof of Facts 751. For proof of medical expenses in actions for death, see Death, Actions for, 4 Am. Jur. Proof of Facts 111. See also, Proof of Hospital Expenses, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 188.

□ 166. Have you received a bill for nursing or rest home care?

For effect of board or lodging furnished to injured person in connection with hospital or nursing care on damages recoverable in personal actions, see 18 ALR2d 659. For damages for personal injury or death as including value of care and nursing gratuitously rendered, see 90 A.L.R. 2d 1323.

□ 167. From whom and in what amount?

□ 168. Has this bill been paid?

□ 169. Have you received a bill for ambulance service?

□ 170. From whom and in what amount?

□ 171. Has this bill been paid?

□ 172. Who paid for these bills?

For hospitalization or medical insurance as affecting damages recoverable for injury or death, see 13 A.L.R. 2d 355.

t. *Physicians' and Nurses' Bills*

□ 173. Have you received bills from the physicians who attended you?

□ 174. From whom and in what amounts?

For proof of necessity and reasonableness of medical expenses, see Damages, 3 Am. Jur. Proof of Facts 751. For proof of medical expenses in actions for death, see Death, Actions, 4 Am. Jur. Proof of Facts 111.

□ 175. Have all or any of such bills been paid? By whom?

□ 176. Have you received a bill for nursing care?

Reasonable compensation for care by nurses and physicians is a proper item of recovery. Some authorities hold that no recovery for such expenses can be had unless there has been an actual expenditure of money for such attention and services or liability therefor has been incurred; others hold that it makes no difference insofar as the right to recovery is concerned that such care or services might have been rendered gratuitously. See Am. Jur., Damages § 199. For damages for personal injury or death as including value of care and nursing gratuitously rendered, see 90 A.L.R. 2d 1323. See also, Proof of Nursing Expenses, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 234.

□ 177. From whom? In what amount?

□ 178. Has this bill been paid? By whom?

u. ***X-Rays and Laboratory Bills***

□ 179. Have you received a bill for X-rays taken after your injuries?

□ 180. From whom and in what amount?

□ 181. Did you or anyone pay this bill?

□ 182. Have you received a bill for laboratory or other tests?

X-ray and laboratory expenses are recoverable under the same theory under which hospital expenses may be recovered. The diagnostic value of X-ray and laboratory tests is too well known to be disputed as a legitimate expense.

□ 183. From whom and in what amounts?

□ 184. Has this bill been paid? By whom?

v. ***Medicine and Drugs***

□ 185. Have you received a bill for medicine and drugs?

□ 186. From whom and in what amount?

□ 187. Has this bill been paid?

Medicines required to treat an injury, whether to lessen pain and suffering or to cure the injury itself, are recoverable items of damages. See Damages, 3 Am. Jur. Proof of Facts 751.

w. ***Special Appliances***

□ 188. Have you been billed for use of crutches, wheelchairs, or any other special appliances?

Special appliances to lessen suffering or to make one's disability less of an inconvenience are recoverable items of damages. See Damages, 3 Am. Jur. Proof of Facts 751.

□ 189. From whom? In what amount?

□ 190. Has this bill been paid? By whom?

x. ***Physical Therapy***

□ 191. Have you had any physical therapy following your accident?

Physical therapy is recognized as an aid to the recovery of one's full physical capacity. Expenditures for such purposes are recoverable. See Damages, 3 Am. Jur. Proof of Facts 751. For proof of physical therapy generally, see Physical Therapy, 9 Am. Jur. Proof of Facts 225.

□ 192. From whom?

□ 193. Have you received a bill? In what amount?

□ 194. Has this bill been paid?

y. *Future Medical Expenses*

□ 195. Have you been advised that you will need future medical attention, nursing, or therapy?

As a general rule, recovery may be had for the expense of future medical attention and nursing that is reasonably certain to be necessarily incurred. See Am. Jur., Damages § 139. For admissibility of opinion or estimate by nonexpert witness in personal injury action of future hospital expenses, future hospitalization, or the like, see 45 A.L.R. 2d 1148. For requisite proof to permit recovery for future medical expenses as item of damages in personal injury action, see 69 A.L.R. 2d 1261. See also, Proof of Future Medical Care, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 178.

□ 196. What will this future care consist of?

□ 197. Who advised this future care?

□ 198. How long will this care be required?

□ 199. Have you been advised what this will probably cost?

z. *Pain Generally*

□ 200. What happened to you when the accident occurred?

□ 201. Did you feel any pain?

For proof of mental anguish, see Damages, 3 Am. Jur. Proof of Facts 722. For proof of pain and suffering, see Damages, 3 Am. Jur. Proof of Facts 742. For proof of conscious pain and suffering in actions for death, see Death, Actions for, 4 Am. Jur. Proof of Facts 73. For admissibility in civil action, apart from res gestae, of lay testimony as to another's expressions of pain, see 90 A.L.R. 2d 1071.

□ 202. In what part of your body?

□ 203. How would you describe that pain?

A: *It was pretty bad.*

□ 204. Exactly how did it feel?

A: *As if someone were jabbing me with a red hot ice pick.*

□ 205. How long did this pain continue?

□ 206. Was it constant? If not, about how long were the periods of pain, and the periods between them?

□ 207. Did the pain originate and end in the same part of your body?

A: *It seemed to be mostly in my neck.*

□ 208. Did you feel it anywhere else?

A: *Yes, I felt it in my shoulder*.

□ 209. Was it in both places at once?

A: *No, it seemed to start at the back of my neck and move across to my shoulder*.

□ 210. Were you able to move about [or perform some other body function]?

□ 211. If not, why not?

A: *I couldn't bear any weight on my leg because of the sharp, shock-like pain*.

Generally speaking, the pain and disability resulting from an injury can best be described by being compared to something graphic that the average mind can readily comprehend. Stating the sensation or pain to be as if someone were stabbing the injured person with a red hot ice pick brings to mind the sharpness of the pain, as well as its burning nature. In addition, the pain must be located; it must be determined whether it moves to other parts of the body; it must be determined whether it is constant or recurring; and it must be determined what disability results.

aa. ***Phantom Limb Pain***

□ 212. As the result of the amputation of your arm, were you left with any pain?

For proofs concerning amputations, see Amputations, 12 Am. Jur. Proof of Facts 39.

□ 213. Where?

A: *I felt a severe pain in my left arm*.

□ 214. What part of the arm?

A: *In the part that was amputated*.

Whenever a client has sustained an amputation of all or a part of a limb, he may suffer from the phenomenon known as phantom limb pain. Since this involves a pain of a high and disabling degree, with no known certain cure, the attorney should be cognizant of it and be prepared to interview the client with respect to the location of the pain, the quality of the pain (which is usually described as burning or stabbing or both), the sensation that the limb is still present with the extremities in an uncomfortable position, and the disabilities attendant in his work, hobbies, social activities, and enjoyment of life. For further questions, see Phantom Pain, 9 Am. Jur. Proof of Facts 109. See also, The Painful Phantom, 5 Handling Accidents Cases §§ 5:727–5:738.

□ 215. How would you describe this pain?

A: *It was a sharp, stabbing, feverish, burning pain*.

□ 216. Could the pain possibly be in the stump?

A: *No, it is definitely in the part that was amputated. It feels exactly as if the hand and fingers were present and in pain*.

□ 217. What sensation do you feel in the fingers?

A: *As if the first and second fingers were crossed over each other and in great tension and pain*.

□ 218. Is the pain that you describe constant?

□ 219. How often does it recur?

□ 220. Is the pain worse at any particular time of day?

□ 221. Is it present now?

□ 222. To what extent?

A: *It is so bad that I can hardly concentrate enough to answer your questions*.

□ 223. Does the pain affect your disposition? How?

A: *It makes me weak, jittery, and nervous. Most of the time I feel absolutely hopeless about the future because there seems no prospect of relief from pain*.

□ 224. How does this pain affect your work?

A: *I have had to resign from my job because all that I could think about was this pain. I could not concentrate on my job enough to get any work done*.

□ 225. Did you have any hobbies before this injury?

□ 226. Do you still follow them?

A: *My hobby required a certain concentration and patience which I no longer have as a result of the pain in my arm*.

□ 227. Did you read, go to movies, or follow similar relaxations prior to your injury?

□ 228. To what extent?

□ 229. Do you do this now? Why not?

A: *The pain makes me restless so that I can't sit still long enough to read or watch a movie*.

□ 230. Did you pay social visits to others or accept visits from other people prior to your injury?

□ 231. To what extent?

□ 232. Do you do this now? Why not?

A: *I feel that people are repelled by seeing that I have no arm and the pain is so distracting that I cannot concentrate on a conversation for any length of time*.

□ 233. Do you have any trouble sleeping because of the pain?

A: *Quite often I cannot get to sleep at all. Occasionally, I find that by putting my arm in a comfortable position I am able to get to sleep*.

□ 234. Does the pain ever awaken you?

□ 235. How often?

A: *It wakes me once or twice during the night and then I have a hard time getting back to sleep*.

□ 236. How many hours did you usually sleep daily prior to your injury?

□ 237. How many hours do you sleep now?

□ 238. Do you wear an artificial arm?

□ 239. Has this helped in any way to relieve your pain?

□ 240. Are you working at the present time?

□ 241. Why not?

□ 242. Are you able to do work of any kind at the present time?

□ 243. Why not?

§ 29. Concluding the interview

In addition to the general matters covered in § 18, there are matters specific to interviewing a client in an injury case that should have been discussed by the conclusion of the initial interview. Usually, arrangements must be made to procure medical and hospital records, and the client frequently must be prepared to undergo special medical examinations.

Aside from these rather routine considerations, the attorney should bear in mind that the client in an injury case frequently has particular problems when approaching litigation. He may find it difficult to contemplate bringing his injuries into a courtroom, and subjecting his account of suffering to scepticism. When he leaves the attorney's office, following the initial interview, he should feel reassured that the attorney will handle his case with sympathy, thoroughness, and tact.

—

RESEARCH REFERENCES

- Advance waivers of conflicts of interest: are the ABA formal ethics opinions advance enough themselves? 19 Geo. J. Legal Ethics 567 (2006 WL 1895890)

- Are you a client-savvy counselor? Sometimes the best client is the one you turn away, 95 Ill. B.J. 440 (2007 WL 2309871)

- Can attorneys assess the legal capacity of elderly clients? 19 Elder L. Rep. 7 (2007 WL 5181814)

- Client counseling as an ethical obligation: advising employers before they discriminate, 33 N. Ky. L. Rev. 222 (2006 WL 2220954)

- Client responsibility for lawyer conduct: examining the agency nature of the lawyer-client relationship, 86 Neb. L. Rev. 346 (2007 WL 4855419)

- Client web sites and the lawyer ethics rules: what your client says about you can hurt you, 16 Prof. Law. 4 (2005 WL 3679544)

- Closing your law practice, 70 Tex. B.J. 170 (2007 WL 916898)

- Creating conflicts of interest: litigation as interference with the attorney-client relationship, 43 Am. Bus. L.J. 173 (2006 WL 1875637)

- Dear client: questions to ask & warnings to give, 29 Fam. Advoc. 14 (2007 WL 293769)

- Direct client solicitation: when does informing someone of available legal services and remedies become ambulance chasing? 19 Geo. J. Legal Ethics 757 (2006 WL 1895960)

- Discreet disclosures: should lawyers who disclose confidential information to protect third parties be compelled to testify against their clients? 49 S. Tex. L. Rev. 307 (2007 WL 4981459)

- Fraud watch: email fraud has the potential to undermine the trust clients place in their lawyers, 80 Law Inst. J. 84 (2006 WL 2475942)

- Getting honest about client perjury, 21 Geo. J. Legal Ethics 133 (2008 WL 643293)

- Heed the warning of the 'bad feeling': keep your practice safe and sound by heeding the warning signs that presage problem clients and malpractice claims, 95 Ill. B.J. 212 (2007 WL 1130703)

- How to Build and Manage a Personal Injury Practice, 2d ed., (Reviewed), 33 Law Prac. 62 (2007 WL 1405320)

- Initial consultations—satisfaction or your money back? Should lawyers provide free consultations to prospective clients? Discounts to new clients? Refunds of a consult fee to clients who ask for one? ISBA lawyers offer their opinions, 95 Ill. B.J. 402 (2007 WL 2285978)

- Law firm marketing 101: you didn't go to law school to be a salesperson, you say. But you still have to sell yourself to prospective clients, especially if you're a solo or small-firm lawyer. Here are fellow lawyers' and marketing pros' tips for building your book of business, 96 Ill. B.J. 20 (2008 WL 160875)

- Legal advertising opinion A-0114: communications to the public involving a lawyer's recognition by a listing in a publication such as “The Best Lawyers in America”, 54 Va. Law. 53 (2005 WL 4137129)

- Litigating the existence, extent and scope of the attorney-client relationship in Maryland, 40 Md. B.J. 50 (2007 WL 431788)

- Make sense of your client's story, 44 Trial 66 (2008 WL 2503045)

- Make yourself the obvious choice: most lawyer ads just “shout” at prospective clients. Here's how to ensure that yours don't get lost in all the noise, 42 Trial 38 (2006 WL 950539)

- Mom pays for son's dissolution—now what? Any ethical problems? 60 Wash. St. B. News 32 (2006 WL 515809)

- More than the Camel's nose: the Sarbanes-Oxley Act as bad news for lawyers, their clients, and the public, 31 Ohio N.U. L. Rev. 359 (2005 WL 3707469)

- My mother, my client: your brother wants you to prepare his 'simple' will. Your college roommate wants you to handle her real estate closing. Should you do it? Probably not, ethics experts and seasoned lawyers say, 96 Ill. B.J. 344 (2008 WL 2657143)

- Neither fish nor fowl: the prospective client, 51 Res Gestae 32 (2008 WL 714911)

- Once you enter this family there's no getting out: ethical considerations of representing family-owned businesses, 75 UMKC L. Rev. 1085 (2007 WL 2319545)

- Our dirty little secret recording: a history and critique of ethical rules regarding lawyers secretly recording conversations, 12 T.G. Jones L. Rev. 1 (2007 WL 5326153)

- Overcoming the 6-Minute Life: How and Why the Legal Profession Should Free Itself from Billable Hours, (Reviewed), 36 Colo. Law. 68 (2007 WL 274645)

- Prosecutorial ethics and the McNulty memo: should the government scrutinize an organization's payment of its employees' attorneys fees? 75 Fordham L. Rev. 3245 (2007 WL 1982575)

- Rainmaking: rewriting the rules; from soup to nuts and more, new ways to ramp up client development, 32 Law Prac. 38 (2006 WL 3005133)

- Should you risk taking the case? Case selection is a risky business. If you take that case, what cards will you be holding? A clear-eyed assessment of liability, damages, the client's story, and your own resources will tell you whether to go all in—or bow out before you get started, 44 Trial 20 (2008 WL 343418)

- Stop, that's my attorney! successive representation and prior consultation, 20 Geo. J. Legal Ethics 447 (2007 WL 2372428)

- Succession planning for attorneys and law firms, 35 Colo. Law. 99 (2006 WL 4449904)

- Surfing the next wave of outsourcing: the ethics of sending domestic legal work to foreign countries under New York City Opinion 2006-3, 2007 B.Y.U. L. Rev. 483 (2007 WL 2219211)

- Telling your client to get another lawyer: what is a 'reasonable opportunity' to consult independent counsel? 61 Wash. St. B. News 32 (2007 WL 4301911)

- The attorney-client privilege and associated confidentiality concerns in the post-Enron era, 55 Def. L.J. 1 (2006 WL 2880584)

- The case for a return to mandatory instruction in the fiduciary aspects of agency and trusts in the American law school, together with a model fiduciary relations course syllabus, 18 Regent U. L. Rev. 251 (2005 WL 4658492)

- The Money Lawyers: The No-Holds-Barred World of Today's Richest and Most Powerful Lawyers, (Reviewed), 54 Fed. Law. 68 (2007 WL 707306)

- The top 10 mistakes law firms make on their websites, 29 Fam. Advoc. 38 (2006 WL 3073280)

- Transformation of the ethical boundaries of the attorney-client privilege in response to the growing complexity of the modern business world, 42 Willamette L. Rev. 79 (2006 WL 1745132)

- Turning away clients: a look at problematic representations, 24 GPSolo 12 (2007 WL 949893)

- Up the ladder: litigator responsibilities under the Sarbanes-Oxley Act, 30 Litigation 21 (2004 WL 3664050)

- Weave a Web site that attracts clients: create an effective Internet presence with high-quality content that draws in clients without draining your budget, 43 Trial 39 (2007 WL 241401)

- What did you say? The perils of clients who don't speak English, 24 GPSolo 22 (2007 WL 1697203)

Westlaw Databases

- Criminal Trial Techniques (CRTRTECH)
- Lane Goldstein Trial Technique (GOLDTRTECH)
- Litigation Management Handbook (LTGMANHB)
- Trial Communication Skills (TRLCOMMSKL)

A.L.R. Library

- Propriety of Radio and Television Attorney Advertisements, 20 A.L.R. 6th 385
- Constitutional Validity of Continuing Legal Education Requirements for Attorneys, 97 A.L.R. 5th 457
- Discipline of Attorney for Failure to Comply with Continuing Legal Education Requirements, 96 A.L.R. 5th 23
- Lawyers' Professional Liability Insurance, 92 A.L.R. 5th 273

- What Constitutes "Unauthorized Practice of Law" by Out-of-State Counsel, 83 A.L.R. 5th 497
- Attorney's right to compensation as affected by disbarment or suspension before complete performance, 59 A.L.R. 5th 693
- Circumstances under which attorney retains right to compensation notwithstanding voluntary withdrawal from case, 53 A.L.R. 5th 287
- Validity and construction of agreement between attorney and client to arbitrate disputes arising between them, 26 A.L.R. 5th 107
- Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases, 78 A.L.R. 4th 571
- Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court, 73 A.L.R. 4th 938
- Validity of release of prospective right to wrongful death action, 92 A.L.R. 3d 1232
- Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 A.L.R. 2d 125
- Severance payments as affecting right to Unemployment Compensation, 93 A.L.R. 2d 1319
- Construction and effect of provision for service of process against minor on a parent, guardian, or other designated person, 92 A.L.R. 2d 1336
- Who, other than natural or adopting parents, or heirs of latter, may collaterally attack adoption decree, 92 A.L.R. 2d 813
- Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 A.L.R. 2d 533
- Suability of individual members of unincorporated association as affected by statute or rule permitting association to be sued as an entity, 92 A.L.R. 2d 499
- Effect of infant's marriage after cause of action accrues on running of limitations as against him or her, 91 A.L.R. 2d 1272
- Injured child's subsequent marriage to tortfeasor as barring parent's action for medical expense, loss of service, and the like, 91 A.L.R. 2d 910
- Damages for personal injury or death as including value of care and nursing gratuitously rendered, 90 A.L.R. 2d 1323
- Decree in suit for "separation" as res judicata in subsequent suit for divorce or annulment, 90 A.L.R. 2d 745
- Husband or wife as competent witness for or against co-offender with spouse, 90 A.L.R. 2d 648
- Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 A.L.R. 2d 1001
- Age of child at time of alleged offense or delinquency, or at time of legal proceedings, as criterion of jurisdiction of juvenile court, 89 A.L.R. 2d 506
- Recovery for loss of earnings or earning capacity: proof that disability benefits will cease if injured person has other earnings, 88 A.L.R. 2d 483
- Place or manner of delivering or depositing papers, under statutes permitting service of process by leaving copy at usual place of abode or residence, 87 A.L.R. 2d 1163
- Propriety of service of process in personam action on resident minor defendant whose only guardian is a nonresident and cannot be served validly either within or without the state, 86 A.L.R. 2d 1183
- Manner of service of process on foreign corporation which has withdrawn from state, 86 A.L.R. 2d 1000
- Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward, 86 A.L.R. 2d 965
- Adopted child as within class named in deed or inter vivos trust instrument, 86 A.L.R. 2d 115
- Adopted child as within class in testamentary gift, 86 A.L.R. 2d 12
- What preliminary data gathered by public departments or officials constitute "public records" within the right of access, inspection, and copying by private persons, 85 A.L.R. 2d 1105
- Right of infant to select his own guardian, 85 A.L.R. 2d 921
- Effect of divorce, remarriage, or annulment, on widow's pension or bonus rights or Social Security benefits plan, 85 A.L.R. 2d 242
- Right to inspect motor vehicle records, 84 A.L.R. 2d 1261
- Damages for wrongful death of husband or father as affected by receipt of Social Security benefits, 84 A.L.R. 2d 764
- Immunity from service of process as affected by relationship between subject matters of litigation in which process was issued, and litigation which nonresident was served while attending, 84 A.L.R. 2d 421
- Holding directors', officers', stockholders', or sales meetings or conventions in a state by foreign corporation as doing business or otherwise subjecting it to service of process and suit, 84 A.L.R. 2d 412
- Pre-existing physical condition as affecting liability under accident policy or accident feature of life policy, 84 A.L.R. 2d 176
- Declarant's age as affecting admissibility as res gestae, 83 A.L.R. 2d 1368

- Time and place, under pretrial discovery procedure, for inspection and copying of opposing litigant's books, records, and papers, 83 A.L.R. 2d 302
- Reports of treaty position delivered to litigant's own attorney as subject of pretrial or other disclosure, production, or inspection, 82 A.L.R. 2d 1162
- Common-law marriage between parties previously divorced, 82 A.L.R. 2d 688
- Admissibility of evidence of plaintiff's or decedent's drawings from partnership or other business as evidence of earning capacity, in action for personal injury or death, 82 A.L.R. 2d 679
- Family relationship other than that of parent and child or husband and wife between tortfeasor and person injured or killed as affecting right to maintain action, 81 A.L.R. 2d 1155
- Pension, retirement income, Social Security payments, and the like, of deceased, as affecting recovery in wrongful death action, 81 A.L.R. 2d 949
- Pension, retirement income, Social Security payments, and the like, of deceased as affecting recovery in wrongful death action, 81 A.L.R. 2d 949
- Competency of young child as witness in civil case, 81 A.L.R. 2d 386
- Negligence in executing release as affecting right to reformation, 81 A.L.R. 2d 7
- Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages on a tort action for personal injury, wrongful death, or property damage, 80 A.L.R. 2d 1224
- State's power to subject nonresident individual other than a motorist to jurisdiction of its court in action for tort committed within state, 78 A.L.R. 2d 397
- Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to Workmen's Compensation benefits, 77 A.L.R. 2d 1154
- Qualification as expert to testify as to findings or results of scientific tests to determine alcoholic content of blood, 77 A.L.R. 2d 971
- Collateral source rule: receipt of public or private pension as affecting recovery against a tortfeasor, 75 A.L.R. 2d 885
- Receipt of public or private pension as affecting recovery against a tortfeasor, 75 A.L.R. 2d 885
- Pretrial discovery to secure opposing party's private reports or records as to previous accidents or incidents involving the same place or premises, 74 A.L.R. 2d 876
- Binding effect, upon party litigant, of testimony of his witnesses at a former trial, 74 A.L.R. 2d 521
- Place or type of motor vehicle accident as affecting applicability of statute providing for constructive or substituted service upon nonresident motorist, 73 A.L.R. 2d 1351
- Admissibility, on behalf of one of multiple defendants in accident case, of admission against interest made out of plaintiff's presence by another defendant to a fourth person, 73 A.L.R. 2d 1180
- Release of one joint tortfeasor as discharging liability of others, 73 A.L.R. 2d 403
- Avoidance of release of personal injury claims on ground of fraud or mistake as to the extent or nature of injuries, 71 A.L.R. 2d 82
- Use in civil case of testimony given in criminal case by witness no longer accessible, 70 A.L.R. 2d 1179
- Identity of subject matter or of issues as condition of admissibility in civil case of testimony or deposition in former proceeding of witness not now available, 70 A.L.R. 2d 494
- Right to copy of physician's report of pretrial examination where there is no specific statute or rule providing therefor, 70 A.L.R. 2d 384
- Discovery and inspection of income tax returns in actions between private individuals, 70 A.L.R. 2d 243
- Admissibility, on issue of defendant's negligence in respect of condition of place where plaintiff was injured, of evidence or prior accidents or injuries at same place, 70 A.L.R. 2d 167
- Admissibility, on issue of defendant's negligence as to condition of place where plaintiff was injured, of evidence of prior accident or injuries at same place, 70 A.L.R. 2d 167, supplementing 65 A.L.R. 130
- Requisite proof of future medical expenses as damage item in personal injury action, 69 A.L.R. 2d 1261
- Admissibility of report of police or other public officer or employee, or portions of report as to cause of or responsibility for accident, injury to person, or damage to property, 69 A.L.R. 2d 1148
- Cross-examination as to previous condition of plaintiff, 69 A.L.R. 2d 593
- Cross-examination of plaintiff in personal injury action as to his previous injuries, physical condition, claims or actions, 69 A.L.R. 2d 593
- Hospital and medical services furnished to injured person by government as affecting damages recoverable for personal injury or death, 68 A.L.R. 2d 876
- Necessity and manner of pleading denial of partnership in action by third person against alleged partners, 68 A.L.R. 2d 545
- Child adopted by another as beneficiary of action or settlement for wrongful death of natural parent, 67 A.L.R. 2d 745
- Tort liability of child of tender years, 67 A.L.R. 2d 570

- Admissibility, in civil assault and battery action, of similar acts or assaults against other persons, 66 A.L.R. 2d 806
- Right to recover for emotional disturbance or its physical consequences, in the absence of impact or other actionable wrong, 64 A.L.R. 2d 100
- Propriety of taking income tax into consideration in fixing damages for breach of contract, 63 A.L.R. 2d 1433
- Propriety of taking income tax into consideration in fixing damages in personal injury or death action, 63 A.L.R. 2d 1393
- Inadequate capitalization as factor in disregard of corporate entity, 63 A.L.R. 2d 1051
- Use of motion pictures as evidence to show malingering or physical condition of party, 62 A.L.R. 2d 698
- Validity of solemnized marriage as affected by absence of license required by statute, 61 A.L.R. 2d 847
- Per diem or similar mathematical basis for fixing damages for pain and suffering, 60 A.L.R. 2d 1347
- Right of parent or representatives to maintain tort action against minor child, 60 A.L.R. 2d 1284
- Admissibility of evidence of precautions taken or safety measures used, on earlier occasions at place of accident or injury, 59 A.L.R. 2d 1379
- Leasing realty as doing business, 59 A.L.R. 2d 1131
- Child's right of action, for loss of support, training, parental attention and the like, against third person negligently injuring parent, 59 A.L.R. 2d 454
- Admissibility of sound recordings in evidence as affected by privilege of communication, 58 A.L.R. 2d 1037
- Right of action for fraud, duress, or the like, causing instant plaintiff to release or compromise a cause of action against third person, 58 A.L.R. 2d 500
- Admissibility and conclusiveness, as against insured, of statements in proof of loss, 58 A.L.R. 2d 429
- Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury, 56 A.L.R. 2d 372
- Hospital record relating to physician's opinion as to patient malingering or feigning injury, 55 A.L.R. 2d 1031
- Duty of one suing for damage to vehicle to minimize damages, 55 A.L.R. 2d 936
- Admissibility and weight of party's admission as to tort occurring during his absence, 54 A.L.R. 2d 1069
- Admissibility as res gestae of statements or exclamation relating to cause of or responsibility for, motor vehicle accident, 53 A.L.R. 2d 1245
- Receipt of compensation from consumption of accumulated employment leave, vacation time, sick leave allowance, or the like, as affecting recovery against tortfeasor, 52 A.L.R. 2d 1451
- Showing use of drugs by witness, 52 A.L.R. 2d 855
- Estoppel of defendant to deny plaintiff's corporate existence by filing counterclaim or cross action against it, 51 A.L.R. 2d 1449
- Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 A.L.R. 2d 521
- Admissibility of mortality tables to aid in computing damages for future pain and suffering, 50 A.L.R. 2d 439
- Statute making foreign corporation not doing business within state subject to action on contract made within state, 49 A.L.R. 2d 668
- Denial of liability as waiver of proofs of loss required by insurance policy, 49 A.L.R. 2d 161
- Duty of injured person to minimize tort damages by medical or surgical treatment, 48 A.L.R. 2d 346
- Right to attack validity of marriage after death of party thereto, 47 A.L.R. 2d 1393
- Service of process on person in military service by serving person at civilian abode or residence, or leaving copy there, 46 A.L.R. 2d 1239
- Admissibility, in damage action arising out of explosion or blasting, of evidence of damage to other property in the vicinity, 45 A.L.R. 2d 1121
- Application of doctrine of idem sonans or the like to substituted or constructive service of process, 45 A.L.R. 2d 1090
- Admissibility of advertisements, brochures, catalogues, and the like as containing admission by a litigant contrary to a position taken by him, 44 A.L.R. 2d 1027
- Right of one spouse to maintain action against other for personal injury, 43 A.L.R. 2d 632
- Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 A.L.R. 2d 1055
- Collision insurance—insured's release of tortfeasor before settlement by insurer as releasing insurer from liability, 38 A.L.R. 2d 1095
- What constitutes doing business within state by foreign magazine, newspaper, or other publishing corporation, for purposes other than taxation, 38 A.L.R. 2d 747
- Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books or papers, or the like, 37 A.L.R. 2d 586

- Federal Rules of Civil Procedure 35(b)(1), (2)and similar state statutes and rules pertaining to reports of physician's examination, 36 A.L.R. 2d 946
- Release of one of joint and several defalcating tortfeasors as releasing insurer which was surety on fidelity bond of each, 35 A.L.R. 2d 1122
- Laches as precluding cancellation of or other relief against release for personal injury, 34 A.L.R. 2d 1314
- Pleading aggravation of pre-existing physical condition, 32 A.L.R. 2d 1447
- Liability insurer's settlement of claim against insured as bar to insured's tort action against person receiving settlement, 32 A.L.R. 2d 937
- Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 31 A.L.R. 2d 190
- Allowance of fees for guardian ad litem appointed for infant defendant, as costs, 30 A.L.R. 2d 1148
- Excuse for failure to file return within limitation provisions of Internal Revenue Code, 30 A.L.R. 2d 452
- Action against spouse or state for causing death of other spouse, 28 A.L.R. 2d 662
- State's power to subject corporation to jurisdiction of its court on sole ground of tort, 25 A.L.R. 2d 1202
- Evidence of results of psychological truth and deception tests, 23 A.L.R. 2d 1306
- Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records, and documents, 23 A.L.R. 2d 862
- Constitutionality, construction, and effect of legislation forbidding or limiting the use, as evidence, of statements secured from an injured person, 22 A.L.R. 2d 1269
- Verification and authentication of slips, tickets, bills, invoices, et cetera, made in regular course of business under the Uniform Business Records as Evidence Act, or similar acts, 21 A.L.R. 2d 773
- Avoidance of release of claim for personal injuries on grounds of misrepresentations as to matters of law by tortfeasor or his representative insurer, 21 A.L.R. 2d 272
- Impeachment of witness by evidence of arrest, accusation or prosecution, 20 A.L.R. 2d 1421
- Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses, 20 A.L.R. 2d 1217
- Admissibility, in civil motor vehicle accident case, of evidence that driver was or was not involved in previous accidents, 20 A.L.R. 2d 1210
- Divorce decree as res judicata or estoppel as to previous marital status, against or in favor of third persons, 20 A.L.R. 2d 1163
- Release of, or covenant not to sue, one primarily liable for tort but expressly reserving rights against one secondarily liable, as bar to recovery against latter, 20 A.L.R. 2d 1044
- What constitutes duress rendering employee's release of employer or past employer subject to avoidance, 20 A.L.R. 2d 743
- Right of tortfeasor to contribution where judgment creditor is spouse, parent, child, etc., of other tortfeasor against whom contribution is sought, 19 A.L.R. 2d 1003
- Receipt of public relief or gratuity as affecting recovery in personal injury actions, 19 A.L.R. 2d 557
- Liability of parent or person in loco parentis for personal tort against minor child, 19 A.L.R. 2d 423
- Effect of board or lodging furnished to injured person in connection with hospital or nursing care on damages recoverable in personal injury action, 18 A.L.R. 2d 659
- Stock ownership or control of other corporations as doing business, 18 A.L.R. 2d 187
- Discovery or inspection of trade secret, formula, or the like, 17 A.L.R. 2d 383
- Maintenance of suit by child, independently of statute, against parent for support, 13 A.L.R. 2d 1142
- Hospitalization or medical insurance as affecting damages recoverable for injury or death, 13 A.L.R. 2d 355
- Purchase of goods for foreign shipment as doing business for purposes of jurisdiction, 12 A.L.R. 2d 1439
- Standing of strangers to divorce proceedings to attack validity of divorce decree, 12 A.L.R. 2d 717
- Loss of profits of a business in which plaintiff is interested as a factor in determining damages in action for personal injuries, 12 A.L.R. 2d 288
- Loss of profits of business as factor in determining damages in personal injury actions, 12 A.L.R. 2d 288
- Mode of proof of testimony given at former examination, hearing, or trial, 11 A.L.R. 2d 30
- What constitutes doing business in state by natural person nonresident under statute providing for service, 10 A.L.R. 2d 200
- Necessity and sufficiency, under statutes and rules governing modern pretrial discovery practice, of "designation" of documents, et cetera, in application or motion, 8 A.L.R. 2d 1134
- Necessity of leaving copy of summons at residence or place of abode, 8 A.L.R. 2d 343

- Contribution between joint tortfeasors as affected by settlement with one or both by persons injured or damaged, 8 A.L.R. 2d 196
- Marriage of child or probability of marriage as affecting right or measure of recovery by parent in death action, 7 A.L.R. 2d 1380
- Attainment of majority by infant, 5 A.L.R. 2d 1147
- What amounts to "reasonable cause" for failure to file, or delay in filing, tax return, 3 A.L.R. 2d 617
- Effect of annulment of marriage on rights arising out of acts of or transactions between parties during marriage, 2 A.L.R. 2d 637
- Conviction in another jurisdiction as disqualifying witness, 2 A.L.R. 2d 579
- Liability of partners in tort as joint and several, 175 A.L.R. 1310
- Conclusiveness as regards venue, of designation of place of business in incorporation papers, 175 A.L.R. 1092
- Leaving process or notice at residence as compliance with requirement that party be served "personally" or "in person," "personally served," et cetera, 172 A.L.R. 521
- Guardian's contract employing attorney as binding on ward or his estate, 171 A.L.R. 468
- Release as covering claims of which releasor was ignorant, 171 A.L.R. 184
- Proxy marriages, 170 A.L.R. 947
- Statutory change of age of majority as affecting pre-existing status or rights, 170 A.L.R. 222
- Admissibility of evidence of repairs, change of conditions, or precautions taken after accident, 170 A.L.R. 7; 64 A.L.R. 2d 1296
- Avoidance of release of claim for personal injuries on grounds of mistake or fraud respecting the nature of the claim covered, 164 A.L.R. 402
- Blood grouping tests, 163 A.L.R. 939; 46 A.L.R. 2d 1000
- Res gestae utterances in actions founded on accidents, 163 A.L.R. 15
- Conviction on plea of nolo contendere as admissible for purpose of impeaching witness, 152 A.L.R. 2931; 89 A.L.R. 2d 611
- Admissibility of evidence that witness in civil action has been under arrest, indictment, or other criminal accusation on a charge growing out of the accident, transaction, or occurrence involved in the civil action, 149 A.L.R. 935
- Attorney-client privilege as applicable to communications between attorney and client's agent, employee, spouse, or relative, 139 A.L.R. 1250
- Who is member of family within statutes relating to service of process by leaving copy with member of family, 136 A.L.R. 1505
- Admissibility, as against objection of remoteness, of evidence as to past earnings, on the issue of amount of damages in an action for personal injury or death, 130 A.L.R. 164; 81 A.L.R. 2d 733
- Admissibility of evidence based on scientific tests for intoxication or presence of alcohol in system, 127 A.L.R. 1513; 159 A.L.R. 209
- Construction and application of phrase "usual place of abode" or similar terms, in statutes relating to service, 127 A.L.R. 1267
- Refreshment of recollection by use of memoranda or other writings, 125 A.L.R. 19; 82 A.L.R. 2d 473
- Physical condition of place before or after event as evidence of condition at time of event, 80 A.L.R. 446
- Liability insurance clause with respect to notice of accident or claim, et cetera, or with respect to forwarding suit papers, 76 A.L.R. 23; 123 A.L.R. 950; 18 A.L.R. 2d 443
- Privilege as to communications to attorney made in presence of third person in connection with drawing of will, 64 A.L.R. 184; 66 A.L.R. 2d 1312
- Divorce of insured and beneficiary as affecting the latter's right in life insurance, 52 A.L.R. 386; 175 A.L.R. 1220
- Remarriage of surviving spouse between death and trial as bearing on, and as a fact which may not be disclosed, in determining damages to spouse in wrongful death case, 30 A.L.R. 123; 87 A.L.R. 2d 252
- Opinion or expert evidence as to whether pain or symptoms of disease, or injury, are real, imaginary, or feigned, or as to the severity of pain, 28 A.L.R. 362; 97 A.L.R. 1284
- Stockholder's or officer's right to inspect books and records of corporation, 22 A.L.R. 24; 43 A.L.R. 783; 59 A.L.R. 1373; 80 A.L.R. 1502; 174 A.L.R. 262; 15 A.L.R. 2d 11
- Actions at law between partners and partnerships, 21 A.L.R. 21; 58 A.L.R. 621; 168 A.L.R. 1088
- Compensation from other source as precluding or reducing recovery against one responsible for personal injury or death, 18 A.L.R. 678; 95 A.L.R. 575
- Measure of damages for loss of earning capacity of person engaged in business for himself, 9 A.L.R. 510; 27 A.L.R. 431; 63 A.L.R. 142; 122 A.L.R. 297
- Crime-Fraud Exception to Work Product Privilege in Federal Courts, 178 A.L.R. Fed. 87
- Views of United States Supreme Court as to attorney-client privilege, 159 A.L.R. Fed. 243

- Attorney-client privilege and the reporting of cash transactions in excess of $10,000, as required by § 6050I of Internal Revenue Code (26 U.S.C.A. § 6050I, 152 A.L.R. Fed. 459
- Admissibility of parties' own statement under Rule 801(d)(2)(A) of the Federal Rules of Evidence, 48 A.L.R. Fed. 922

Treatises and Practice Aids

- Proof of age. 1 & 76 Schweitzer, Cyclopedia of Trial Practice (2d ed.)
- Memoranda Recording Past Recollection. 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § ;224
- Loss of Profits or Earnings as Damages. 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) §§ 15, 16, 58, 250
- Damages and Proof of Aggravation of Pre-Existing Condition. 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) §§ 47, 48, 77
- Proof of Blood Tests. 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 86
- Proof of Capacity to Work. 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) §§ 98 et seq.
- Proof of Conviction or Acquittal. 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) §§ 113 et seq.
- Proof of Pain and Suffering. 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) §§ 132, 235
- Proof of Prior Condition of Health. 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 249
- Interpretation of Medical Records. 6 Handling Accidents Cases, Ch 97
- Neurological Aspects of Head Injuries as Viewed by the Trial Lawyer. 7 Handling Accidents Cases, Ch 112
- Neurological Aspects of Health Injury as Viewed by the Trial Lawyer. 7 Handling Accidents Cases, Ch 112
- Existence of the Relationship of Attorney and Client. Jones on Evidence (5th ed.) § 831
- Chemical Tests of Body Fluids, Jones on Evidence (6th ed.) § 110
- Relevancy of Similarity of Conditions. Jones on Evidence (6th ed.) § 156
- Relevancy of showing of profits as damages. Jones on Evidence (6th ed.) § 189
- Expert Opinion on Blood Tests, Jones on Evidence (6th ed.) § 435
- "Pain and Suffering" and Dollars and Cents. Modern Trials, Ch XVI
- Traumatic Neuroses, Hysterical Paralysis, and Emotional Disturbance. Modern Trials §§ 12, 44
- The Lawyer's Secretary and Investigator: Ethics. Modern Trials § 25
- Alcohol and Blood Tests. Modern Trials § 65
- Head Injury. Modern Trials § 86
- Psychiatric and Psychological Tests. Modern Trials § 275
- Electrocardiography (EKG). Modern Trials § 279(24)
- Electroencephalogram (EEG). Modern Trials § 279(23)
- Malingering. Modern Trials § 279(5)
- Neurological Tests and Examinations. Modern Trials § 279(3a)
- Discovery of Income Tax Returns, by John G. Phillips. Trial Lawyer's Guide p 55

Trial Strategy

- Proof of Personal Jurisdiction in the Internet Age, 59 Am. Jur. Proof of Facts 3d 1
- Proof of Waiver of Attorney-Client Privilege, 32 Am. Jur. Proof of Facts 3d 189
- Existence of Attorney-Client Relationship, 48 Am. Jur. Proof of Facts 2d 525
- Tuberculosis, 11 Am. Jur. Proof of Facts 434
- Proof of repairs or change of conditions following accident, see Repairs, 10 Am. Jur. Proof of Facts 297
- Foundation for introduction in evidence of remarriage tables, Remarriage, 10 Am. Jur. Proof of Facts 284
- Refreshing witnesses' present recollection, see Refreshing Recollection, 10 Am. Jur. Proof of Facts 251
- Pulmonary tests, see Pulmonary Function Tests, 9 Am. Jur. Proof of Facts 641
- Physical Therapy, 9 Am. Jur. Proof of Facts 229
- For proof of services rendered by a general practitioner, see Physicians and Surgeons, 9 Am. Jur. Proof of Facts 18
- For proof of reasonable value of services rendered by a physician, see Physicians and Surgeons, 9 Am. Jur. Proof of Facts 15

- Parkinson's Disease, 8 Am. Jur. Proof of Facts 696
- Parkinson's Disease, 8 Am. Jur. Proof of Facts 696
- Neurologic disease diagnosis, see Neurological Examination, 8 Am. Jur. Proof of Facts 454
- Neuritis, 8 Am. Jur. Proof of Facts 379
- Neuritis, 8 Am. Jur. Proof of Facts 379
- For a discussion of the legal and medical aspects of malingering, and tests that may be employed in some instances to determine whether a person is malingering, see Malingering, 7 Am. Jur. Proof of Facts 427
- Proof of life expectancy. Life Expectancy, 7 Am. Jur. Proof of Facts 219
- Leg Injuries (Thrombophlebitis), 7 Am. Jur. Proof of Facts 149
- Leg Injuries, 7 Am. Jur. Proof of Facts 149
- Drunkenness as evidenced by intoximeter breath test, see Intoxication, 6 Am. Jur. Proof of Facts 501
- Qualifying an infant client to testify as a witness, Infants, 6 Am. Jur. Proof of Facts 338
- Psychogenic impotency in female, see Impotency, 6 Am. Jur. Proof of Facts 324
- Mental deficiency following brain injury to previously normal person, see Idiocy and Other Mental Deficiency, 6 Am. Jur. Proof of Facts 284
- Conversion reaction following physical trauma, see Hysteria (Conversion Reaction), 6 Am. Jur. Proof of Facts 217
- Psychological stress as causative factor of conversion reaction, see Hysteria (Conversion Reaction), 6 Am. Jur. Proof of Facts 211
- Establishing nonintoxication through cross-examination of expert, see Supplement, Intoxication, 6 Am. Jur. Proof of Facts 16
- Heart injuries generally, see Heart Injuries, 5 Am. Jur. Proof of Facts 591
- Gall Bladder, 5 Am. Jur. Proof of Facts 399
- For proof concerning former testimony, see Former Testimony, 5 Am. Jur. Proof of Facts 229
- Epilepsy from brain injury, see Epilepsy, 4 Am. Jur. Proof of Facts 704
- Electroencephalogram authentication, see Electroencephalograms, 4 Am. Jur. Proof of Facts 643
- Explanation of electrocardiograms including their authentication and accuracy, see Electrocardiograms, 4 Am. Jur. Proof of Facts 627
- Foreign corporation or other enterprise, or an individual, as doing business in a state, see Doing Business, 4 Am. Jur. Proof of Facts 483
- Diabetes, 4 Am. Jur. Proof of Facts 457
- Stress following injury as cause of dementia praecox, see Dementia Praecox (Schizophrenia), 4 Am. Jur. Proof of Facts 288
- For proof in actions for death generally, see Death, Actions For, 4 Am. Jur. Proof of Facts 71
- Damages, 3 Am. Jur. Proof of Facts 681
- For proof of disability prior to injury through testimony of plaintiff, see Damages, 3 Am. Jur. Proof of Facts 681
- For proof of good health prior to injury through testimony of plaintiff, see Damages, 3 Am. Jur. Proof of Facts 675
- Loss of profits, contract opportunities, and professional income as a result of injuries, see Damages, 3 Am. Jur. Proof of Facts 661
- Loss of profits, contract opportunities, and professional income, see Damages, 3 Am. Jur. Proof of Facts 661
- Injury to business and/or loss of profits from property damage, see Damages, 3 Am. Jur. Proof of Facts 599
- Proof of coronary thrombosis, see Coronary Occlusion, 3 Am. Jur. Proof of Facts 428
- Cancer, 3 Am. Jur. Proof of Facts 135
- Buerger's Disease, 3 Am. Jur. Proof of Facts 82
- Buerger's Disease, 3 Am. Jur. Proof of Facts 82
- Brain injuries, see Brain Injuries, 2 Am. Jur. Proof of Facts 693
- For proof of impeachment based on previous conviction, see Conviction of Crime, 2 Am. Jur. Proof of Facts 405
- For proof of aggravation of particular physical conditions, see Arthritis, 2 Am. Jur. Proof of Facts 45, 55, Asthma, 2 Am. Jur. Proof of Facts 201
- For various proofs concerning the aggravation of previously existing conditions, see Arthritis, 2 Am. Jur. Proof of Facts 45, 55 and Asthma, 2 Am. Jur. Proof of Facts 201
- Annulment of marriage, Annulment, 1 Am. Jur. Proof of Facts 661
- Proof of angina pectoris, see Angina Pectoris, 1 Am. Jur. Proof of Facts 583
- Proving age generally, see Age, 1 Am. Jur. Proof of Facts 333
- Compliance with adoption requirements, Adoption, 1 Am. Jur. Proof of Facts 224
- Refusal to submit to physical examination as admission by conduct, see Admissions, 1 Am. Jur. Proof of Facts 190
- For proofs relating to admissions by conduct, see Admissions, 1 Am. Jur. Proof of Facts 161
- Proof relating to books of account, see Account, Books of, 1 Am. Jur. Proof of Facts 89
- Meaning of abbreviation in commercial writing, see Abbreviations, 1 Am. Jur. Proof of Facts 12
- Considerations in Litigating a Civil Case with Non-English Speaking Clients, 65 Am. Jur. Trials 1

- Managing Litigation, 51 Am. Jur. Trials 1

Law Reviews and Other Periodicals

- 20 years later, still Capote's lawyer: attorney balances celebrity client's legacy against wishes of historians, L.A. Daily J., November 30, 2005, at 1 (2005 WL 3620981)
- 4th and 205: how a rush of global comments blocked the SEC's first attempted punt of attorney-client privilege under Sarbanes-Oxley, 20 Touro L. Rev. 363 (2004 WL 3216167)
- Accident-Proneness, by John Henderson. Defense Law Journal Vol. 6 p. 73
- A client's own worst enemy: when the person you represent behaves badly, it makes your job a whole lot harder, 91 A.B.A. J. 24 (2005 WL 489604)
- Acquiring foreign-born clients: marketing legal services to a growing niche, 33 Colo. Law. 55 (2004 WL 2307310)
- Advice and counsel: the question of whether a lawyer has given legal or nonlegal advice is highly fact-specific, 28 L.A. Law. 31 (2005 WL 2209364)
- Advising the Older Client, (Reviewed), 25(4) Est. Tr. & Pensions J. 373 (2006 WL 2734910)
- All for one and one for all? Legal malpractice arising from joint defense consortiums and agreements, the final frontier in professional liability, 53 Def. L.J. 341 (2004 WL 3551054)
- A professional Web site is essential and need not exhaust resources, N.Y. L.J., July 11, 2008 (2008 WL 2833611)
- A quagmire of internet ethics law and the ABA guidelines for legal website providers, 18 Geo. J. Legal Ethics 1021 (2005 WL 1451795)
- Are you spamming your clients? How firms can make sure their e-mails don't violate the law, 198 J. Acct. 63 (2004 WL 1903336)
- A trap for the unprivileged—new SEC attorney conduct rules, 37 Md. B.J. 8 (2004 WL 2165723)
- Attorney ads are big cheese in hunt for mouse clicks, L.A. Daily J., April 3, 2006, at 1 (2006 WL 1067964)
- Attorney advertising: does television advertising deserve special treatment? 28 J. Legal Prof. 153 (2004 WL 3329634)
- Attorney reporting under Sarbanes-Oxley: has the SEC built a better mousetrap (or just created more rats)? 22 Preventive L. Rep. 38 (2004 WL 3152341)
- Attorney's faxes deemed prohibited as advertising, N.Y. L.J., September 6, 2006 (2006 WL 2661366)
- Auctioning for loyalty: selection and monitoring of class counsel, 22 Yale L. & Pol'y Rev. 69 (2004 WL 891916)
- Bridge over troubled water: Gowling pays the price for not updating its conflicts database, 29(4) Am. Law. 29 (2007 WL 1221270)
- Buzz: How to Create It and Win with It, (Reviewed), 9(7) Law. Competitive Edge J.L. Econ. & Mgmt. 13 (2007 WL 2359146)
- Can client confidentiality survive Enron, Arthur Andersen, and the ABA? 34 Stetson L. Rev. 147 (2004 WL 3314991)
- Choosing what to keep: lawyers must choose carefully when adding provisions to fee retainer agreements, 90 A.B.A. J. 34 (2004 WL 811918)
- Civil claim settlement talks involving third parties and insurance company adjusters: when should lawyer conduct standards apply? 53 Def. L.J. 407 (2004 WL 3556584)
- Client is uncooperative, but lawyer cannot quit, N.Y. L.J., April 10, 2007, (2007 WL 1140621)
- Client perjury: when do you know the defendant is lying? 22 GPSolo 26 (2005 WL 738046)
- Company sues over class action ads: lawyer denies pursuit of clients is defamation; turn of the screw? L.A. Daily J., May 24, 2006, at 1 (2006 WL 1929592)
- Compelling disclosures: recently admitted lawyers are questioning the obligation for client confidentiality where it is apparent that children may be left at risk, 78 Law Inst. J. 82 (2004 WL 2165811)
- Confidentiality of attorney-client relationship: SEC Rule 205 and state bar issues; a summary report, 15 Prof. Law. 24 (2004 WL 3551093)
- Conflict-free fees: a hedge fund sues a bank, and the firm with the fewest conflicts wins, 30(1) Am. Law. 18 (2008 WL 193070)
- Conflicts of Interest and Chinese Walls, 2d ed., (Reviewed), 25 C.J.Q. 119 (2006 WL 496941)
- Confronting dilemma on potential client perjury, 9/12/2005 N.Y. L.J., September 12, 2005 (2005 WL 2421716)
- Court Advertising Panel Lays Down Rules for Law Firm Ads on the Web, N.J.L.J., May 23, 2005 (2005 WL 1233042)
- Criminal defendant perjury: what does one do? 28 J. Legal Prof. 165 (2004 WL 3329635)
- Difficult clients: sometimes, you must choose between giving them lots of TLC and showing them the door, 90 A.B.A. J. 30 (2004 WL 1552585)
- Disciplinary panels differ on rights of attorneys to waive confidentiality, N.Y. L.J., November 22, 2004 (2004 WL 3358769)

- Do good fences make good neighbors? Representing nationwide clients where they do business—but you are not admitted, 29 ALI-ABA Bus. L. Course Materials J. 7 (2005 WL 758715)
- Don't just hit send: unsolicited e-mail and the attorney-client relationship, 17(2) Harv. J.L. & Tech. 533 (2004 WL 3654383)
- Don't learn the hard way: representation agreements should be written with care, 92 A.B.A. J. 24 (2006 WL 139042)
- Double Recovery of Lost Earnings—Employer Pays Wages During Disability, by Charles O. Brizius. Trial Lawyers Guide (1959) p. 93
- E-mail communication and the attorney-client privilege: an ethical quagmire, 26 Whittier L. Rev. 685 (2004 WL 3244554)
- Establishing date of birth. The Practical Lawyer Vol. 7 No. 6 p. 78
- Estate Planning Strategies: A Lawyer's Guide to Retirement and Lifetime Planning, (Reviewed), 6 Law. Competitive Edge J.L. Econ. & Mgmt. 13 (2004 WL 2282814)
- Evaluation of Damage to Ability to Earn Income, by Robert D. Banzuly. Trial Lawyers Guide (1961) p. 137
- Evidentiary Problems of Medical Tests, by Harold S. Sawyer and Guy Vanderjagt. The Practical Lawyer Vol. 8 No. 4 p. 57
- Exploring disqualification of counsel in Texas: a balancing of competing interests, 37(4) St. Mary's L.J. 1009 (2006 WL 2113431)
- Failure to Award for Pain and Suffering, by Thomas F. Lambert, Jr. NACCA Law Journal Vol. 29 p. 166
- Fear of blogging: as the law catches up to the technology, bloggers look for a few good attorneys, 91 A.B.A. J. 16 (2005 WL 1655609)
- Getting to know you: a client's right to lawyer disclosure, 20 Crim. Just. 62 (2005 WL 1636649)
- Government lawyer conflicts: representing a government agency and its constituents, 60 Rec. Ass'n B. City N.Y. 282 (2005 WL 2147150)
- Guide to Hospital Records, by Edwin J. Holman. Defense Law Journal Vol. 3 p. 29
- HIPAA implications for attorney-client privilege, 35 St. Mary's L.J. 871 (2004 WL 3223209)
- How the CAN-SPAM Act of 2003 affects electronic communication by lawyers, 51 Prac. Law. 17 (2005 WL 2146837)
- How to Defend Yourself Against Your Lawyer, (Reviewed), 79 Fla. B.J. 61 (2005 WL 84260)
- How to Get Quoted and Featured in the Media, (Reviewed), 63(9) Bench & B. Minn. 32 (2006 WL 3863346)
- How to lose the attorney-client privilege in a New York minute and Martha as a bad example, 24 Mich. Bus. L.J. 7 (2004 WL 3222400)
- How young, female, minority attorneys can be rainmakers, N.J.L.J., March 24, 2006 (2006 WL 864588)
- Hushing of Cochran client makes waves: picketing couple wanted $10 million to stop demonstrating, L.A. Daily J., March 24, 2004, at 1 (2004 WL 3370112)
- Impeachment by Prior Conviction, by Mark J. Satter. Trial Lawyers Guide (1958) p. 155
- Implementing attorney ethics policies in law firms and corporate law departments after Sarbanes-Oxley, 50 Prac. Law. 37 (2004 WL 1371923)
- International regulation of the legal profession: an impending possibility? 22 GPSolo 38 (2005 WL 738052)
- Is mandating disclosure in your fee letter that you do not carry malpractice insurance a sound idea? 18 Utah B.J. 12 (2005 WL 2704190)
- Judge rules attorney must answer subpoena about source of fees, N.Y. L.J., June 6, 2006, (2006 WL 1645136)
- Lawyer-client relationships can arise from legal hotline calls panel rules, N.J.L.J., January 17, 2008, (2008 WL 187409)
- Lawyering for older clients: a new paradigm, 32 Est. Plan. 48 (2005 WL 806679)
- Lawyer Life: Finding a Life and a Higher Calling in the Practice of Law, (Reviewed), 6 Law. Competitive Edge J.L. Econ. & Mgmt. 14 (2004 WL 2282815)
- Lawyers sue over taping of jail phone calls: attorney say they didn't know of policy about recording, L.A. Daily J., November 13, 2006, at 1 (2006 WL 3769389)
- Letter for Lawyers: Essential Communications for Clients, Prospects, and Others, 2d ed., (Reviewed), 6 Law. Competitive Edge J.L. Econ. & Mgmt. 14 (2004 WL 2282824)
- Listen: It Will Change Your Life, A Practical Guide to Effective Listening and Communication, (Reviewed), 59 Disp. Resol. J. 88 (2004 WL 2419728)
- Looking ahead: ABA ethics opinion says clients may waive objections to future conflicts of interest, 91 A.B.A. J. 26 (2005 WL 2094556)
- Making justice accessible to our newest neighbors: the Bar's efforts to bridge foreign language barriers helps make the courts and our justice system more accessible to our non-English speaking residents, 77 Wis. Law. 3 (2004 WL 1928850)
- Making rain on the net: today's web offers a wide world of marketing tactics, if you're savvy, 92 A.B.A. J. 46 (2006 WL 2383860)

Additional References

- Malingering in Personal Injury Cases, by Frederick D. Lipman. Temple Law Quarterly Vol. 35 No. 2 p. 141; Personal Injury Commentator (1962) p. 240

Law Reviews and Other Periodicals

- Mickens v. Taylor: the court's new don't ask, don't tell policy for attorneys faced with a conflict of interest, [535 U.S. 162 (2002)], 18 St. John's J. Legal Comment. 919 (2004 WL 2453136)
- MJP picks up steam: more states are looking at ABA proposals to ease rules on multijurisdictional practice, 90 A.B.A. J. 42 (2004 WL 65630)
- Modern trends of restrictions on lawyer solicitation laws, 29 J. Legal Prof. 281 (2005 WL 2289159)
- More than lawyers: the legal and ethical implications of counseling clients on nonlegal considerations, 18 Geo. J. Legal Ethics 365 (2005 WL 752691)
- Mouthpiece: A Life in and Sometimes Just Outside the Law, (Reviewed), 28(1) Am. Law. 66 (2006 WL 322386)
- Multiple representations; informed consent; waiver of conflicts, 61(1) Rec. Ass'n B. City N.Y. 122 (2006 WL 1853612)
- Navigating troubled waters: dealing with personal values when representing others, 43 Brandeis L.J. 415 (2005 WL 1810656)
- New book by marketing master Coulter offers women attorneys rainmaking advice, 24 Of Counsel 3 (2005 WL 958632)
- No lawyer is immortal—have you considered how to wind up your practice? 9(1) Law. Competitive Edge J.L. Econ. & Mgmt. 2 (2007 WL 274722)
- Non-recovery for Mental and Emotional Injuries in the Absence of Physical Injury, by Kenneth M. Wormwood. Defense Law Journal Vol. 5 p. 119
- No shirt, no shoes, no English... no dice? How should we test English proficiency for foreign-trained attorneys? 18 Geo. J. Legal Ethics 691 (2005 WL 1412559)
- Not quite a client: new ethics rule provides guidance on a lawyer's duty to prospective clients, 90 A.B.A. J. 50 (2004 WL 65632)
- Not-so-secret secrets? The state of attorney-client privilege in North Carolina in the wake of In re Investigation of death of Eric Miller and Crawford v. Washington, 83 N.C. L. Rev. 1591 (2005 WL 2757716)
- One privilege to rule them all? Some post-Sarbanes-Oxley and other reflections on a federally codified attorney-client privilege, 38 Loy. L.A. L. Rev. 597 (2004 WL 3517648)
- Outside authority: government lawyers must distinguish their duties from the obligations of clients, 90 A.B.A. J. 53 (2004 WL 65635)
- Parent-child Tort Actions, by Richard W. Dunn. Cleveland-Marshall Law Review Vol. 12 No. 2 p. 339; Personal Injury Commentator (1964) p. 1
- Past Recollection Recorded, by David Linn and Berel Wein. Trial Lawyers Guide (1957) p. 249
- Personal Tort Actions Between Spouses, by Conrad R. Solum, Jr. So Cal LR Vol. 31 p. 431; Personal Injury Commentator (1959) p. 146
- Practice pointer: when can a lawyer end an attorney-client relationship? 17 Utah B.J. 7 (2004 WL 2307148)
- Prejudicial Elements in Plaintiff's Argument for Damages, by Richard F. Griffin. Defense Law Journal Vol. 11 p. 1
- Present Recollection Revived, by David Linn and Berel Wein. Trial Lawyers Guide (1957) p. 337
- Propriety of Mathematical Formula on Per Diem Valuation for Pain and Suffering, by Thomas F. Lambert, Jr. NACCA Law Journal Vol. 29 p. 187
- Psychiatric View of Traumatic Neurosis, by Herbert C. Modlin. NACCA Law Journal Vol. 10 p. 205
- Questions in-house corporate counsel should ask about the conflicts-checking procedures of the firms they hire, 15 Prac. Litigator 5 (2004 WL 2712832)
- Rainmaking Made Simple: What Every Professional Must Know, (Reviewed), 33 Colo. Law. 63 (2004 WL 2307314)

- Recognizing and Handling a Traumatic Neurosis Case, by Donald W. Loria. Defense Law Journal Vol. 7 p. 77

Additional References

- Refusal of Surgery in Mitigation of Damages, by Eileen Kelley. Cleveland-Marshall L R Vol. 10, No. 3, p. 421; Personal Injury Commentator (1962) p. 30

Law Reviews and Other Periodicals

- Regulating professional services advertising: current constitutional parameters and issues under the First Amendment commercial speech doctrine, 24(3) Cardozo Arts & Ent. L.J. 953 (2007 WL 1196706)
- Resolving conflicts of duty in fiduciary relationships, 54 Am. U. L. Rev. 75 (2004 WL 3245917)
- Return to sender: been arrested? Check your mail. Defendants facing charges like drunken driving say they're awash with direct-mail solicitations from attorneys—and they want these lawyers to lose their addresses. Despite critics in state agencies and the criminal bar, attorneys are sending more "jail mail" than ever, L.A. Daily J., April 19, 2004, at S12 (2004 WL 3363293)
- Sarbanes-Oxley and changing the norms of corporate lawyering, 2004 Mich. St. DCL L. Rev. 541 (2004 WL 2067017)
- Sarbanes-Oxley Act, section 307—the price of accountability: how will section 307 affect the role of the corporate attorney? 107 W. Va. L. Rev. 901 (2005 WL 2504271)
- SarbOx 307's impact on subordinate in-house counsel: between a rock and a hard place, 2004 Mich. St. DCL L. Rev. 559 (2004 WL 2067018)
- Should attorneys have a duty to report financial abuse of the elderly? 38 Akron L. Rev. 707 (2005 WL 1840757)
- Should You Marry a Lawyer? A Couple's Guide to Balancing Work, Love and Ambition, (Reviewed), 150(97) Chi. Daily L. Bull. 5 (2004 WL 3485909)
- Spin control and the high-profile client—should the attorney-client privilege extend to communications with public relations consultants? 55 Syracuse L. Rev. 545 (2005 WL 1580891)
- Spotting the losers: sometimes the best way to handle a case is not at all, 91 A.B.A. J. 28 (2005 WL 1333163)
- Take the money and run: two Seattle attorneys who accepted bags of cash from drug clients are headed to the big house, 28(2) Am. Law. 27 (2006 WL 408453)
- Tale of the tape: lawyers recording conversations, 15 Prof. Law. 10 (2004 WL 3554782)
- Talking points: class action lawyers face restrictions in communicating with potential clients, 93 A.B.A. J. 22 (2007 WL 4533373)
- Tell us what you want: the art of managing client expectations begins with a series of questions, 92 A.B.A. J. 32 (2006 WL 787091)
- Tension among Section 307 of the Sarbanes-Oxley Act of 2002, 17 C.F.R. 205.3(d)(2), and state rules governing disclosure of confidential client information, 53 Drake L. Rev. 133 (2004 WL 3155465)
- The attorney as advocate and witness: does the prohibition of an attorney acting as advocate and witness at a judicial trial also apply in administrative adjudications? 26(1) J. Nat'l A. Admin. L. Judges 1 (2006 WL 2328946)
- The Child Witness, by Irving Goldstein. Trial Lawyers Guide (1959) p. 427
- The Collateral Source Doctrine, by Alfred Lubin. Trial Lawyers Guide (1960) p. 337
- The decline of the attorney-client privilege in the corporate setting, 96(2) J. Crim. L. & Criminology 621 (2006 WL 1705038)
- The e-mail advice line: participating in web site answer services can be gratifying, but ethics issues abound, 92 A.B.A. J. 22 (2006 WL 139041)
- The Impact of Botta v. Brunner on Recovery for Pain and Suffering, by Robert Shaw. Defense Law Journal Vol. 6 p. 3
- The Lawyer's Guide to Effective Yellow Pages Advertising, 2d ed., (Reviewed), 63(3) Bench & B. Minn. 35 (2006 WL 1075899)
- The limits of attorney client privilege: the common interest doctrine, 51 Prac. Law. 7 (2005 WL 2645754)
- The need for uniformity: fifty separate voices lead to disunion in attorney internet advertising, 18 Geo. J. Legal Ethics 1005 (2005 WL 1451794)
- See also The review of psychic injury cases by Thomas F. Lambert, Jr. in NACCA Law Journal Vol. 28 p. 33
- The search and seizure of privileged attorney-client communications, 72 U. Chi. L. Rev. 729 (2005 WL 1412870)

- To disclose or not to disclose, that was the question—until now: Tennessee's new Rule of Professional Conduct 1.6 mandates disclosure of confidential client information to prevent physical injury or death to third parties, 34 U. Mem. L. Rev. 941 (2004 WL 3246323)
- To whom it may concern: using disclaimers to avoid disqualification by receipt of unsolicited e-mail from prospective clients, 16 Prof. Law. 1 (2005 WL 2787191)
- Trauma and Heart Disease, by Ernest P. Boas. NACCA Law Journal Vol. 2 p. 113
- Uncertainties in Assessing Damages for Pain and Suffering, by Marcus L. Plant. Defense Law Journal Vol. 5 p. 3
- Unforeseeable concurrent client conflicts, 61(1) Rec. Ass'n B. City N.Y. 102 (2006 WL 1853610)
- Use of engagement letters to protect clients and lawyers by defining the scope of representation, manner of determining fees, and handling conflicts and confidentiality, 32(1) Tax Mgmt. Est. Gifts & Tr. J. 76 (2007 WL 1645047)
- Use of Scientific Tests in Defense of Personal Injury Actions, by Howard W. Dresser. Defense Law Journal Vol. 5 p. 135
- Vexatious litigants and unusually persistent complainants and petitioners: from querulous paranoia to querulous behavior, 24(3) Behavioral Sci. & L. 333 (2006 WL 2371234)
- Watch what you say: regulators still take ethics rules on lawyer marketing seriously, so practitioners should too, 91 A.B.A. J. 58 (2005 WL 2704387)
- Watch what you say: avoiding the accidental attorney-client relationship, 93 Ill. B.J. 22 (2005 WL 237729)
- Welcoming foreign-born clients: law firms that make the effort to understand and meet the needs of non-English-speakers will find a unique—and rapidly expanding—market for their services, 40 Trial 66 (2004 WL 2287967)
- What do I do now? A lawyer's duty post-Sarbanes-Oxley, 38 Val. U. L. Rev. 1261 (2004 WL 3111184)
- What not to do—handling incriminating evidence and other adventures, 34(1) S.F. Att'y 50 (2008 WL 1946216)
- When you don't know it all: client referrals, 22 GPSolo 58 (2005 WL 1123723)
- Whistleblowing attorneys and the Sarbanes-Oxley Act of 2002, 48 B. B.J. 18 (2004 WL 2006523)
- Who is the client? It seems like a simple question, but getting the answer wrong can lead you into an ethics minefield, 90 A.B.A. J. 48 (2004 WL 65631)
- Who is your client? Ethical considerations potential counsel must consider, 14 J. Bankr. L. & Prac. 55 (2005 WL 3294750)
- Why not try the carrot? A modest proposal to grant immunity to lawyers who disclose client financial misconduct, 92 Cal. L. Rev. 1825 (2004 WL 3222368)
- Why were Perry Mason's clients always innocent? The criminal lawyer's moral dilemma—the criminal defendant who tells his lawyer he is guilty, 39 Val. U. L. Rev. 65 (2004 WL 3243592)
- Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses, (Reviewed), 32 J. Psychiatry & L. 551 (2004 WL 3322435)

Additional References

- Accident-Proneness, by John Henderson. Defense Law Journal Vol. 6 p. 73
- Expectation of life at birth for years 1920–1959. Am Jur 2d Desk Book Document No. 142
- Mortality tables. Am Jur 2d Desk Book Document No. 140
- Selected life table values for the years 1900–1959. Am Jur 2d Desk Book Document No. 139
- For information as to where to write for divorce records, see Am Jur 2d Desk Book Document No. 183
- Forms concerning aggravation of pre-existing physical condition. Am Jur Pl & Pr Forms Nos. 7:40, 7:67–7:68.1
- Instructions concerning award of damages for pain and suffering. Am Jur Pl & Pr Forms 7:69–7:72.2
- Instructions for impeachment of witness by showing conviction of crime. Am Jur Pl & Pr Forms No. 20:103
- Setting aside release obtained by fraud, fraudulent representations or misrepresentations, and denials thereof. Am Jur Pl & Pr Forms 17:941–17:947
- Denial of doing business in state. Am Jur Pl & Pr Forms No. 15:1176
- An Analysis of Diagnostic Aids for Detection of Injuries to the Heart, by Taylor H. Cox. Insurance Counsel Journal Vol. 24 No. 1 p. 30
- Brain Injuries Related to Trauma, by Hamlet J. Barry Jr. Insurance Counsel Journal Vol. 24 No. 3 p. 272
- Electroencephalogram in General Practice, by Robert S. Schwab. Insurance Counsel Journal Vol. 27 No. 3 p. 493
- Evaluation of the Electroencephalogram—Cross Examination, by Harley J. McNeal. Insurance Counsel Journal Vol. 25 No. 3 p. 364
- Investigation and Interpretation of Head Injuries, by Francis E. Camps. Insurance Counsel Journal Vol. 27 No. 1 p. 178
- Methods of Neurologic Diagnosis and Their Critical Assessment, by Bernard H. Smith. Insurance Counsel Journal Vol. 26 No. 1 p. 169
- Post Traumatic Neuroses, by E. W. Shannon. Insurance Counsel Journal Vol. 28 No. 3 p. 472

- The Subjective Complaint and the Medical Examination, by Paul F. Ahlers. Insurance Counsel General Vol. 25 No. 1 p. 83
- Traumatic Neuroses, by Cecil G. Baker. Insurance Counsel Journal Vol. 25 No. 1 p. 88

Footnotes

* Lawrence V. Hastings, M.D., Attorney at Law, is a member of the law firm of Green and Hastings, of Miami, Florida. Doctor Hastings was born in Flushing, New York, in 1919. He received his M.D. from Johns Hopkins Medical School in 1948, and his L.L.B. from the University of Miami in 1953. He took postgraduate work at both Michigan and Columbia Universities, and he was admitted to the Florida Bar in 1954.

Doctor Hastings was formerly assistant surgical resident at Bellevue Medical Center, New York City, and the assistant senior surgeon with the United States Public Health Service. He is diplomate of the American Board of Legal Medicine, a member of the American Academy of Forensic Sciences, and a fellow of the Academy of Florida Trial Lawyers. In addition to serving as consultant on this article, he has lectured in the University of Miami's Schools of Law and Medicine. He has been Vice-Chairman of the Medical-Legal Affairs Committee and Trial Tactics Committee of the Florida Bar Association.

1 See §§ 17a– x.

1 For admissibility of sound recordings in evidence, see 58 A.L.R. 2d 1024. See also, Proof of Information Obtained from Dictaphone, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 150.

2 For attorney's liability for negligence in preparing or conducting litigation, see 45 A.L.R. 2d 5.

For measure and elements of damages recoverable for attorney's negligence with respect to maintenance or prosecution of litigation or appeal, see 45 A.L.R. 2d 62.

3 See Architectural Suggestions for a Law Office Building, by Arthur B. White. The Practical Lawyer Vol. 2, No. 8, p. 66.

4 See The Reception Room Image of the Law Office, by Billie R. Bethel. 69 Case and Comment p 38 No. 2.

1 Effect of presence of third persons on privileged communications, see Am. Jur., Witnesses §§ 492–494.

Propriety of exercise of power to require disclosure of privileged matter, see Am. Jur., Discovery and Inspection §§ 16, 17.

1 See §§ 17a– x, 28a– aa.

1 See questions on prior civil litigation in § 17v.

1 For suit by corporation, see Am. Jur., Corporations §§ 845, 967, 1154.

2 For suit by partnership in firm name generally, see Am. Jur., Partnership §§ 432 et seq..

For power of majority of partners to authorize suit, see Am. Jur., Partnership § 116.

3 For filing of income tax returns generally, see Am. Jur., Income Taxes §§ 218 et seq..

4 Inclusion or exclusion of day of birth in computing one's age, 5 A.L.R. 2d 1143.

5 For records of birth generally, see Am. Jur., Evidence § 1030.

For information as to where to write for birth records in the United States and outlying areas, see Am Jur 2d Desk Book Document No. 181 and pocket supplement thereto.

6 For matters relating to guardian and ward, see Am. Jur., Guardian and Ward §§ 23 et seq., 97, 178, 205 et seq..

For guardian ad litem matters, see Am. Jur., Guardian and Ward §§ 154, 199; Am. Jur., Infants §§ 116 et seq..

7 For sensibility to obligation of oath generally, see Am. Jur., Witnesses §§ 128 et seq..

8 For proof of marriage generally, see Am. Jur., Marriage §§ 190 et seq..

9 For annulment or avoidance of marriage generally, see Am. Jur., Marriage §§ 56 et seq..

10 For effect of adoption upon rights, duties, and liabilities of parties thereto, see 2 Am. Jur. 2d, Adoption §§ 83 et seq..

11 For cross-examination as to previous personal injuries, see Am. Jur., Witnesses § 641.

12 Wife as beneficiary in wrongful death action, see Am. Jur., Death § 93.

13 For effect of compensation from other sources, see Am. Jur., Damages §§ 198, 200, 201; Am. Jur., Workmen's Compensation §§ 60 et seq., 358 et seq..

14 For mitigation of damages, see Am. Jur., Damages §§ 192 et seq..

For effect of compensation from other sources, see Am. Jur., Damages §§ 198 et seq..

15 For procedure to follow for notice of accident or claim to liability insurer, see 7 Am. Jur. 2d, Automobile Insurance §§ 141 et seq..

16 For service at usual place of abode, see Am. Jur., Process §§ 60–63.

17 Capacity of one spouse to sue and be sued by other, see Am. Jur., Husband and Wife §§ 584 et seq..

18 For admissibility of evidence of repairs and alterations, see Am. Jur., Evidence § 282.

19 For what constitutes "doing business," see Am. Jur., Foreign Corporations §§ 360 et seq..

20 For admissibility of other accidents or injuries, see Am. Jur., Evidence § 304.

21 For refreshing memory of witnesses, see Am. Jur., Witnesses §§ 578 et seq..

22 For entries made in regular course of business, see Am. Jur., Evidence §§ 1043 et seq..

23 For the examination of books or records of another, see Am. Jur., Discovery and Inspection §§ 38 et seq., 83, 84, 86; subpoena duces tecum, see Am. Jur., Witnesses §§ 20 et seq.

24 For impeachment by showing arrest, trial, or investigation, see Am. Jur., Witnesses § 754.

25 Res gestae statements, see Am. Jur., Evidence §§ 661 et seq..

26 For relief from release, generally, see Am. Jur., Release §§ 50 et seq..

For effect of fraud, duress, or mistake on release, see Am. Jur., Release §§ 17 et seq..

1 For proof concerning foundation for admission of motion pictures, see Motion Pictures as Evidence, 9 Am. Jur. Proof of Facts 158; for proof of surveillance motion pictures, see Surveillance Motion Pictures, 13 Am. Jur. Proof of Facts 26; for use of motion pictures as evidence, see 62 A.L.R. 2d 686. See also Use of Motion Pictures at Trial, 1 Schweitzer, Cyclopedia of Trial Practice (2d ed.) § 232.

1 See §§ 28a– aa.

1 Measure of damages where there has been aggravation of a pre-existing physical condition, see Am. Jur., Damages §§ 80, 81.

2 Duty to minimize damages, see Am. Jur., Damages §§ 27 et seq..

1 Evidence on feigned conduct as to physical condition, see Am. Jur., Evidence § 873.

1 Injury or illness from mental or emotional disturbances, see Am. Jur., Torts §§ 55 et seq..

2 See Dementia Praecox (Schizophrenia), 4 Am. Jur. Proof of Facts 283.

3 See Amnesia, 1 Am. Jur. Proof of Facts 507; for presumption as to due care at time of accident of one who survived injury but, because of loss of memory or other mental or physical condition, is, or is claimed to be, incapable of testifying intelligently as to the accident, see 141 A.L.R. 872.

1 Recovery for loss of profits in personal injury action, see Am. Jur., Damages § 155.

2 For compensation from collateral source, see Am. Jur., Damages §§ 198, 200, 201; Am. Jur., Workmen's Compensation §§ 60 et seq.; 358 et seq..

1 As to requisite proof to permit recovery for future medical expenses as item of damages in personal injury action, see 69 A.L.R. 2d 1261.

2 For discussion of necessity and sufficiency of evidence as to reasonableness of charges of physicians, surgeons, nurses, or for medicine, to authorize recovery therefor in an action for personal injuries or death, see 82 A.L.R. 1325.

1 Damages for pain and suffering, see Am. Jur., Damages §§ 72–74.

1 For competency of tests and experiments generally, see Am. Jur., Evidence §§ 257, 755 et seq..

2 For tests concerning blood, see Blood Tests, 2 Am. Jur. Proof of Facts 585.

3 Admissibility in civil action of electrocardiogram or report based on such test. 66 A.L.R. 2d 536.

4 For admissibility in civil action of electroencephalogram or other record made by instrument used in medical test or of report based on such test, see 66 A.L.R. 2d 536.

5 For admissibility of other accidents or injuries, see Am. Jur. 2d, Automobiles and Highway Traffic §§ 930, 940–944; Am. Jur. 2d, Evidence § 304; Am. Jur. 2d, Witnesses § 615.

6 For cross-examination as to previous personal injuries, see Am. Jur., Witnesses § 641.

7 For the effect on damages of compensation from collateral source, see Am. Jur., Damages § 198.

8 For loss of time, earnings, and profits, see Am. Jur., Damages §§ 88–98, 155, 353.

End of Document

62 Santa Clara L. Rev. 1

Santa Clara Law Review
2022

Article

Lindsey P. Gustafson [a1] Aric K. Short [aa1] Neil W. Hamilton [aaa1]

TEACHING AND ASSESSING ACTIVE LISTENING AS A FOUNDATIONAL SKILL FOR LAWYERS AS LEADERS, COUNSELORS, NEGOTIATORS, AND ADVOCATES

Our students will be more effective leaders, counselors, negotiators, and advocates as they deepen their ability to actively listen. As a professional and interpersonal skill linked closely with a lawyer's success, our students' ability to listen should demand our attention as legal educators. This attention is worth the effort because studies indicate active listening is not a static ability: we can teach students to be better listeners. But "active listening" is missing from most law schools' learning outcomes or curricula, or it is only included as an undefined element of effective communication. Consequently, it is a critical lawyering skill that is routinely not being effectively, independently taught and assessed.

This article introduces the Active Listening Milestone Rubric for Law Students, which is a stage-development or milestone model in competency-based education. The rubric includes four sub-competencies, which are defined using expertise drawn from listening experts and studies then explained in the context of the practice of law: 1) Active listeners assess and accurately allocate resources necessary to the conversation; 2) active listeners work to create a shared understanding with the speaker by considering both the speaker's and the listener's lenses and how they may differ; 3) active listeners work to increase shared understanding with the verbal and nonverbal cues; and 4) active listeners move to a response only after fully exploring and understanding the speaker's meaning.

TABLE OF CONTENTS

I. Introduction 3
II. Stage-Development Models, or Milestone Models, in Competency-Based Education 5
III. Active Listening as a Foundational Skill for Lawyers as Leaders, Counselors, Negotiators, and Advocates 8
IV. The Active Listening Milestone Rubric for Law Students 10
A. First sub-competency: Active listeners assess and accurately allocate resources necessary to the conversation 11
1. Why Listen? 12
2. What Practical Considerations Exist? 15
3. Be Aware of Emotions 17
B. Second sub-competency: Active listeners work to create a shared understanding with the speaker by considering both the speaker's and the listener's lenses and how they may differ 19
C. Third sub-competency: Active listeners work to increase shared understanding with verbal and nonverbal cues 26
1. Use recognizable, appropriate nonverbal cues and accurately read the speaker's nonverbal cues 27
2. Use verbal feedback to demonstrate attention, understanding, responsiveness, and empathy 29
D. Fourth sub-competency: Active listeners move to a response only after fully exploring and understanding the speaker's meaning 32
V. Conclusion 34
Appendix 35
Table 1: The Five Core Components of Competency-Based Legal Education 35
Figure 1: Competency-Based Legal Education's Two Central Core Components Informing the Three Other Components in a Law School's CBE Program 36
Figure 2: Dreyfus & Dreyfus Development Model 37
Figure 3: Holloran Competency Alignment Model 37

Milestone Rubric: Active Listening 39

***3 I. INTRODUCTION**

Active listening is a core professional skill for lawyers. In their traditional roles as advocates, negotiators, and counselors, lawyers are most effective when they form relationships of trust with their clients and understand the world from their perspectives. Doing so without effective listening skills is nearly impossible. Beyond the legal system, lawyers serve as leaders of all types, helping to run governments, companies, non-profits, and even neighborhood associations. Effective leadership in these increasingly complicated and diverse settings requires a combination of professional, technical, and interpersonal skills, but none is more important than active listening. In short, lawyers will serve as more effective leaders and professionals as they become better listeners.

Despite the importance of active listening for lawyers, legal education has not prioritized the development of this skill. [1] Only twenty-three United States law schools currently include listening within their J.D. program learning outcomes. [2] And very little scholarship exists addressing the instruction and assessment of active listening in law school. [3] Perhaps this is because many believe our capacity to listen effectively is "fixed," or perhaps it results from a sense that the components of listening are too amorphous or obscure to articulate beyond, "[y]ou know good listening when you observe it." [4] Or perhaps ***4** law students and lawyers are not predisposed to listening well, so they devalue the skill.

In fact, despite the silent treatment that legal education has given to listening, there is a rich and developing social science literature on listening theory and practical components of effective listening. Multiple studies have demonstrated that active listening is a "trainable skill," and there is a growing body of scholarship on how to develop listening as a competency. [5] In addition, we know from empirical studies that legal employers and clients highly value an attorney's ability to listen effectively. [6]

In this article, we make the case for recognizing active listening as a foundational lawyering skill that should be incorporated by schools into their J.D. program learning outcomes. We encourage schools to approach active listening as they do analytical thinking, oral communication, and legal writing--as a competency that should be introduced early, practiced over time, and developed to at least a minimum standard by each student before graduation. To assist in this process, we draw on existing social science, interdisciplinary research, and scholarship to identify and explain the components of active listening in the legal context. And we offer a framework for assessing the sub-skills of active listening along stages of development that are consistent with competency-based education.

Part II provides a brief overview of the stage-based model for developing skills--called a Milestone model--that is used in competency-based education to move learners from student to ***5** competent practitioner and beyond to mastery. Part III provides a review of research and scholarship demonstrating that listening is critical for lawyers as leaders, counselors, negotiators, and advocates. Part IV begins with a definition of active listening, including its primary goals, drawn from existing literature, and adapted to the context of law. The section then identifies and explains the four primary stages or sub-competencies of active listening. Appendices that follow contain a number of supplementary materials, including a sample active listening rubric that breaks the skill down into its major sub-competencies and provides stages of development for each one. [7]

II. STAGE-DEVELOPMENT MODELS, OR MILESTONE MODELS, IN COMPETENCY-BASED EDUCATION

The ABA requirement to adopt institutional learning outcomes, and provide formative and summative assessments of those program outcomes [8] means that legal educators need to move gradually toward competency-based education. [9] Competency-based education is a different model from traditional education where the emphasis has been on student completion of a certain number of exposure hours of credit (called a tea-steeping model where the student is like a tea bag in cup of hot water for the right amount of time). [10] By contrast, competency-based education is an approach to preparing lawyers for practice that is fundamentally organized around competencies derived from an analysis of client and societal needs. [11] Evaluating the design of ***6** competency-based education programs has been hampered by the lack of a clear shared identification and understanding of the most important components of this type of program. [12]

Law schools can borrow from medical education's experience with competency-based education to identify the core components of competency-based legal education. [13] This scholarship identifies outcome competencies and a sequenced progression as the central core components of competency-based medical education. [14] The medical education community recognized the need to build a narrative model of how development on each competency occurs through a progressive sequence of developmental stages from novice to competent graduate. [15] This led to the creation of what medical educators call Milestones on each competency. [16]

The Milestones on a specific competency provide a "shared mental model" of professional development from student to competent practitioner and beyond to mastery. [17] A Milestone model both defines a logical learning trajectory of professional development and highlights and makes transparent significant points in student development using a narrative that describes demonstrated student behavior at each stage. [18] Milestones can be used for formative and summative assessment, as well as program assessment. [19] These are also called rubrics. [20] If a faculty and staff adopt a Milestone model for a particular competency, they are also building consensus on what competent performance looks like, and thus will foster interrater reliability. [21] Milestones also describe what a trajectory should look like so that learners can track their own progress ***7** toward becoming competent at a particular skill, and programs can recognize students who need extra help as well as students who are more advanced. [22]

A Milestone model for a learning outcome like active listening has substantial benefits for all the major stakeholders in legal education. [23] For law students, the model provides a descriptive roadmap to foster development toward later stages, increases transparency of performance requirements, encourages informed self-assessment and self-directed learning, facilitates better feedback to the student, and guides personal action plans for improvement. [24] For law schools, faculty, and staff, the model guides curriculum and assessment tool development, provides more explicit expectations of students and a meaningful framework/shared mental model of student development, supports better systems of assessment, and enhances the opportunity for early identification of under-performers to allow for early intervention. [25] Thus, Milestone models will enable continuous monitoring of programs and may allow for lengthened site visit cycles. For the public, the model allows for greater public accountability and builds on a community of practice, with a focus on continuous improvement. [26]

It is important that a Milestone model on listening aligns with the competency models that legal employers are using to assess their lawyers on the same competency. This means both that the school's learning outcomes are meeting employer and client needs, and that students can communicate value to potential employers using the employers' language. [27]

***8 III. ACTIVE LISTENING AS A FOUNDATIONAL SKILL FOR LAWYERS AS LEADERS, COUNSELORS, NEGOTIATORS, AND ADVOCATES**

Clients, employers, and law schools are recognizing active listening as a foundational skill for lawyers as leaders, counselors, negotiators, and advocates. [28] As a leader, a lawyer attempts to influence a group of individuals to achieve common goals. [29] As a counselor, a lawyer influences the client by exercising independent professional judgment and rendering candid advice, referring not only to law, but also to moral, economic, social, and political factors that may be relevant to the client's situation. [30] As a negotiator, a lawyer influences others to obtain results advantageous to the client but consistent with the requirements of honest dealings with others. As an advocate, a lawyer influences others to benefit the client's position under the rules of the adversary system. [31]

In each of these roles, lawyers seek to influence others. Lawyers are most likely to be influential when they understand, as fully as possible, their audience's entire message and context, including the other person's emotions, goals, advantages and disadvantages, strengths and weaknesses, opportunities, fears, and constraints. [32] Listening for emotions in particular is key. Peter Salovey, a leading social psychologist researching emotional intelligence and the president of Yale University, notes "[a]ny lawyer who can understand what emotions are being presented and why is at a tremendous advantage." [33] Recognizing this key skill, textbooks on teaching both lawyering skills and leadership in law schools emphasize the competency of active listening. [34]

***9** In addition, clients identify good communication skills and particularly attentive listening skills as the two most important skills lawyers can have.[35] A professional's strong listening skills will lead to better outcomes for the person served. For example, there are many empirical studies indicating that patients highly value the listening skills of health practitioners.[36] When health practitioners listen to their patients, they increase the level of patient engagement, satisfaction, and compliance with treatments, which improves patient outcomes.[37] The same is true when lawyers listen well to their clients.[38]

In the context of the most important competencies for new lawyers generally (which includes all four roles above), Educating Tomorrow's Lawyers did a survey of 24,137 lawyers in 2016 asking what competencies are "necessary in the short run" for new law graduates.[39] "Listening attentively" was the sixth most important competency.[40] The importance of listening skills is emphasized in textbooks on interviewing, counseling, and negotiation,[41] and in textbooks on conflict resolution.[42] Listening skills are also important in a lawyer's role as an ***10** advocate in pre-trial and at trial to understand the witnesses, the opposing side, and the decision makers.[43] Listening is particularly important in all four roles above in multi-cultural contexts.[44]

IV. THE ACTIVE LISTENING MILESTONE RUBRIC FOR LAW STUDENTS

So, what is effective, active listening? Although there is no all-encompassing definition of listening,[45] experts agree that listening is "recognized as a multi-dimensional construct that consists of complex (a) affective processes, such as being motivated to attend to others; (b) behavioral processes, such as responding with verbal and nonverbal feedback; and (c) cognitive processes, such as attending to, understanding, receiving, and interpreting content and relational messages."[46] What qualifies as effective listening depends on the specific listening processes and behaviors most useful in a specific disciplinary context.[47]

"Active listening" is a type of listening widely recognized in a variety of contexts that require gathering information and problem-solving,[48] and it receives the "lion's share of attention" in interpersonal communication textbooks and listening studies.[49] Active listening is also called empathic listening, reflective listening, and therapeutic listening because it seeks an emotional understanding, which may alleviate the anxiety of a client or a witness.[50] Active listening typically refers not only to a listener's cognitive processes--how the listener attends to, understands, receives, and interprets the speaker's message--but also to how the listener motivates and meets the speaker to create a shared understanding through verbal and nonverbal ***11** feedback.[51] Active listeners work to capture the speaker's entire message, which includes not only the meaning of the speaker's words but also any critical context, including accompanying emotions, discomfort, and anxieties.[52] Active listening, therefore, aligns with the values and competencies clients and employers use and furthers lawyers' development as leaders.

The authors define active listening for the practice of law as building a shared understanding between the speaker and the listener through the creation of a relationship built on trust and empathy, and, where appropriate, equipping the listener to reply or problem-solve at the appropriate time in a manner that corresponds to the speaker's concerns or goals. The coordinating Milestone Rubric sets out four sub-competencies: 1) active listeners assess the purpose and context of the conversation and allocate the resources and attention appropriate and necessary to absorb, interpret, and decode the information given to them by a speaker; 2) in working to create a shared understanding with the speaker, active listeners consider the lens through which the speaker speaks and the lens through with the listener listens; 3) active listeners continually assess the shared understanding between the speaker and the listener and, where necessary, work to increase the shared understanding with verbal and nonverbal cues; and 4) active listeners only move to respond or problem-solve where appropriate to the conversation and only after fully exploring, and ultimately understanding, the speakers' message.[53]

A. First sub-competency: Active listeners assess and accurately allocate resources necessary to the conversation

The first step in the active listening process--preparing to listen, or the presage stage[54] --is easily overlooked, largely because many of us unconsciously prepare to listen in our daily conversations. But for law students and lawyers, as well as other active listeners, the presage stage ***12** is important because it sets the intention of the listener and creates the foundation for a successful conversation. Given how critical listening is to effective lawyering,[55] taking time to intentionally prepare and allocate resources for listening is wise. This stage begins with an explicit decision to listen--to allocate time and energy to decode

and understand what is being said by the speaker and to be active in the process of co-creating meaning. [56] For the purposes of this article, we assume the relevant listening context to be a professional setting for an attorney--communicating with a client, opposing counsel, co-worker, judge, or another constituent. To effectively prepare to listen and allocate the necessary resources for a successful conversation in this setting, there are several important areas that should be considered. [57]

1. Why Listen?

There may be many reasons for lawyers to actively listen, depending on the identities of the parties involved, their history and relationship, the current setting, the broader context, next steps that might be anticipated, and other considerations. But two primary and interrelated reasons for listening in the professional legal setting are paramount. The first and most obvious reason is to decode and understand the meaning that the speaker intends to convey. [58] As a ***13** starting point, the listener absorbs and processes the sounds made by the speaker, but active listening goes well beyond mechanical hearing. [59] And the listener is not passive in this experience. [60] As the label suggests, the listener is an active participant in the conversation. They are not only actively talking at times in the normal back-and-forth sequence of conversation, but also actively listening--probing, encouraging, and supporting the speaker. [61] In this way, the listener and speaker are actually creating a shared meaning together, [62] which should be the real goal of active listening in the law context. [63] As described in this Section and below, the listener should prepare for and engage in the conversation by taking steps to maximize the chances that the speaker will be successfully understood. [64]

The second reason to actively listen is to build and develop the relationship between speaker and listener. [65] Trust is one of the most important components of an effective lawyer-client relationship, [66] and trust is developed over time. [67] A lawyer may need multiple meetings ***14** over weeks or months to foster trust with the client. This is especially true because the challenges that clients bring to their lawyers are often messy with difficult emotional and personal issues attached. Only after a relationship has been formed and developed may a client feel comfortable sharing the details that are necessary for a successful representation. [68] Similarly, multiple meetings may be necessary for the listener to have enough contextual awareness to accurately understand what the speaker is trying to communicate.

After we acknowledge the two primary reasons for active listening, we should generally reflect on why we will be listening in this particular conversation. [69] What is the broader context of the conversation? Of the relationship between speaker and listener? Who is the speaker? Is there any obvious cultural or identity difference that should be considered from the outset? What are our specific goals in listening today? What do we hope to learn or convey in the broader conversation? What do we believe the speaker's goals are, both in speaking and in the overall conversation? Identifying listening goals may help set a flexible framework for the conversation.

It is worth clarifying that in the listening presage stage, it may be useful to consider how the conversation might develop, as well as possible next steps the parties might later take. Doing so may help the listener better appreciate the place that this conversation plays in the broader relationship between the parties. This may be especially valuable for lawyers, who are often in an ongoing relationship with the speakers--with both a history and a future together. But while active listeners benefit from processing "what if scenarios before a conversation to best equip them for what might transpire, they should work hard to keep an open mind. [70] They do not know, in fact, what will ***15** be said, what emotions may motivate those words, and how they, as a listener, might respond in the moment. And, as a result, they cannot predict with certainty exactly what next steps might be necessary. Preparation is valuable, but it should not artificially constrain a conversation.

2. What Practical Considerations Exist?

This second presage area for consideration includes all of the practical and logistical considerations that precede active listening. [71] Sometimes a listening opportunity or conversation arises spontaneously. But often, particularly in the lawyer-client context, planning is possible. Assuming the listener has some control over the practical aspects of the conversation, below are planning questions to consider. In doing so, the listener should retain focus on the two primary goals of listening: to accurately understand the meaning of the speaker and to enhance the relationship between speaker and listener. [72]

Where should the conversation be held? The physical setting may be relevant for various reasons, including to speak privately, to make the speaker comfortable, or to provide a neutral space to meet. The lawyer's office may make sense for a variety of reasons, including efficiency for the lawyer's overall schedule and access to law-related resources. But the active listener should also consider any downsides associated with that choice. For example, some clients unaccustomed to the business setting might find certain lawyer offices intimidating, which might stifle communication. More sophisticated corporate clients might, instead, expect their lawyers to come to them for various reasons. And for certain causal work-related conversations, perhaps an informal setting like a coffee shop would provide the best backdrop. In any case, considering the impact of the conversation's physical setting is an important step in planning to listen effectively. [73]

How much time should be allotted to the conversation? The listener should allocate sufficient time for the speaker to fully communicate his message and to feel comfortable doing so. [74] But practical considerations may come into play to limit the available time, including scheduling conflicts and deadlines. If those external considerations could ***16** artificially limit a conversation, the listener should alert the speaker to these possibilities in advance. And sufficient time should be scheduled later to explore the conversation in adequate detail.

What work preparation should the listener undertake before the conversation? The lawyer may need to research legal arguments, read transcripts or the case file, consult with other attorneys or experts, or prepare a list of questions to ask or important ideas to convey. Directly related to this research and organization, the lawyer may need to plan a possible structure for the conversation. Particularly when working with a client, a lawyer may need to provide background, context, options, chances of success, or various alternatives before the client is in a reasonable position to communicate effectively and the lawyer is ready to listen well. [75]

Will the conversation be recorded? If so, how? Will the listener take notes? While it may be necessary to take notes during certain conversations, active listening requires a focus on the speaker that includes being aware of the speaker's behavior while talking, which may be difficult if the listener is also taking notes. The listener should also take into consideration how the speaker might interpret note-taking during a conversation--perhaps as evidence of the listener's engagement or as a barrier to bonding between the speaker and listener. [76] As described later, some of these activities may be useful in conveying active listening to the speaker.

Should anyone else be present or available to participate in the conversation if necessary? For example, will a translator or someone to take notes be needed? Should the attorney expect or plan for the client to bring family members or others into the meeting? If anyone else is expected in the conversation, adequate space should be planned to accommodate everyone involved.

17** ***3. Be Aware of Emotions

Emotions in the context of active listening, and more broadly, effective communication, are complicated--and perhaps especially difficult for lawyers. As a starting point, lawyers are traditionally trained in cold, hard legal analysis to "think like a lawyer"--not "feel like a lawyer." [77] The people attracted to law school may even score lower in empathy and emotional intelligence than the average population. [78] Emotions can, at times, cloud our judgment and negatively affect our ability to process information and communicate effectively. [79] In particular, they may cause us to listen less mindfully than we might otherwise. They may also make lawyers feel out of control [80] or uncomfortable, or they might trigger challenging emotions for the listener. [81] Perhaps these are reasons why "lawyers are notorious for being poor listeners." [82]

Nevertheless, emotions are a fundamental part of what it means to be human. We experience emotions every day, particularly surrounding events or relationships that are so important, high-stakes, or problematic that we visit an attorney about them. [83] While strong emotions may affect our analytical thinking, [84] they also convey meaning--both in substance and depth. As a result, being aware of the emotional component of a ***18** situation makes a lawyer more effective. [85] If we fail to recognize meaning in the speaker's emotion, we may, as a listener, jump to conclusions to fill in the gaps. [86] Beyond meaning, an expression of emotions by the speaker and an acknowledgment of those emotions by the listener can help deepen the relationship between the parties. [87] This sensitivity to emotions, then, supports and encourages further effective communication between the parties.

But recognizing the existence of strong emotions may take work. Some emotions for some speakers may be obvious in their tone or word choice. Other people's emotions may need to be probed because of what is left unsaid. [88] Either way, preparation for active listening should include being ready to identify, acknowledge, and even deal with strong emotions--both the speaker's and the listener's. [89] If the lawyer ignores those emotions or moves past them too quickly to get to the "real issue" in question, both primary goals of active listening may be undercut. Beyond missing important clues about meaning, this approach would likely make the client feel unheard and unappreciated, creating distance between the lawyer and client. [90]

19** ***B. Second sub-competency: Active listeners work to create a shared understanding with the speaker by considering both the speaker's and the listener's lenses and how they may differ

Active listeners help create a shared understanding by recognizing that the speaker communicates using not just words, but also silence, tone and cadence of speech, body language, and even broader behavior. [91] When absorbing and decoding all of these communications, the listener must consider that each person filters speech and behavior through a unique lens of cultural identity. That lens helps define how they fundamentally engage with the rest of the world. Within a conversation, filtering creates contour, nuance, and detail for words and behavior that can dramatically affect the meaning of communication. [92] Failure to appreciate the existence of these lenses can disconnect speaker and listener, making a shared understanding elusive and undermining trust, [93] respect, and the overall relationship between the parties. [94]

Each person's cultural identity lens is influenced by many factors, including race, gender, religion, sexual orientation, nationality, sexual identity, education, and income. [95] The various components that affect a person's lens combine in different groupings depending on the context ***20** and the person's overall life experiences. This resulting intersectionality makes each person's lens a unique and complex mix of factors. [96] That, in turn, makes the job of an active listener even more challenging. [97] The task is not simply to decipher meaning from the speaker's words, behavior, and silence; the listener must also factor into the analysis the speaker's cultural identity lens and how it may account for a difference between the meaning the speaker intends to convey and what the listener perceives. [98] But the challenge is even more daunting. How a listener communicates engagement or interest to a speaker may depend on cultural context and background. So, in addition to filtering content effectively, active listeners should be aware of how their responses and behavior during the conversation will be perceived by the speaker, and whether they will help facilitate or hinder effective communication. [99]

Differences in cultural identity affect perception, understanding, and reactions associated with a wide range of important issues that may be relevant within a lawyer-client communication. [100] For example, a person's cultural identity lens may account for very different perspectives about the role of the lawyer, the importance of hierarchy, [101] formality, [102] deference that should be accorded elders or people occupying positions of power, the importance of emotions in understanding a situation, [103] the information that should be assumed or ***21** expressly stated, [104] the role and importance of body language. [105] Cultural norms and identity may also drive perspectives on areas that relate to a particular issue being discussed by the lawyer and client, such as a police traffic stop and subsequent interaction between a police officer and the client. [106] And critically, cultural differences may shape a client's different point of view on what a desired or acceptable outcome in a case might be. [107] They can even affect and shape opinions about how, where, and when conversations about important topics are held, as well as the format [108] and duration of those conversations.

Imagine that a lawyer brings a prospective client into his office for an initial consultation, and then closes the door. As the lawyer begins asking questions, the prospective client seems uncomfortable--shifting in her seat and averting eye contact with the lawyer. As the conversation progresses, the prospective client appears less and less comfortable, and her answers to questions are short and inconsistent. At this point, a busy lawyer might reasonably begin to infer that the woman is hiding something or is perhaps being evasive or lying. That judgment, if not actively suspended by the lawyer, could cloud everything the lawyer hears from the potential client.

Failing to accurately take into consideration the unique cultural identity of the speaker results in a problematic default state: the listener simply assumes that the speaker shares his own cultural identity lens--meaning that he takes the speaker's words, body

language, and general behavior to mean what they mean to listener, rather than what they might mean to the speaker. [109] It is entirely possible, of course, that the prospective client is lying. But it is also possible that she is simply uncomfortable with the perceived power imbalance between the lawyer and her. Or perhaps within her culture, important conversations customarily occur with family present for support, so she is nervous ***22** alone with the lawyer. Or perhaps she was a victim of an assault and becomes anxious when in a confined space with a man. If any of these possible scenarios were true, the prospective client's behavior that appeared suspicious to the lawyer would not, in fact, accurately signal anything about her honesty. If the lawyer is able to identify and then decode the prospective client's behavior, he might be able to address it in a way that would foster trust and respect, enhancing the relationship and thereby facilitating communication between the parties.

An approach is necessary, then, to decipher the speaker's cultural identity lens. One direct option would be to simply ask the speaker questions that would reveal aspects of the speaker's lens, such as the following: “I want you to be as comfortable as possible during our meetings. Is there anything I should know about your background before we get started that would help me represent you?” [110] Or perhaps a more focused question: “So I can better serve as your attorney, we're going to need to talk about some sensitive issues. Would you be more comfortable if I sat behind my desk or if I were sitting next to you in that chair?” But assuming that most listeners will not ask these kinds of questions, or assuming that the answers would not be self-reflective enough to be of value, [111] the listener needs another strategy.

An alternative approach would be to generalize based on the perceived identity characteristics of the speaker that the listener believes are important in communication. Certainly, this approach would move the listener off an assumption that everyone communicates the same way--i.e., like the listener communicates. But it seems fraught with potential missteps, bad judgment, and faulty assumptions, and it appears unlikely to lead to shared understanding between speaker and listener. [112] Stereotyping based on gender, race, national origin, etc., ignores many realities that may affect communication patterns, including whether the value in question is more central or marginal to the culture, [113] how long the individual has been a part of the relevant culture, and the extent to which this particular individual reflects the behaviors or attitudes typically associated with the culture to which she belongs. [114] Beyond being poorly calibrated to lead to shared understanding in a particular ***23** conversation, this approach would almost certainly be detrimental, long-term, to effective communication in a diverse society.

A different tack tries to find a middle ground, aided by the listener's curious, informed, and flexible mind. [115] This approach begins from the assumption that “discrete communities tend to share certain preferences, styles, patterns, and values” that may affect how a client communicates with a lawyer. [116] If the client has a different cultural identity lens, the lawyer should educate himself about that culture, including any dominant values and practices. [117] The lawyer-listener enters into a conversation armed with this knowledge, sensitizing him, at least to some extent, in cross-cultural communication. [118] While the task of fully preparing for all possible cultural differences may be overwhelming, the listener's preparation should focus on areas where we can reasonably expect cultures to differ. [119] These areas include [120] proxemics (relating to personal and interpersonal space), [121] kinesics (the use and interpretation of bodily movements), [122] the importance of time, [123] narrative preferences, [124] tolerance of uncertainty, [125] and individualism ***24** vs. collectivism. [126] In these areas, the listener should be prepared to make adjustments based on the cultural identity of the speaker. [127] But this is just the starting point.

The listener's cultural sensitivity and perspective should be tempered by humility and even a recognition that he will be wrong about some of this--a state described as “informed not-knowing.” [128] As the conversation progresses, the lawyer should be on alert to explore with curiosity [129] any areas in which the speaker's preferred or default behavior does not conform to that usually attributable to her cultural identity. In those areas, the listener should be prepared to adjust based on the unique individual who is speaking. [130] By approaching listening in this way, the attorney is essentially engaging in relational lawyering--spending time and effort getting to know the client as a human being, [131] as opposed to focusing on stereotypes or instrumental ends in the relationship. [132]

As the listener takes stock of how the client's cultural identity lens may affect communication, he should not overlook that he has a unique cultural identity lens as well. [133] We all carry implicit biases that we may not even be aware of. [134] This is, of course, dangerous for a listener seeking to create a common understanding with a speaker. It would be natural for a listener to slowly move from biases about the client's culture to negative conclusions about the client's behavior and speech. [135]

Accurately appreciating the full content of the listener's lens and how it ***25** filters information he perceives is critical to effective absorption of information.

Combatting these normal stereotypes and biases for the listener is hard work and requires a conscious and intentional practice. [136] One approach to this challenge is for the listener to begin a searching examination of his own cultural identity, including the embedded assumptions that have developed over time. [137] The goal here is not necessarily to immediately eliminate those deeply ingrained biases, but to appreciate that they exist and may cloud the listener's perception of communication. Once those biases can be at least partially uncovered, they can be challenged by facts. And then the lawyer-listener can proceed, to the extent possible, based on facts. [138] This process of self-inquiry, self-awareness, and introspection has at its core a deep mindfulness and emotional intelligence that may not come naturally for lawyers who are trained primarily in rational, analytical thinking. [139] But, it is crucial to appreciating the cultural identity lens through which the listener absorbs and makes sense of speech and behavior.

Recognizing and taking into account the cultural identity lens of both the speaker and listener is a significant amount of work. It requires advanced planning and study, which brings it within the ambit of the work described above in Section IV. A. b. But this work is worth it: accurately appreciating the filters in a conversation will help a listener more accurately understand the meaning of the speaker. And at least as importantly, it should help reinforce and support the relationship between speaker and listener.

***26** *C. Third sub-competency: Active listeners work to increase shared understanding with verbal and nonverbal cues*

The third sub-competency assesses the listener's ability to build a shared understanding with the speaker through appropriate verbal and nonverbal behaviors. [140] In short, this sub-competency focuses on the concrete behaviors that "operationalize" active listening. [141] These verbal and nonverbal skills are often called "immediacy behaviors" because they communicate to the speaker the listener's interest and engagement throughout the conversation. [142] Nonverbal and verbal cues work together to communicate a listener's involvement in a conversation. [143] An active listener is not just a "Speaker-in-Waiting," but is instead communicating steady, respectful engagement to the speaker. [144] The listener's engagement may be communicated through animated facial expressions or expressivity, conversation management with effective turn taking, the composure of the listener when it is appropriate to the message and context, and positive affect, which may include general vocal pleasantness, communicating warmth and openness, and a mirroring of the speaker's posture. [145]

Predictably, studies demonstrate that these immediacy behaviors frequently reduce a speaker's uncertainty, encourage clear "information management," [146] and help reveal the core of the client's problem. [147] As ***27** one listening expert noted, "[w]hether the reader opens a scholarly journal or trade publication, textbook or handbook, flyer or self-help manual, part of the advice relevant to being a good support provider will include one or more skills like paraphrasing, asking questions, and reflecting feelings." [148] But the common, pedestrian advice turns out to be solid. In a 2015 study of listeners, speakers were asked to describe a recent stressful event. [149] When a listener displayed more verbal and nonverbal immediacy behaviors, speakers perceived the listener as more emotionally aware and felt better about the interaction. [150] The study authors noted the behaviors of listening are "part of a joint contribution to discourse," and that they communicate to the speaker that "there is a building of mutual knowledge between interlocutors." [151] In addition, as discussed earlier, core verbal communications skills, including the ability to decode the verbal communication of others and to knowingly manage one's social self-presentation--have been linked to leadership effectiveness. [152]

1. Use recognizable, appropriate nonverbal cues and accurately read the speaker's nonverbal cues

What does active listening look like? Listeners should know not only what it actually looks like when someone is interested or bored with the conversation, but also--and likely more importantly--what people believe it looks like. [153] In their interpretation of nonverbal behavior, participants in a conversation may also be influenced by the context, their cultures, or even their gender. [154] Some studies show "a strong and consistent superiority of women in both expressing and decoding ***28** nonverbal cues." [155] But studies on the actual differences between men and women have inconclusive findings, [156] and if we assume,

for example, that women are stronger listeners, a woman who appears not to be listening carefully is more surprising and off putting to the speaker.

Generally recognized nonverbal immediacy cues may include head nods, appropriately responsive or mirroring facial expressions, eye contact, and a forward body lean. [157] Other nonverbal behaviors, such as touch, may be inappropriate in particular contexts, including an initial interview with a client. [158] The listener's entire presence may signal "social readiness and availability for communication" or "avoidance and inaccessibility." [159] People expect behavior within a normative or polite range, and deviations may create negative impressions of the listener or of his attentiveness or empathy. [160]

Active listeners increase the understanding between the parties when they attend to and accurately read the speaker's nonverbal cues. [161] This attentiveness has been referred to as "listening with the third ear." [162] This attentiveness to the speaker's nonverbal cues allows listeners to capture the speaker's message more accurately and completely. And nonverbal cues are not an insignificant portion of the communication: one study found that ninety-three percent of the total impact of a message comes from the nonverbal aspects of that message, both vocal and visual. [163]

Because a speaker will decode nonverbal cues according to what she believes they mean given the context and her experience, a speaker will likely be less able to view listeners as active listeners if those listeners have poor social skills, social anxieties or disorders, or an ***29** autism spectrum disorder. Likewise, some listeners may similarly be less able to accurately interpret the speaker's nonverbal cues, leading to a deficit of understanding. Speakers and listeners may also misinterpret nonverbal cues because of cultural, ethnic, or even generational differences. [164] Listeners who become more aware of how their nonverbal cues are interpreted may be better able to improve them or compensate for them with stronger verbal cues. However, even when a listener is aware of the impact of his nonverbal cues, his efforts to improve them may distract him from actually listening to the speaker. Contrary to what a speaker may perceive, listeners who struggle socially may actually be more able to listen to a conversation by closing their eyes or by keeping a more rigid body posture.

At its core, true effective communication is "deeply personal," so effective nonverbal cues must be rooted in each listener's personality and must reflect actual engagement in the conversation. [165] Listeners may learn better practices, but they must be applied genuinely, or the immediacy cues will not lead to greater understanding. Techniques of listening must be external manifestations of actual inner attention; [166] otherwise, "such pretended usage will soon become evident and the whole listening process will lose its promotive effect." [167] Training in nonverbal cues should therefore also include suggestions for mindful listening, such as note-taking, eye contact, and any other technique to pull the listener back to conscious listening. [168]

2. Use verbal feedback to demonstrate attention, understanding, responsiveness, and empathy

Although effective listening often requires the listener to remain quiet, most experts agree that a listener's verbal cues are "the most important contributor to judgments of others as good (or bad) listeners." [169] While nonverbal immediacy cues are generally "processed as gestalt," verbal cues tend to be processed "linearly," so verbal cues become central in the speaker's judgment of the listener's attention, ***30** understanding, and responsiveness. [170] Verbal cues include: 1) "minimal encouragers" like "yeah," "right," and "hmh," which communicate to the speaker the listener is following and understanding the message; [171] 2) reflecting-back statements, "that must have been difficult for you," which demonstrate empathy for emotions the speaker shares; [172] 3) message paraphrases, which summarize what the listener has heard; [173] and 4) questions that check assumptions and then shift the conversation into particular directions. [174]

Minimal encouragers function similarly to nonverbal cues in that they provide a generic response that can fit anywhere in the narrative. [175] They are "receipt tokens" that may be used to indicate the listener understands what the speaker has said--which may shorten the speaker's message--or to indicate the listener is still paying attention to the message--which may lengthen the speaker's message. [176] Again, context is key: minimal encouragers are generic and may be less effective in actually building understanding between the parties than more meaning-specific verbal cues. [177] Generally, generic cues are more useful early in the conversation and meaning-specific verbal cues are more encouraging and appropriate as the conversation continues.

These more meaning-specific verbal cues, like message paraphrases and questions, may likewise be used in a way that stops the speaker or disrupts the speaker's train of thought. [178] Lawyers should be hesitant to interrupt a client's narrative, especially when the narrative is core to understanding the client's problem. [179] Lawyers may miss key information if they "pursue a strategy of interaction structured by their ***31** questions rather than by a client narrative." [180] If a speaker's narrative fails to provide key information, then the listener may ask open-ended questions intended to redirect the conversation while still showing a commitment and engagement with the conversation. [181]

Throughout the conversation, how the listener hears and responds to the speaker's emotions can be key to encouraging more trust and greater understanding. Listeners should mirror, but not judge, the speaker's feelings. [182] Lawyers often pay too little attention to clients' feelings, which can be messy, time consuming, and even obstructive. [183] Lawyer listeners should practice not only how to listen to emotions, but also how to respond to vaguely expressed feelings, unstated feelings, and nonverbal expressions of feelings. [184]

Closely connected to how a listener hears and respects the speaker's emotions is how the listener views the speaker. In counseling contexts, experts describe "verbal person centeredness" as the degree to which the listener acknowledges, legitimizes, contextualizes, and possibly elaborates on the perspective and story of the speaker. [185] Listeners with high person-centered perspectives "view others as psychological entities possessing unique intentions, feelings, and perspectives that are extensively elaborated in talk." [186] In contrast, listeners with low person-centeredness perspectives view others primarily through their "concrete characteristics, such as physical qualities, demographic categories, and especially socially defined roles." [187] A listener with a low person-centered perspective generally, or for the speaker specifically, is more likely to respond with verbal cues that simply regulate the conversation, and ignore feelings and emotions the speaker may be sharing. [188] A listener with a high person-centered perspective is more likely to invite for elaboration or extensive contextualization. [189] For example, a listener may find himself or herself reacting to a certain person with defensiveness, so he or she listens while inwardly critiquing ***32** or structuring a rebuttal. [190] A listener who is aware of this defensiveness is more likely to move past it and listen more openly to the actual speaker. [191]

Speakers are likely to view a listener giving strong verbal cues as effective and socially attractive, and as being attentive and responsive to their concerns. Speakers tend to disclose more to listeners they like and trust. [192] "Research in a variety of settings suggests that cues that communicate sincere concern and interest for the speaker, no matter how they are expressed, outweigh particular types of verbal strategies such as advice giving or questioning." [193] Again, however, context is key: some studies found that certain speakers preferred advice giving to active listening message paraphrasing. [194] For example, college counseling clients preferred advice-giving over active listening, even early in the counselor-client relationship. [195] This study has obvious implications for lawyers.

D. Fourth sub-competency: Active listeners move to a response only after fully exploring and understanding the speaker's meaning

Even when a client speaker would prefer to hear advice over a message paraphrase from the listener, the listener should not move to advice until he or she has fully explored and understood the speaker's meaning. No matter the discipline or context, active listening requires the listener to understand the full message being conveyed before responding. [196] The listener must ground his response in a full understanding of the speaker's meaning, which requires the speaker's presentation and the listener's acceptance of that meaning. [197] The speaker and the listener are engaging in a "joint construal process," ***33** where "the listener and the speaker are collaboratively settling on what the speaker is to be taken to mean." [198]

As mentioned above, specific verbal cues, rather than generic minimal encouragers, become more effective at this final evaluation stage. Active listeners should use message paraphrases and questions to verify, clarify, and sort the information (including emotions) received, continuing to consider whether there may be bias or prejudice impacting the understanding of either party in the conversation. [199] Again, to confirm the parties understand the message similarly, a listener may ask probative questions to help the speaker discuss relevant facts or topics that she may be avoiding. [200]

The principle that effective listeners make sure to fully understand the speaker's message has become part of practical training provided sales associates to help them build relationships with potential customers. For example, Carew International's LAER system stands for listening, which must be non-judgmental and "without preconceived judgments or overreaction;" acknowledgment, which includes both nonverbal and verbal cues showing interest and understanding; exploring, which "is NOT probing or interrogating" but rather an identification and understanding of the relevant underlying issues; and finally the response, which is the answer, recommendation, or solution to address the speaker's needs. [201] Carew International stresses in its training that the first three steps should be repeated in a loop until the listener is confident he understands the message, and only then is he encouraged to move towards a response. [202]

Like sales associates, lawyers are also looking to satisfy clients and build protective relationships. To meet this objective, lawyers should hold back the urge to respond and advise the speaker until the lawyer actually understands their needs and the client feels understood. If the listener begins giving advice too soon, the listener will stop listening, and any remaining relevant information the speaker needs to convey may be lost. [203] A lawyer may also need to listen for "red flag moments of ***34** disconnect," determine when the client looks bored or distracted, recognize when they take over the conversation and when the client stops asking questions, or discern when the emotions in the conversation shift to anger or judgment. [204] A lawyer listening to a client may extend his or her active listening to a post-conversation debrief where the lawyer considers tricky moments of the conversation and plans for the next. [205] A regular debrief of a conversation can become the first sub-competency of listening--preparing for the conversation. [206]

V. CONCLUSION

A lawyer who knows how to actively listen will be a better advocate, negotiator, counselor, and leader. Lawyers who actively listen attain better outcomes for clients, employers, and themselves. We know legal employers and clients alike value and prioritize active listening, so a competency-based education in law should include intentional training in active listening as a discrete skill. The Active Listening Milestone Rubric, presented fully in the appendix below, draws on listening research to help law schools make this training and assessment as thoughtful and productive as possible.

*35 APPENDIX

Table 1: The Five Core Components of Competency-Based Legal Education [207]

COMPETENCY-BASED LEGAL EDUCATION IS AN APPROACH TO PREPARING LAWYERS FOR PRACTICE THAT IS FUNDAMENTALLY ORGANIZED AROUND COMPETENCIES DERIVED FROM AN ANALYSIS OF CLIENT AND SOCIETAL NEEDS				
CORE COMPONENTS				
OUTCOME COMPETENCIES: Competencies required for practice are *clearly articulated.*	SEQUENCED PROGRESSIVELY: Competencies and their developmental markers are *sequenced* progressively.	TAILORED LEARNING EXPERIENCES: Learning experiences *facilitate* the developmental acquisition of competencies.	COMPETENCY-FOCUSED INSTRUCTION: Teaching practices *promote* the developmental acquisition of competencies.	PROGRAMMATIC ASSESSMENT: Assessment practices *support & document* the developmental acquisition of competencies.
PRACTICE: What the core component should look like in practice				
Required outcome competencies are based on a profile of graduate and/or practice-based abilities.	Competencies are organized in a way that leads to a logical developmental sequence across the	Learning takes in settings that model practice, is flexible enough to accommodate variation in	Teaching is individualized to the learner, based on abilities required to progress to the next stage of learning.	Learner progression is based on a systematic approach to decision-making including standards, data collection,

	continuum of legal education or practice.	individual learner needs & is self-directed.		interpretation, observation & feedback.
PRINCIPLE: How the core component is supposed to work in practice				
Specification of learning outcomes promotes focus and accountability.	A sequential path supports the development of expertise.	Learning through real life experiences facilitates membership into the practice community & development of competencies.	Development of competencies is stimulated when learners are supported to learn at their own pace and stage.	Programmatic assessment systems allow for valid and reliable decision making.

36** ***Figure 1: Competency-Based Legal Education's Two Central Core Components Informing the Three Other Components in a Law School's CBE Program [208]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

37** ***Figure 2: Dreyfus & Dreyfus Development Model [209]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

38** ***Figure 3: Holloran Competency Alignment Model

Stages of Development of Learning Outcome Competencies: A Continuum from Entry into Law School Throughout a Career [210]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

39** ***Milestone Rubric: Active Listening

The goal of active listening is to show empathy for the speaker, to build a shared understanding between the speaker and the listener, and--where appropriate--to equip the listener to reply or problem solve in a manner that corresponds to the speaker's concerns or goals.

SUB-COMPETENCIES	NOVICE	INTERMEDIATE	COMPETENT	EXCEPTIONAL
1. Active listeners **assess the purpose and context of the conversation and allocate the resources and attention appropriate and necessary** to absorb, interpret, and decode the information given to them by a speaker.	*RARELY assesses the purpose and context of the conversation and allocates the necessary resources and attention.*	*SOMETIMES assesses the purpose and context of the conversation and allocates the necessary resources and attention.*	*OFTEN assesses the purpose and context of the conversation and allocates the necessary resources and attention.*	*CONSISTENTLY assesses the purpose and context of the conversation and allocates the necessary resources and attention.*

2. **In working to create a shared understanding with the speaker, active listeners consider the lens through which the speaker speaks and the lens through which the listener listens.** Those lenses may have many components, including the history of the parties, the context in which the conversation takes place, the relative power dynamic of the parties, their gender, race, culture, or other aspects of their identity, and any personal experiences that may affect how they communicate. Taking into consideration these lenses is critical to accurately decoding the meaning of the speakers' words and emotion.	RARELY considers the speaker's lens and his or her own lens to work towards creating a shared understanding.	SOMETIMES considers the speaker's lens and his or her own lens to work towards creating a shared understanding.	*OFTEN considers the speaker's lens and his or her own lens to work towards creating a shared understanding.*	*CONSISTENTLY considers the speaker's lens and his or her own lens to work towards creating a shared understanding.*
3. Active listeners **continually assess the shared understanding between the speaker and the listener and, where necessary, work to increase** that shared understanding. Work to increase shared understanding may involve the use of both verbal and nonverbal cues.	*RARELY assesses the shared understanding or works to increase it.*	*SOMETIMES assesses the shared understanding or works to increase it.*	*OFTEN assesses the shared understanding or works to increase it.*	*CONSISTENTLY assesses the shared understanding or works to increase it.*
3a. Active listeners may provide nonverbal cues to demonstrate attention, understanding, responsiveness, and empathy. To engage the speaker in the ongoing conversation and follow respectful conversation pacing and collaboration, active listeners may use open, natural body language, reflect the speaker's emotions, employ silence, and maintain or break eye contact.	*RARELY makes effective use of nonverbal cues to demonstrate active listening.*	SOMETIMES makes effective use of nonverbal cues to demonstrate active listening.	OFTEN makes effective use of nonverbal cues to demonstrate active listening.	CONSISTENTLY makes effective use of nonverbal cues to demonstrate active listening.
3b. Active listeners may provide verbal feedback to demonstrate attention, understanding, responsiveness, and empathy. Active listeners may reflect back to the	*RARELY makes effective use of verbal feedback, as appropriate, to demonstrate active listening.*	*SOMETIMES makes effective use of verbal feedback, as appropriate, to demonstrate active listening.*	*OFTEN makes effective use of verbal feedback, as appropriate, to demonstrate active listening.*	*CONSISTENTLY makes effective use of verbal feedback, as appropriate, to demonstrate active listening.*

speaker, paraphrasing and restating the speaker's words, meaning, and feelings. Active listeners may ask for additional information, using elaboration, clarification, and repetition when necessary.				
4. Active listeners **only move to respond or problem-solve where appropriate to the conversation,** and only after fully exploring, and ultimately understanding, the speaker's meaning.	*RARELY waits to respond or problem-solve until fully understanding the speaker's meaning.*	*SOMETIMES waits to respond or problem-solve until fully understanding the speaker's meaning.*	*OFTEN waits to respond or problem-solve until fully understanding the speaker's meaning.*	*CONSISTENTLY waits to respond or problem-solve until fully understanding the speaker's meaning.*

Footnotes

a1 Associate Dean for Academic Affairs and Arkansas Bar Association Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock.

aa1 Professor of Law and Director, Professionalism and Leadership Program, Texas A&M University School of Law.

aaa1 Holloran Professor of Law and Co-director of the Holloran Center for Ethical Leadership in the Professions, University of St. Thomas School of Law.

1 A notable exception to this statement is the treatment of listening in textbooks for experiential courses, such as interviewing and counseling or clinics. *See infra* at note 34.

2 *Learning Outcomes 302(c) and (d),* HOLLORAN CENTER, https://www.stthomas.edu/hollorancenter/learningoutcomesandprofessionaldevelopme/learningoutcomesdatabase/learningoutcomes302c/ (last visited July 30, 2021) (listing learning outcomes of 186 schools that have reported them as of June of 2020). The majority of these twenty-three schools use the phrase "active listening" in their learning outcomes. Law schools have also adopted other learning outcomes where listening is a key sub-competency. For example, seventeen schools have a learning outcome in Client Interviewing. Seventeen schools have Counseling. Nineteen have a learning outcome in Negotiation. Twelve have a learning outcome on Leadership. Nine have an outcome in Mediation and Conflict Resolution. In total, adjusting the total to eliminate duplication where schools have adopted more than one of the above outcomes, fifty-seven schools have learning outcomes in either listening, or competencies where active listening is an integral sub-competency. *Learning Outcomes 302(b) and (d),* HOLLORAN CENTER, https://www.stthomas.edu/hollorancenter/learningoutcomesandprofessionaldevelopme/learningoutcomesdatabase/learningoutcomes302b/ (last visited July 30, 2021).

3 *See* Susan L. Brooks, *Listening and Relational Lawyering, in* THE HANDBOOK OF LISTENING 361-71 (Debra L. Worthington & Graham D. Bodie eds., 2020); Neil Hamilton, *Effectiveness Requires Listening: How to Assess and Improve Listening* Skills, 13 FLA. COASTAL L. REV. 146-80 (2012). *See also* the textbooks on interviewing and counseling, negotiation, and conflict resolution cited in note 34 *infra* for discussion of the importance of listening skills in those contexts.

4 *See* Susan Timm & Betty L. Schroeder, *Listening/Nonverbal Communication Training,* 14 INT'L J. OF LISTENING 109, 113 (2000) ("Listening is the missing component in the reading, writing and speaking areas taught in our school

system; yet, it is probably the most important part of good communication in the workplace ....") (quoting private correspondence with the training director at Northern Illinois University).

5 Harry Weger Jr. et al., *The Relative Effectiveness of Active Listening in Initial Interactions,* 28 INT'L J. OF LISTENING 13, 15 (2014) [hereinafter *Relative Effectiveness of Active Listening*] (describing studies testing listening training in a variety of situations); Valerie Manusov et al., *Conditions and Consequences of Listening Well for Interpersonal Relationships: Modeling Active-Empathic Listening, Social-Emotional Skills, Trait Mindfulness, and Relational Quality,* 34 INT'L J. OF LISTENING 1, 7 (2018) (noting that training in active listening skills increases therapists' overall listening skills); Harry Weger Jr., Gina R. Castle & Melissa C. Emmett, *Active Listening in Peer Interviews: The Influence of Message Paraphrasing on Perceptions of Listening Skill,* 24 INT'L J. OF LISTENING 34, 36 (2010) [hereinafter *Active Listening in Peer Interviews*]. Emotional intelligence, which improves a listener's ability to actively engage with the speaker, can also be developed and grown. *See* Marjorie A. Silver, *Emotional Competence and the Lawyer's Journey, in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 5, 11-12 (Marjorie A. Silver ed., 2007) [hereinafter *Emotional Competence and the Lawyer's Journey*].

6 *See* Neil Hamilton, *The Gap Between the Foundational Competencies Clients and Legal Employers Need and the Learning Outcomes Law Schools Are Adopting,* 89 UMKC L. REV. 559, 561, 563-64 (2021).

7 *See infra* Appendix. The authors developed much of the substance of this article, as well as the attached rubric, as a working group formed by the Holloran Center at the University of St. Thomas School of Law. Our working group was part of a larger effort by the Holloran Center to convene faculty from around the country to develop rubrics and teaching and assessment materials to support common professional formation learning outcomes identified by law schools. Robin Thorner, Assistant Dean of Career Services at St. Mary's University School of Law, led our active listening working group and was an integral part of our weekly collaborative discussions. She helped guide our conversations and provided useful research, thoughtful critiques, and valuable insights into our collective work. This article would not have been possible without her generous contributions.

8 AMERICAN BAR ASSOCIATION, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 17, 24, 25 (Erin Ruehrwein ed., 2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf (last visited My 31, 2021).

9 Neil Hamilton & Jerome Organ, *Learning Outcomes that Law Schools Have Adopted: Seizing the Opportunity to Help Students, Clients, Legal Employers, and the Law School,* 69 J. LEGAL EDUC. 1-2 (forthcoming).

10 *See* Eric Holmboe & Robert Englander, *What Can The Legal Profession Learn From The Medical Profession About The Next Steps?*, 14 U. ST. THOMAS L.J. 345, 348 (2018).

11 *See id*. at 347.

12 *See id*. at 345-46.

13 *See* Hamilton & Organ, *supra* note 9, at 351-52.

14 *See infra* Table 1 and Figure 1. Table 1 and Figure 1 are adapted from Elaine Van Melle et al., *A Core Components Framework for Evaluating Implementation of Competency-Based Medical Education Programs,* 94 ACAD. MED. 1002, 1002-09 (2019). In a multi-stage process drawing on scholarship from education theory and medical education, fifty-nine members on an international CBME expert panel identified five core components to CBME. *Id*.

15 *See* Holmboe & Englander, *supra* note 10, at 347-48.

16 *See* Laura Edgar et al., *Milestones 2.0: A Step Forward,* 10 J. GRADUATE MED. EDUC. 367-69 (2018).

17 *See id*. at 367-69. *See also* Holmboe & Englander, *supra* note 10, at 350-51.

18 Edgar et al., *supra* note 16, at 367.

19 Andrea A. Curcio, *A Simple Low-Cost Institutional Learning-Outcomes Assessment Process,* 67 J. LEGAL EDUC. 489, 493 (2018).

20 Georgia State professor Andy Curcio explains that, "Rubrics for outcome-measures assessment not only identify a competency, they also describe what competent performance looks like, along a continuum of development and in a way that fosters reliability among raters." Rubrics also make the faculty's expectations clearer for each student. Curcio, *supra* note 19, at 489, 493.

21 *Id*.

22 Holmboe & Englander, *supra* note 10, at 350-51. Overall, each Milestone reflects the Dreyfus and Dreyfus model of development from novice to expert shown in Figure 2, *see infra* Appendix.

23 *See infra* Milestone Rubric: Active Listening. This list adapted from CELESTE ENO ET AL., ACGME MILESTONES GUIDEBOOK FOR RESIDENTS AND FELLOWS 2-3 (2020).

24 *Id*.

25 *Id*.

26 *Id*.

27 *See infra* Figure 3 for the alignment model developed by Holloran Center. This continuum/alignment model, developed by Jerry Organ and the author, builds on the Dreyfus and Dreyfus Model of development from novice to expert. Stuart E. Dreyfus, *The Five-Stage Model of Adult Skill Acquisition,* 24 BULL. OF SCI., TECH. & SOC'Y 177-81 (2004). A "competent learner" is ready to take the bar and begin to practice law after passing the bar exam.

28 Brooks, *supra* note 3, at 363.

29 *See* PETER G. NORTHOUSE, LEADERSHIP THEORY AND PRACTICE 5 (8th ed. 2019); *see also* Deborah Rhode, *Leadership in Law,* 69 STAN. L. REV. 1603, 1607 (2017); *see* LEAH JACKSON TEAGUE ET AL., FUNDAMENTALS OF LAWYER LEADERSHIP 6 (2021).

30 MODEL RULES OF PROF'L CONDUCT r. 2.1 (Am. Bar Ass'n, 1983).

31 *Model Rules of Professional Conduct: Preamble & Scope,* AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ (last visited July 31, 2021).

32 Neil Hamilton, *Fostering and Assessing Law Student Teamwork and Team Leadership Skills,* 48 HOFSTRA L. REV. 619, 632-33 (2020).

33 Rhonda Muir, *The Importance of Emotional Intelligence in Law Firm Partners,* 33 L. PRAC. 60 (2007).

34 *See* TEAGUE ET AL., *supra* note 29, at 254; STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 45-46, 84-86 (Erwin Chemerinsky et al. eds., 3d ed. 2007) [hereinafter ESSENTIAL LAWYERING SKILLS]; DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 41-63 (2d ed. 2004) [hereinafter LAWYERS AS COUNSELORS]. *See also* DEBORAH L. RHODE, LAWYERS AS LEADERS 67 (2013) [hereinafter RHODE, LAWYERS AS LEADERS] (explaining that "many law firm leaders rank [listening] as their most important skill").

35 RANDALL KISER, SOFT SKILLS FOR THE EFFECTIVE LAWYER 32 (2017) (summarizing client survey data).

36 Lisa McKenna et al., *Listening in Health Care, in* THE HANDBOOK OF LISTENING 373, 374-75 (Debra L. Worthington & Graham D. Bodie eds., 2020).

37 *Id*.

38 *See* LAWYERS AS COUNSELORS, *supra* note 34, at 41 ("[Y]our ability to engender clients' trust, develop rapport, elicit full descriptions of clients' problems and help clients develop effective solutions may hinge as much on your listening as on your questioning and advice-giving skills. Thus, helping clients find satisfactory solutions to their problems often depends on your effectiveness as a listener."). There is some data indicating that active listening results in better outcomes for lawyers also. A recent study of American and Finnish attorneys and their professional listening competence found that attorneys who became more aware of and then skilled with the mechanics of active listening had an "elevated sense of self-efficacy, which increase[d] their subjective sense of well-being at work." Sanna Ala-Kortesmaa & Pekka Isotalus, *Dimensions of Professional Listening Competence in the Legal Context,* 21 INT'L J. LEGAL PROF. 233, 233 (2014).

39 *See* NEIL HAMILTON, ROADMAP: THE LAW STUDENT'S GUIDE TO MEANINGFUL EMPLOYMENT 18 (2d ed. 2018).

40 *See id*. The 2003 Shulz-Zedeck survey of 2,000 Berkeley Law alums asking "if you were looking for a lawyer on an important matter for yourself?" includes listening and "able to see the world through the eyes of others" among the twenty-six effectiveness factors identified. *Id*. at 20-21.

41 *See* ESSENTIAL LAWYERING SKILLS *supra* note 34, at 45-46, 83-87, 357-58, (discussing the importance of listening skills for the client relationship and on the importance of listening in negotiation); LAWYERS AS COUNSELORS, *supra* note 34, at 41; ROBERT COCHRAN JR., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 27 (3d ed. 2014).

42 CARRIE MENKEL-MEADOW, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 61-65 (2018).

43 *See Listening: The Art of Advocacy,* FINDLAW, https://corporate.findlaw.com/litigation-disputes/listening-the-art-of-advocacy.html (last updated Mar. 26, 2008).

44 *See* ALLEN IVEY ET AL., INTENTIONAL INTERVIEWING AND COUNSELING: FACILITATING CLIENT DEVELOPMENT IN A MULTICULTURAL SOCIETY 131-49 (4th ed. 2018).

45 Debra L. Worthington & Graham Bodie, *Defining Listening: A Historical, Theoretical and Pragmatic Assessment, in* THE SOURCEBOOK OF LISTENING: METHODOLOGY AND MEASURES 9 (Debra L. Worthington & Graham D. Bodie eds., 2018) [hereinafter *Defining Listening: A Historical, Theoretical and Pragmatic Assessment*].

46 *Id*. at 3.

47 *Id*. at 10-11.

48 *See generally* Christine Bauer, Kathrin Figl & Renate Motschnig-Pitrik, *Introducing "Active Listening" to Instant Messaging and E-Mail: Benefits and Limitations*, IADIS INT'L J. ON WWW/INTERNET (2009) (listing contexts, like therapy, school and career counseling, medicine, etc.).

49 *Relative Effectiveness of Active Listening, supra* note 5, at 14.

50 *Id*. (describing qualitative research on American and Finnish attorneys on professional listening competence).

51 Graham D. Bodie & Susanne M. Jones, *The Nature of Supportive Listening II: The Role of Verbal Person Centeredness and Nonverbal Immediacy,* 76 WESTERN J. OF COMM. 250, 251 (describing the "multidimensional construct" of active listening) [hereinafter *Supportive Listening II*].

52 *See* Bauer, Figl & Motschnig-Pitrik, *supra* note 48, at § 2.1; *see generally* ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 46 ("The ability to listen well is as important in the practice of law as the ability to talk well.").

53 *See infra* Milestone Rubric: Active Listening.

54 Graham D. Bodie, Debra Worthington, Margarete Imhof & Lynn O. Cooper, *What Would a Unified Field of Listening Look Like? A Proposal Linking Past Perspectives and Future Endeavors,* 22 INT'L J. OF LISTENING 103, 112 (2008) [hereinafter *Unified Field of Listening*].

55 *See* RHODE, LAWYERS AS LEADERS *supra* note 34 ("[M]any law firm leaders rank [listening] as their most important skill.").

56 According to listening scholars, "[f]rom a behavioral perspective, listening is indeed not a passive act, and listeners are not mere receptors of information; they are full collaborators or co-narrators in a story-telling, partners in the meaning-making process." Graham D. Bodie, *Measuring Behavioral Components of Listening, in* THE SOURCEBOOK OF LISTENING RESEARCH: METHODOLOGY AND MEASURES 123, 124 (Debra L. Worthington & Graham D. Bodie eds., 2018) [hereinafter *Measuring Behavioral Components of Listening*]; *see id*. This decision to listen in this context reflects a "positive listening attitude" and ties to the general ideas that listening is active, not passive, and involves the genuine desire to listen well. *See* Graham D. Bodie & Susanne M. Jones, *Measuring Affective Components of Listening, in* THE SOURCEBOOK OF LISTENING RESEARCH: METHODOLOGY AND MEASURES 97, 97

(Debra L. Worthington & Graham D. Bodie eds., 2018); *Unified Field of Listening, supra* note 54, at 112-13 (discussing that the "resulting affective outcome depends on the resources available and allocated" to the listening task).

57 Scholars on listening have described the resource allocation involved as influenced by a number of factors, including whether the conversation is likely to be "easy" or "hard." *See Unified Field of Listening, supra* note 54, at 112 (citing another source). In the resource allocation stage, "personal and contextual presage become relevant," including "trait-like competencies and skills as well as state characteristics, affective motivation and situational perceptions and decisions." *Id*.

58 One of the listener's central goals should be isomorphic attribution or attributing the same meaning to the words and actions of the speaker as the speaker intended. *See* Susan J. Bryant & Jean Koh Peters, *Six Practices for Connecting with Clients Across Culture: Habit Four, Working with Interpreters and Other Mindful Approaches, in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 187 (Marjorie A. Silver ed., 2007) [hereinafter *Connecting with Clients Across Culture}*.

59 *See Defining Listening: A Historical, Theoretical, and Pragmatic Assessment, supra* note 45, at 3.

60 *See* Janet Beavin Bavelas, Linda Coates & Trudy Johnson, *Listener Responses as a Collaborative Process: The Role of Gaze,* 52 J. OF COMM. 566, 567 (2006) [hereinafter *Listener Responses as a Collaborative Process*] (noting that the listener's "insertions and overlapping contributions" during a conversation result in collaboration with the speaker to create communication that is "joint action"); *Measuring Behavioral Components of Listening, supra* note 56, at 124 ("Listeners have vast influence on the trajectory of conversations and on the outcomes of those conversations, not only because of how they process information but also because of how they act, that is, how they behave as listeners").

61 Behaviors associated with active listening are discussed *infra* at Section IV. C. a. and accompanying notes.

62 *See Listener Responses as a Collaborative Process, supra* note 60, at 567; *Measuring Behavioral Components of Listening, supra* note 56, at 124.

63 *See* Susan L. Brooks, *Using a Communication Perspective to Teach Relational Lawyering,* 15 NEV. L.J. 477, 482-85 (2015) [hereinafter *Relational Lawyering*].

64 Research suggests that active listeners--those demonstrating the traits described below in Section IV. C.--may be a necessary component of an effective conversation. *See Listener Responses as a Collaborative Process, supra* note 60, at 569 (observing that speakers with distracted or unresponsive listeners are less likely to complete their stories than those in a control group).

65 Some have argued that being an effective lawyer is less about outcomes and more about relationships. *See Relational Lawyering, supra* note 63, at 479.

66 *See* DOUGLAS O. LINDER & NANCY LEVIT, THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW 203 (2014) ("Nothing--and we mean nothing--is more important in the lawyer-client relationship than trust").

67 *See id*. at 203. A lack of effective communication is one of the most frequently identified sources of client dissatisfaction in the attorney-client relationship. A 2005 study found that seventy percent of corporate clients surveyed did not recommend their primary law firm. *See* Clark D. Cunningham, *What Do Clients Want from Their Lawyers,* 2013 J. OF DISP. RESOL. 143, 143-44 (2013). Client dissatisfaction with their lawyers does not seem to be based on a failure to

achieve a desired outcome, but with a failure to effectively handle the attorney-client relationship. *See id*. at 146. A failure to listen was among the most frequently identified weaknesses of lawyers. *Id*.

68 The need for multiple meetings to establish and foster trust and more effective communication may be greater when cross-cultural communication is involved. *See infra* at Section IV.B. and accompanying notes.

69 Listening scholars recognize various types of listeners based on the purposes for which they listen. *See, e.g.,* Graham D. Bodie & William A. Villaume, *Aspects of Receiving Information: The Relationship Between Listening Preferences, Communication Apprehension, Receiver Apprehension, and Communicator Style,* 17 INT'L J. OF LISTENING 47, 48-50, 64-65 (2003) (differentiating among listeners who are oriented to people, content, action, and time and noting that most listeners have the ability to adjust listening styles based on the circumstances or adopt multiple styles simultaneously).

70 *See Connecting with Clients Across Culture, supra* note 58, at 196-200 (discussing the importance of mindful listening to "assist[] the lawyer in the critical and challenging task of remaining completely open to his client's story while skillfully assembling her legal case").

71 *Unified Field of Listening, supra* note 54, at 112-13.

72 *See supra* Section IV.A.a.

73 *See Emotional Competence and the Lawyer's Journey, supra* note 5, at 14 n.35.

74 Some people, labeled by listening scholars as "time-oriented listeners," are "overly concerned with time limitations" and may be more likely than others to "interrupt others and give off nonverbal cues that signal disinterest." *See Bodie & Villaume, supra* note 69, at 50. Listeners oriented to time should guard against these tendencies when engaging with clients.

75 In fact, "listeners" rarely only listen in conversations. There is a back-and-forth nature to most conversations, in which both parties oscillate between speaker and listener. *See* Susan L. Brooks, *Interpersonal Communication, in* THE HANDBOOK OF LISTENING 114 (Debra L. Worthington & Graham D. Bodie eds., 2020) [hereinafter *Interpersonal Communication*]; *see* Janet B. Bavelas, Linda Coates & Trudy Johnson, *Listeners as Co-Narrators,* 79 J. OF PERSONALITY AND SOC. PSYCHOL. 941-51 (2000) [hereinafter Listener *as Co-Narrators*] (describing the impact of both generic and specific listener responses and their impact on the storyteller's narrative).

76 *See* Graham D. Bodie, Kellie St. Cyr, Michelle Pence, Michael Rold & James Honeycutt, *Listening Competence in Initial Interactions I: Distinguishing Between What Listening Is and What Listeners Do,* 26 INT'L J. OF LISTENING 1, 3, 21-24 (2012) [hereinafter *Listening Competence*] (discussing various attributes and behaviors and whether they correlate to the perception of effective listening).

77 *See generally Emotional Competence and the Lawyer's Journey, supra* note 5, at 8-9.

78 *See* Susan Daicoff, *Lawyer Know Thyself: A Review of the Empirical Research on Attorney Attributes Bearing on Professionalism,* 46 AM. U. L. REV. 1337, 1365-66 (1997) (discussing how law students often prefer "thinking over feeling" in the decision-making process).

79 *See Emotional Competence and the Lawyer's Journey, supra* note 5, at 12-13 (noting that strong emotions "might be problematic" in a given situation, and lawyers should "recognize the situations where they may impair our representation of clients in order to avoid these consequences").

80 *See generally* ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 52 (discussing tactics used to respond in situations where emotions could cloud progress).

81 *See* LAWYERS AS COUNSELORS, *supra* note 34, at 24. Noticing the emotions that arise for the listener-lawyer is an important part of the process of relational lawyering. *See Relational Lawyering, supra* note 63, at 505.

82 *See* Brooks, *supra* note 3, 361, 363. Most client complaints about their lawyers relate not to poor outcomes, but to a failure or lack of communication. *See id*.

83 *See* Timothy W. Floyd, *Spirituality and Practicing Law as a Healing Profession: The Importance of Listening, in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 473, 473 (Marjorie A. Silver ed., 2007) (explaining that lawyers "often deal with the individual manifestations of [] brokenness: people who seek legal counsel are often wounded--sometimes physically, often psychologically and emotionally--by the events that gave rise to the legal problem.").

84 *See generally* Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship,* 6 CLINICAL L. REV. 259, 260 (1999) (discussing how the lawyer-client relationship "may be enhanced by the lawyer's recognition and resolution of strong emotional reactions--positive or negative--towards a client.").

85 *See Emotional Competence and the Lawyer's Journey, supra* note 5, at 6.

86 *See Relational Lawyering, supra* note 63, at 505 (recognizing that lawyers "are not good at not knowing" and may "jump to conclusions ... partly because we may be disconnected from what we truly *feel*.") (emphasis in original).

87 *See* LAWYERS AS COUNSELORS, *supra* note 34, at 27-28. Employer studies have consistently ranked emotional intelligence as an important lawyering competency. ALLI GERKMAN & LOGAN CORNETT, FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT 9 (2016), https://iaals.du.edu/sites/default/files/documents/publications/foundations_for_practice_whole_lawyer_character_quotient.pdf.

88 In this work, attorneys may need to direct their attention to what is not explicitly stated. In the parallel medical context, "exemplary physicians" described their listening as a "multisensory process" that included "the importance of listening for what is not being spoken, of both intuiting and analyzing the circumstances around what each patient might have to say .... A few also mentioned that some patients may say little but display significant nonverbal cues." *See* Helen Meldrum, *The Listening Practices of Exemplary Physicians,* 25 INT'L J. OF LISTENING 145, 157 (2011) [hereinafter *Listening Practices of Exemplary Physicians*].

89 Meditative practices may be especially useful for a listener before entering into a stressful or emotional conversation. *See* Leonard L. Riskin, *Awareness in Lawyering: A Primer on Paying Attention, in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 447, 464-66 (Marjorie A. Silver ed., 2007).

90 Prof. Susan Brooks discusses the importance of "relationship-centered lawyering," which focuses on the quality of the underlying relationship between lawyer and client, as well as interpersonal, cultural, and emotional issues. *See Relational Lawyering, supra* note 63, at 480. She contrasts this approach with the traditional law school and lawyering approach

that has an instrumental focus. *See id*. As Prof. Brooks correctly notes, even instruction on listening in the traditional law school model is approached from an instrumental, rather than a relationship-focused, perspective. *See id*.

91 *See Measuring Behavioral Components of Listening, supra* note 56, at 123 (observing that when people listen "interpersonally," they are processing information cognitively and "*acting toward* another" and "enacting various behaviors to convey specific meaning to their interlocutor."); ESSENTIAL LAWYERING SKILLS, *supra* note 37, at 56; LINDER & LEVIT, *supra* note 66, at 250.

92 *See* Paul R. Tremblay & Carwina Weng, *Multicultural Lawyering: Heuristics and Biases, in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 143, 146 (Marjorie A. Silver ed., 2007) [hereinafter *Multicultural Lawyering: Heuristics and Biases*] (observing that the varied personal characteristics of clients "matter a great deal in the interviewing and counseling process").

93 Trust has been called the most important component of the lawyer-client relationships. LINDER & LEVIT, *supra* note 66, at 203 ("Nothing--and we mean nothing--is more important in the lawyer-client relationship than mutual trust"). Not surprisingly, trust is also central in the parallel doctor-patient relationship, where patients "will only open up once they feel they can trust a physician, and sensing that deep listening is present further solidifies that sense of trust." *See Listening Practices of Exemplary Physicians, supra* note 88, at 157 (noting that this "cycle ... once established, fosters a level of mutual understanding that benefits both physician and patient").

94 Appreciating and taking into consideration that lens can help the listener fully understand not just what the speaker is communicating, but who the speaker is. *See* ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 45; *see also id*. at 53 ("A lawyer can be effective only if the lawyer understands cultural differences and knows how to recognize and deal with them."). In addition, the initial communications between parties will help "decide our preferences for future interaction, and our first impressions can strongly influence subsequent relational progression." *See Listening Competence, supra* note 76, at 2.

95 *See Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 143, 148 (defining culture as "all of the customs, values, and traditions that are learned from one's environment"); ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 53.

96 The importance of cultural identity lenses may be heightened in situations where the speaker and listener are from very different backgrounds and share little in the way of identity. But they are important in all conversations involving all people. *See Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 151 ("[*A*]ll counseling is cross-cultural--even an interaction between a male WASP lawyer from Newton Centre, Massachusetts and his male, WASP client from the same city.").

97 *See id*. at 149 (describing culture as "neither static nor easily knowable").

98 *See generally Connecting with Clients Across Culture, supra* note 58, at 185.

99 There are multiple ways of thinking about this. From a general perspective, participants in a conversation may have very different ideas of what effective listening means and how it is demonstrated, especially if there is a cultural difference between them. *See* Margarete Inhof & Laura Ann Janusik, *Development and Validation of the Imhof-Janusik Listening Concepts Inventory to Measure Listening Conceptualization Differences Between Cultures,* 35 J. OF INTERCULTURAL COMM. 79, 92-93 (2006) (identifying significant cross-cultural differences in what listening means, as well as the relational and informational goals of listening). And in the law setting, lawyers may undercut effective communication and skew a speaker's meaning by focusing on "crafting the strongest legal case." *See Connecting with Clients Across Culture, supra* note 58, at 197.

100 *See* LAWYERS AS COUNSELORS, *supra* note 34, at 32-40; *Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 148 ("[A] better lawyer will understand that the cultural background of a lawyer or a client matters-- it can affect how that person will behave and respond to behaviors suggested by skill models or theories of good lawyering").

101 *See* ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 55.

102 *See id*.

103 *See* LINDER & LEVIT, *supra* note 66, at 1-35; ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 55.

104 *See* ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 55.

105 *See id*. at 56.

106 *See* ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 66.

107 *See* LAWYERS AS COUNSELORS, *supra* note 34, at 36.

108 *See Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 161-62 (discussing narrative preferences based on culture).

109 This is the opposite of isomorphic attribution. *See Connecting with Clients Across Culture, supra* note 58, at 187 n.9 ("A capacity to make isomorphic attributions requires the lawyer to focus on the differing connotations that a word or act may have in the different worlds inhabited by the client and lawyer."). Failure to take the speaker's culture into consideration when evaluating lawyer-client communication has been referred to as "cultural imperialism." *See Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 152 ("[A] critical responsibility of cross-cultural practice is to understand, respect, and work with your client's preferences and values ... [and] privilege your client's cultural preferences and values, but not yours ....").

110 *See* LAWYERS AS COUNSELORS, *supra* note 34, at 38-39 (discussing, generally, asking direct questions of the speaker to elicit details about her cultural identity lens).

111 The speaker may alternatively find these kinds of questions to be rude, although that response may be balanced against another reasonable client perspective, which would appreciate the listener's attempt to understand the speaker. *See id*. at 39.

112 *See id*. at 33-34.

113 *See id*.

114 *See id*.

115 *See Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 148.

116 *See id*.

117 *See* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling,* 27 GOLDEN GATE U. L. REV. 345, 18-19 (1997); *Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 154 ("A culturally competent lawyer ought to have available to her resource materials which would explain the cultural traits, customs, and values that she can expect to encounter in her work with diverse clients."); *Connecting with Clients Across Culture, supra* note 58, at 205-07 (discussing the importance of gathering culture-specific information related to the client); ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 57-58.

118 *See* LAWYERS AS COUNSELORS, *supra* note 34, at 34, 36-37 (providing generalized listings of countries as feminine or masculine, long term or short term, and collective or individualistic, among other categories). Another benefit of this approach is to reduce the distractions the lawyer-listener may experience during a conversation, so his attention can be focused on the substance of the conversation. *See id*. at 44 (discussing client distractors as one obstacle to effective listening).

119 *See Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 154.

120 Scholars in other disciplines have identified various dimensions of human interaction that might be especially contingent on cultural and identity perspectives, at least in the abstract. *See, e.g.,* LAWYERS AS COUNSELORS, *supra* note 34, at 34-37 (including the dimensions of "Masculinity/Femininity," "Long-Term/Short Term Orientation," and "High Context/High Content Communication").

121 *See Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 154-57.

122 *Id*. at 157-60.

123 *Id*. at 160-61.

124 *Id*. at 161-63.

125 *See* LAWYERS AS COUNSELORS, *supra* note 34, at 34-35 (citing JACK SCARBOROUGH, THE ORIGINS OF CULTURAL DIFFERENCES AND THEIR IMPACT ON MANAGEMENT 10 (1998)) (discussing how this dimension assesses the extent to which an individual prefers formal rules and structured situations, as compared to flexibility and low-rule situations).

126 *See* LAWYERS AS COUNSELORS, *supra* note 34, at 35; *Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 163-66.

127 *See Interpersonal Communication, supra* note 75, at 112. By focusing on the unique characteristics of the individual speaker and adjusting accordingly, the active listener maximizes interpersonal listening. In this context, "one does not try to speak for the other or to impose one's own language, concepts, and interpretive schemes on the other." *Id*.

128 *Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 150-51.

129 *See* ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 58.

130 *See id.*; *see also Connecting with Clients Across Culture, supra* note 58, at 188 (observing that with the proper approach, "[c]ulture takes its rightful place as one but not the only explanatory theory for shaping and interpreting interactions with clients").

131 *See Relational Lawyering, supra* note 63, at 482.

132 *See id*. at 481.

133 *See Measuring Behavioral Components of Listening, supra* note 56, at 125 (describing one component of being a competent listener as "attend[ing] with an open mind," which includes having "an awareness of personal, ideological, and emotional biases" and "awareness that each person has a unique perspective"); *Relational Lawyering, supra* note 63, at 485-86 (noting that "[r]ecognizing the importance of context begins with appreciation of one's own context, and needs to include a similar effort to appreciate the context of another person," and that "each individual brings a context into every interaction" as a core principle of communication perspective).

134 *See Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 169.

135 *See id*. at 171.

136 *See Connecting with Clients Across Culture, supra* note 58, at 196-200 (discussing the value of mindfulness in the listening process to better understand and connect with the speaker).

137 *Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 173-74 (citing JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTION PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 249-50 (2d ed. 2001)).

138 In reality, the listener should perhaps be most focused on understanding and appreciating the subjective lens of the speaker-client. *See Listening Practices of Exemplary Physicians, supra* note 88, at 157 (explaining, in the medical context, that the "listener deliberately suspends his or her own experience temporarily in order to be available to fully enter the patient's model of the world").

139 *See Connecting with Clients Across Culture, supra* note 58, at 196-200. For a general discussion of mindfulness in the context of lawyering, *see* Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers, and Their Clients,* 7 HARV. NEGOT. L. REV. 1 (2002).

140 *See* Ala-Kortesmaa & Isotalus, *supra* note 38, at 235 (listing "behavioral" or "what I do when I listen" as an essential dimension of listening competence); *Active Listening in Peer Interviews, supra* note 5, at 35 (describing value of both verbal and nonverbal cues, but focusing study on message paraphrasing); *Supportive Listening II, supra* note 51, at 263 ("[B]oth verbal and nonverbal behaviors are important when judging others as supportive listeners"). Some experts break down listening responses into generic and specific, rather than nonverbal and verbal; generic responses come earlier in the conversation and specific responses come later. *See Listeners as Co-Narrators, supra* note 69, at 950.

141 *See Supportive Listening II, supra* note 51, at 251.

142 Graham D. Bodie et al., *The Role of "Active Listening" in Informal Helping Conversations: Impact on Perceptions of Listener Helpfulness, Sensitivity, and Supportiveness and Discloser Emotional Improvement,* 79 W. J. OF COMM. 151, 153 (2015) [hereinafter *Informal Helping Conversations*].

143 *Id*. at 153.

144 *Listeners as Co-Narrators, supra* note 75, at 941-42.

145 *See* Susanne M. Jones, *Supportive Listening,* 25 INT'L J. OF LISTENING 85, 88 (2011) (describing a variety of immediacy cues recognized through studies as being influential); *see also* ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 83 ("What might help a client tell you as much as possible? You can build a relationship in which the client feels comfortable and trusts easily.").

146 *Relative Effectiveness of Active Listening, supra* note 5, at 15 (noting increased instrumental and relational effects) (citing another source).

147 *See* Bauer, Figl & Motschnig-Pitrik, *supra* note 48, at § 2.1; Susanne M. Jones & Laura K. Guerrero, *The Effects of Nonverbal Immediacy and Verbal Person Centeredness in the Emotional Support Process,* 27 HUM. COMM. RES. 567, 570 (2001) (describing both long-term and short-term benefits); *Relative Effectiveness of Active Listening, supra* note 5, at 17 (describing the increased instrumental and relational effects gained with use of immediacy behaviors).

148 *Informal Helping Conversations, supra* note 142, at 152.

149 *Id*. at 151.

150 *Id*. at 165.

151 *Id*. at 166.

152 Manusov et al., *supra* note 5, at 113 (citing Riggio's core elements); *Active Listening in Peer Interviews, supra* note 5, at 36-37 (noting active listening appears to benefit the person who engages in it because it builds confidence in problem solving skills and increases work satisfaction).

153 Catherine S. Fichten et al., *Verbal and Nonverbal Communication Cues in Daily Conversations and Dating,* 132 J. OF SOC. PSYCHOL. 751, 753 (1992).

154 *See* Manusov et al., *supra* note 5, at 113 (describing studies finding that participants' gender was a "confounding variable"); Fichten et al., *supra* note 153, at 763 (noting the nature of the interaction--everyday conversations or more formal interactions--influenced the way speakers interpreted social listening cues).

155 Fichten et al., *supra* note 153, at 754 ("The literature on gender differences in communication behaviors reports a variety of discrepancies between men and women in the use of language and nonverbal behaviors ....").

156 *Compare* Corine Jansen, *Sex Differences in Listening,* https://www.globallisteningcentre.org/sex-differences-in-listening/ (last visited Oct. 17, 2021) (describing a study finding men and women employ different listening styles and actually have different brain activities while listening); Fichten et al., *supra* note 153, at 753 (noting in the study that male and female subjects did not differ on the number of different communication cues they reported in the contexts).

157 *See Supportive Listening II, supra* note 51, at 262; Jones & Guerrero, *supra* note 147, at 568 (describing physical behaviors that "reflect empathy, interpersonal warmth, and psychological closeness"); LAWYERS AS COUNSELORS, *supra* note 34, at 45-46 (categorizing silence and minimal verbal prompts as "passive listening").

158 *Informal Helping Conversations, supra* note 142, at 156.

159 Jones & Guerrero, *supra* note 147, at 570.

160 *Supportive Listening II, supra* note 51, at 253.

161 *See* Timm & Schroeder, *supra* note 4, at 109-10.

162 *Id*. at 109.

163 *Id*. at 112.

164 *See Multicultural Lawyering: Heuristics and Biases, supra* note 92, at 157-60 (noting people from different cultures often differ on their "kinesics," or the way in which bodily movements are used and interpreted).

165 Bauer, Figl & Motschnig-Pitrik, *supra* note 48, at § 2.1 (quoting another source).

166 *Connecting with Clients Across Culture, supra* note 58, at 196 n.25 (warning that "[t]oo many lawyers know from good experience that it is possible to employ active listening techniques without a high quality of listening taking place.").

167 Bauer, Figl & Motschnig-Pitrik, *supra* note 48, at § 2.1 (quoting another source).

168 *See Connecting with Clients Across Culture, supra* note 58, at 200.

169 *Supportive Listening II, supra* note 51, at 263 (reporting that in all but one reported judgment task, "the verbal dimension was seen as more relevant to listening-related judgments than the nonverbal dimension").

170 Manusov et al., *supra* note 5, at 3 (stating that active listeners can be active and empathetic in sensing, processing, and responding stages).

171 *See Informal Helping Conversations, supra* note 142, at 153; *Relative Effectiveness of Active Listening, supra* note 5, at 14.

172 *See* ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 84 (noting that active listening "reassures the client that what the client is saying has an effect on you"); LAWYERS AS COUNSELORS, *supra* note 34, at 11 (explaining that a listener's goal is not to eradicate emotions, but to recognize and analyze them and then to figure out how to respond appropriately).

173 *Active Listening in Peer Interviews, supra* note 5, at 24.

174 *Informal Helping Conversations, supra* note 142, at 153.

175 *Id*. at 166.

176 Carsta Simon, *The Functions of Active Listening Responses,* 157 BEHAV. PROCESSES 47, 47 (2018).

177 *See Informal Helping Conversations, supra* note 142, at 166 (hypothesizing that the difference in impact between verbal and nonverbal cues may be a difference in impact between specific and generic cues).

178 *See* LAWYERS AS COUNSELORS, *supra* note 34, at 48.

179 *See Connecting with Clients Across Culture, supra* note 58, at 190 (noting that narrative is the best default mode to allow a client to tell the full story).

180 *Id*. at 190-91.

181 *Id*.

182 LAWYERS AS COUNSELORS, *supra* note 34, at 48 ("[A]ctive listening responses probably fulfill the empathic ideal of 'non-judgmental acceptance' ....").

183 *Id*. at 49.

184 *Id*. at 49-55 (providing specific guidance on each skill).

185 *See* Jones & Guerrero, *supra* note 147, at 567; *Supportive Listening II, supra* note 51, at 4 (noting that beneficial emotional support must be person centered).

186 Jones & Guerrero, *supra* note 147, at 569.

187 *Id*.

188 *Id*. at 659.

189 *Id*.

190 *See Relational Lawyering, supra* note 63, at 491-92 ("[W]hen I find it difficult to listen to a client or an opponent, I am being defensive. There is something about me I am defending. When I am defending, I am not listening.").

191 *Id*. at 484 ("In the context of the attorney and client relationship, the goal is to encourage law students to be interested in the client as a human being .... Taking a communication perspective means trying to remain curious and open-minded about the client.").

192 *Active Listening in Peer Interviews, supra* note 5, at 45.

193 *Id*.

194 *See Relative Effectiveness of Active Listening, supra* note 5, at 16-17; *See Active Listening in Peer Interviews, supra* note 5, at 37 (citing another source).

195 *See Active Listening in Peer Interviews, supra* note 5, at 36-37.

196 *See id*. at 35 (concluding that waiting to respond, along with verbal and nonverbal cues, is a universal trait of active listening); *see generally Supportive Listening II, supra* note 51 (noting the importance of nonverbal response strategies for listeners); *see* Babita Tyagi, *Listening: An Important Skill and Its Various Aspects,* THE CRITERION 1, 1 (2013).

197 *Informal Helping Conversations, supra* note 142, at 167.

198 *Id*.

199 Tyagi, *supra* note 196, at 2.

200 *See* PETER STOYKO, ACTIVE LISTENING (2020) http://www.elanica.com/collaboratory/ActiveListening2020-pages.pdf.

201 Scott Stiver, *LAER Bonding Process Essential for Effective Selling,* CAREW INTERNATIONAL (May 30, 2014), https://www.carew.com/sales-training-blog/laer-bonding-process-timeless-essential-effective-selling.

202 *Id*.

203 *See* Tyagi, *supra* note 196, at 2 ("The effective listener makes sure that he or she doesn't begin this activity too soon; beginning this stage of the process before a message is completed requires that we no longer hear and attend to the incoming messages--as a result, the listening process ceases.").

204 *See Connecting with Clients Across Culture, supra* note 58, at 220.

205 *Id*. at 219.

206 *Id*.

207 Table 1 is adapted from Melle et al., *supra* note 14, at 1005. In a multi-stage process drawing on scholarship from education theory and medical education, 59 members on an international CBME expert panel identified five core components to CBME. *Id*.

208 Adapted from *id*.

209 Neil Hamilton, *Formation-of-an-Ethical-Professional-Identity (Professionalism) Learning Outcomes and E-Portfolio Formative Assessments,* 48 U. PAC. L. REV. 847, 853 (2017).

210 *Hollaran Competency Milestones,* HOLLARAN CENTER, https://www.stthomas.edu/hollorancenter/hollorancompetencymilestones/ (last visited July 31, 2021). This continuum/alignment model, developed by Jerry Organ and the author, builds on the Dreyfus and Dreyfus Model of development from novice to expert. Dreyfus, *supra* note 27, at 177-81. A "competent learner" is ready to take the bar and begin to practice law after passing the bar exam.

62 SANCLR 1

DISCP MA-CLE 4-1

Massachusetts Continuing Legal Education, Inc.

2021
Massachusetts Discovery Practice
Chapter 4

SELECTED CASE INVESTIGATION TECHNIQUES [FNa1]

Brian M. Casaceli, Esq. [FNa]
Mirick, O'Connell, DeMallie & Lougee LLP, Westborough
Richard C. Van Nostrand, Esq. [FNb]
Mirick, O'Connell, DeMallie & Lougee LLP, Westborough

4th Edition 2021

§ 4.1 INTRODUCTION

§ 4.2 THE GAME PLAN FOR YOUR INVESTIGATION

- § 4.2.1 Knowing Your Case and Spotting Your Issues
- § 4.2.2 Identify Your Potential Sources of Information
  - (a) Internet Resources
- § 4.2.3 Working with Your Client
- § 4.2.4 Working with Other Witnesses
- § 4.2.5 Identify and Gather Documents
- § 4.2.6 Evolve Your Investigation
- § 4.2.7 Formal Discovery—Knowing Your Limits

§ 4.3 WORKING WITH YOUR CLIENT

- § 4.3.1 Identifying Your Goals
  - (a) Establish a Relationship with Your Client
  - (b) Evaluate Your Client as a Client
  - (c) Evaluate Your Client as a Potential Witness
  - (d) Gather Information
  - (e) Refine the Legal Issues Involved
  - (f) Recommend a Course of Action
- § 4.3.2 Planning and Preparation
  - (a) Formulate an Agenda
  - (b) Create a Chronology
  - (c) Make an Outline
  - (d) Where Should You Meet?
  - (e) Who Should Be Present—Or Not Present?
  - (f) Taking Notes and Making Recordings
  - (g) Envision Your Next Steps
- § 4.3.3 The Client Interview
  - (a) Learn to Listen
  - (b) Find an Icebreaker to Put the Client at Ease
  - (c) Encourage Your Client to Tell the Story

(d) Recognize the Need for Empathy and Your Client's Need to Vent
(e) Follow a Chronological Sequence
(f) Follow Up on Key Points and Ask the Tough Questions
(g) Continue to Identify Legal Issues
(h) Find Out Who the Other Players Are
(i) Find Out What Documents or Electronic Records Exist, and Take Steps to Preserve Them
(j) Size Up the Client as a Possible Witness
(k) Size Up the Client as a Decision Maker
§ 4.3.4 The Postinterview Game Plan
(a) Before You Leave: Assign Homework with Realistic Deadlines
(b) After You Go: Review and Update Your Notes
(c) Send a Follow-Up to Your Client
§ 4.3.5 Special Issues in Initial Client Contacts
(a) Representation of Multiple Clients
(b) Privilege Issues Relating to Corporate Clients
§ 4.4 WORKING WITH OTHER WITNESSES
§ 4.4.1 Identifying Potential Witnesses
§ 4.4.2 Interview Preparation
§ 4.4.3 Interview Process
§ 4.4.4 Use of Witness Statements
(a) Consider Reducing the Witness's Statement to Writing
(b) Dealing with Unfavorable Witness Statements
(c) When to Proceed Directly to a Deposition
§ 4.4.5 Ex Parte Contact with Employees of a Corporate Opponent
§ 4.5 USING PRIVATE INVESTIGATORS
§ 4.5.1 Services Provided
(a) Location of Witnesses
(b) Tracking Down Reluctant Witnesses
(c) Witness Interviews
(d) Asset Investigation
§ 4.5.2 Choosing an Investigator
§ 4.5.3 Work Product Issues
§ 4.6 THE LIVING INVESTIGATION
§ 4.7 BEYOND ZEALOUS ADVOCACY: AN ATTORNEY'S RESPONSIBILITY
✓ CHECKLIST 4.1—Investigation Game Plan
✓ CHECKLIST 4.2—Client Meeting Agenda
✓ CHECKLIST 4.3—Outline of Client Interview
✓ CHECKLIST 4.4—Checklist for Client Interview
EXHIBIT 4A—Initial Chronology
EXHIBIT 4B—Updated Chronology
EXHIBIT 4C—Litigation Chronology

EXHIBIT 4D—Joint Representation Agreement

Scope Note

This chapter discusses a methodology for informal information gathering in litigation matters. It begins with the creation of an investigation game plan, including identification of potential sources of information such as the client, other nonparty witnesses, documents and electronically stored information, and other public resources. The chapter then discusses each of the actual investigation steps, including the client interview, working with other witnesses, and the potential uses for private investigators. Included as exhibits are checklists, samples, and templates that provide the reader with a helpful toolbox for conducting effective investigations as a supplement to formal discovery efforts.

§ 4.1 INTRODUCTION

Although we as lawyers have transformed the word "discovery" into a term of art, it is important to realize that Rules 26 through 37 of the Massachusetts and Federal Rules of Civil Procedure are not the only ways to ""discover" information concerning your case. A better analytical approach is to consider the word "discover" in its *Webster's Dictionary* sense: "to find out; learn of the existence of." Effective investigation of your case should therefore include both formal *and* informal means of obtaining relevant information. Formal discovery methods are discussed elsewhere in this book; this chapter focuses on informal methods of investigation.

Effective investigation does not just happen. Like most of what we as attorneys do, it requires thought, reflection, and preparation. Rather than simply jumping in, you should develop an investigation game plan at the outset. This will help keep you organized so that your investigation will be valuable throughout your representation of your client.

§ 4.2 THE GAME PLAN FOR YOUR INVESTIGATION

An effective investigation requires a starting point—an investigation game plan.

There are six basic steps in the creation of such a plan:

- knowing what your case is or may be about, and spotting your issues;
- identifying potential sources of information;
- working with your client;
- working with other witnesses;
- identifying and gathering pertinent documents, data, and electronically stored information; and
- adapting your investigation as new information is learned. These steps will be discussed in more detail below.

A rudimentary outline of an investigation game plan for a basic automobile accident case is included as **Checklist 4.1**.

§ 4.2.1 Knowing Your Case and Spotting Your Issues

The first step in developing your investigation game plan is to identify your client's problem. In most instances, this is simple and straightforward. A client calls, having been injured in an accident. Or the client purchased a piece of equipment that does not work. Or a claim of discrimination has been filed by a disgruntled former employee.

At least at the outset, it should be fairly easy to identify what legal issues are involved in the matter. List them on your investigation game plan.

One of the goals of your investigation as it progresses should be to identify other potential legal issues you may not have spotted at the outset. Will there be a claim of comparative negligence? Was there a disclaimer of liability or limitation on the recovery of certain damages? Is the employee a qualified handicapped person who is entitled to legal protection? A good investigation game plan will help you to flesh out these less-apparent aspects of your case. As you identify additional issues, use your investigation game plan to keep track of them as your investigation proceeds.

§ 4.2.2 Identify Your Potential Sources of Information

In almost every instance, your client will be your primary source of information, not only for the identification of the problem but also for whatever other sources of information there may be. If your client is a business entity, who are the other individuals at the entity who have information about the issue? Who outside the entity knows anything? Your client may not know everyone and everything but can give you a number of places to start. Your client can also identify what documents might be out there, whether in old-fashioned hardcopy form or in electronic form. Are there emails? Text messages? Voicemails? Facebook, Twitter, and Instagram posts regarding the subject matter? Other new forms of communication?

(a) ***Internet Resources***

Do not overlook the simple or obvious investigative techniques before moving on to the more complicated—and often more expensive—ones. Put another way: try Google, then Westlaw. Add Facebook, Twitter, Instagram, LinkedIn, the Massachusetts secretary of state's website, and the vast array of free Internet resources.

There is a growing recognition that advancing technology may even give rise to an ethical obligation to investigate social media—a "duty to Google" as some have referred to it. *See* Heather L. LaVigne, Assistant Bar Counsel, Massachusetts Board of Bar Overseers, "From Technophobe to Technolawyer: A Lawyer's Duties Related to Technology Competence and Prevention of Inadvertent Disclosure," Mar. 2018, https://bbopublic.blob.core.windows.net/web/f/TechCompetence.pdf ("[D]iligent representation might require attorneys to consider whether evidence exists on a client's Facebook page or on the Facebook page of an opposing party or a witness, to the extent that those pages are public"); District of Columbia Bar, Ethics Opinion 371, "Social Media II: Use of Social Media in Providing Legal Services," https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-371 ("[c]ompetent and zealous representation ... may require investigation of potentially relevant social media postings of adverse parties and their counsel, other agents, and experts").

Ethics Commentary

> Comment [8] to Mass. R. Prof. C. 1.1 broadly states that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in law and practice, *including the benefits and risks associated with relevant technology*, and engage in continuing study and education" (emphasis added).

As a cautionary note, however, such social media investigation has its limits. It is permissible to view an adverse party's public Facebook page. It is not permissible to attempt to gain access to private posts or information in a clandestine or deceptive manner. For example, you cannot "friend" the adverse party without disclosing your role, nor can you have someone do it on your behalf, i.e., "pretexting." *See* Massachusetts Bar Association Ethics Opinion 2014-5 (May 2014), www.massbar.org/publications/ethics-opinions/ethics-opinions-2014-opinion-2014-5 ("A lawyer for a party may 'friend' an unrepresented adversary in order to obtain information helpful to her representation from the adversary's nonpublic website *only when the lawyer has been able to send a message that discloses his or her identity as the party's lawyer*.") (emphasis added). *See* John G. Browning, "Keep Your 'Friends' Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media," *St. Mary's J. on Legal Malpractice & Ethics*, Mar. 2013.

Ethics Commentary

> Of course, you cannot contact a person represented by counsel through social media. Mass. R. Prof. C. 4.2. Even if the person is not represented, "pretexting" implicates other ethical obligations. Rule 4.3 of the Massachusetts Rules of Professional Conduct provides that
>
> > [i]n 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 that misunderstanding.

During the life of your case—from your initial client meeting, through discovery, mediation, settlement, or trial—there may be no tool that you will rely on more, or find more versatile, than the Internet. For more information on this topic, see chapter 7 of this book.

With all of the resources available over the Internet, using a proper chronological and intuitive approach can yield desired results. For example, the Massachusetts secretary of state corporate database (https://corp.sec.state.ma.us/corpweb/corpsearch/CorpSearch.aspx) can provide the location of the opposing entity, if unknown, and the identity and addresses of the principals and resident agent. A Pipl search can yield prior addresses and other associations. Zillow lists property valuations and recent transactions, employment history will be available on social networking sites such as LinkedIn, and salary information may be available on GlassDoor. Although sites such as Zillow and GlassDoor should not be depended on for "trial precise" information, a few minutes of targeted searching can provide a comprehensive initial profile of the principals of an opposing entity. If the adverse party is already represented, a similar search on opposing counsel can provide you with a good scouting report on practice focus, experience and expertise, and potentially even litigation style. All of this information may not be directly pertinent to the litigation, but a skilled litigator may utilize these profiles in any number of ways.

§ 4.2.3 Working with Your Client

The person who signs your engagement letter will almost always be your most valuable resource. As detailed below in § 4.3, working with your client requires thorough planning and preparation. What are your goals? What do you need to think about in advance? What techniques will maximize the benefits of that relationship?

§ 4.2.4 Working with Other Witnesses

In most matters, your client and the adverse party do not have a monopoly on information, and there are almost always other witnesses to the events that are central to the dispute. These arguably unbiased individuals may provide the most credible information in situations where there are conflicting accounts of what happened. As perhaps the simplest example, was the light red when the other driver entered the intersection? Your opponent says "no" and your client says "yes." What does the man on the corner say? Your investigation must include speaking with that eyewitness.

See § 4.4, below, for a discussion on interactions with nonparty witnesses and highlights of the challenges you may face.

§ 4.2.5 Identify and Gather Documents

You should attempt to identify whatever documents and electronically stored information (emails, text messages, voicemails, postings to social media, etc.) that may exist, where they are located, and the means by which they can be identified and retrieved. With the evolution of technology, think creatively about the ever-changing ways in which we communicate with each other.

§ 4.2.6 Evolve Your Investigation

Allow your investigation to evolve as you learn new facts, discover new documents or witnesses, or encounter conflicting information. See § 4.6, below, for tips for conducting a dynamic investigation.

§ 4.2.7 Formal Discovery—Knowing Your Limits

In developing your investigation game plan, it is important to recognize the limits, ethical or otherwise, on your investigation. In many instances, the best means of obtaining certain information will be to utilize formal discovery under the rules of civil procedure.

Practice Note

Prompt investigation is critical. Virtually all of the major civil courts establish a schedule for the completion of discovery. That schedule should be evaluated, and the case investigation planned out, so that formal discovery can be undertaken well before one side or the other is forced to seek an extension of the schedule.

§ 4.3 WORKING WITH YOUR CLIENT

§ 4.3.1 Identifying Your Goals

The natural starting points for your investigation are your client, your client's documents and tangible things, and sources affiliated with your client. For an individual client, these sources may include, for example, the client's accountant, medical provider, or attorney. In the case of a corporation, such sources may include corporate employees, attorneys, accountants, and consultants.

Obtaining information from your client may seem like a simple concept: You have a client. Your client—wronged by someone else or accused of wronging someone— has a problem. You talk to your client and you find out the facts. What could be so hard about that?

Maybe nothing, if you know how to do it. But if you do not identify your goals, do not prepare in advance, are not savvy about your technique, or are not thorough or persistent enough, you could miss an important fact. That could mean being blindsided at a deposition or trial—all because you did not know how to interview your client. And poor preparation or technique could cause you to miss an ideal opportunity—particularly with a new client—to instill confidence and begin building a strong and effective attorney-client relationship.

The ultimate success of your interview will be guided by your preparation before the interview, your questions during the interview itself, your demeanor, and your followup after the interview. So, before you get started, it is useful to look more closely at the goals of the interview itself.

(a) ***Establish a Relationship with Your Client***

Building a relationship with your client and acquiring facts are interdependent. The stronger your relationship with your client, the more likely facts and information will flow freely and vice versa. Building a relationship is a two-way street: while it is a

chance for you to begin to evaluate your client and your client's case, it is also your client's first opportunity to size up your competence and trustworthiness.

Note that your client may have concerns that are seemingly in the background but nevertheless important to identify. For example, is your client struggling with financial issues that may affect your client's desire to settle? Does your client worry that complaining about the employer's failure to accommodate may ultimately cost your client a job? Is your client's pride or self-esteem interfering with an ability or willingness to admit unfavorable facts? Do not ignore the range of human emotions that may be at work on your client. The more completely you come to understand such complementary concerns, the more effectively you will serve your client's needs.

(b) ***Evaluate Your Client as a Client***

The interview may be your first opportunity to see firsthand the ease or difficulty with which you will be able to work with your client. As your initial interview and subsequent interactions progress, look for the following cues that might help you size up your client:

- Is the client able to articulate the problem to you?
- Despite any anger about the issue is your client able to process your questions or comments?
- Can the client focus on the issue and what will be needed to address the problem?
- Can the client see the other side of the issue and process that there are two sides to every story?
- Is the client listening to you?
- How demanding will the client be?
- Will the financial cost of the representation be beyond the client's means?
- Does it appear that the financial cost of the representation, no matter how reasonable, will be a constant irritant?
- Will the client be able to make decisions?
- Is the interviewee the best person for you to work with directly, or is there someone else who will be better to work with on a day-to-day basis?
- Is the client just exploring options or ready to take action?

The purpose of identifying these issues is not to scare you away from representing your client—although you may decide that this is the best option—but rather to help you adjust your approach to work with your client's hot buttons and sensitivities in the most effective manner.

(c) ***Evaluate Your Client as a Potential Witness***

Your client's demeanor and capability as a witness is something you can work to improve during the course of your relationship, but the interview will give you a good initial read. Your interview is more than just asking questions and listening to answers: consider how your client processes information, formulates responses, describes events, interprets motivations, understands cause and effect, psychologically responds to the situation, and generally comes across as a credible relator of information.

(d) ***Gather Information***

There are important aspects of the information-gathering process that may be overlooked without thoughtful preparation and disciplined execution. In addition to gathering the material facts, look to

- identify the strengths and weaknesses in the parties' positions;
- identify additional witnesses to interview; and
- identify documents (hardcopy and electronically stored information) to obtain from your client, the opposition, and third persons.

(e) ***Refine the Legal Issues Involved***

It is not uncommon that the problem initially identified by the client actually involves more, or different, legal issues than initially anticipated. Moreover, some of your client's issues may not be legal at all. Part of your work before, during, and after your client interview will involve adjusting and refining your legal analysis to address the acquired facts.

(f) ***Recommend a Course of Action***

Most clients want their attorneys to offer opinions on their cases and give advice as to what they should do. One of the primary drivers of your investigation is to give you the information you need to fairly size up the case and offer sound advice. Be careful

not to let your opinions and advice outpace the information you have. In most instances, it is better to defer than to have to walk back your advice because you did not give your investigation enough time to mature.

Also, be careful of the expectations that you may create regarding the eventual outcome. If you do not yet have all the necessary information to opine on the client's chances, qualify any opinions you may give. If you perceive that the client is not heeding your reservations, it may be prudent to reduce that opinion and the qualifiers to writing.

§ 4.3.2 Planning and Preparation

The number one rule in preparing for a client interview is *do your homework*. While a client interview may not be part of the formal discovery process, it requires an equal amount of preparation and attention to detail. Before you walk into a client interview, you want to know as much information as possible about the following:

- Your client. If your client is an individual, this may include personal, educational, and professional background. If your client is corporate, this will likely include the nature and location(s) of the business; the corporate structure; the identities of principals, partners, or board members; and where the person you will be speaking with falls in that hierarchy.
- The facts, to the extent your client has already shared them with you.
- The legal issues, both those already identified and those you think may come into play.
- The existing and potential adverse parties. As with your client, information on an adverse party may include personal, educational, and professional background if the party is an individual. If the party is corporate, information will likely include the nature and location(s) of the business, the corporate structure, and the identities of principals, partners, or board members.
- Relevant documents, including those that your client has provided to you and other documents that are likely to exist.

As set forth above and in chapter 7 of this book, there are a number of Internet-based sources from which you may gather some of the background facts and information that will help you to prepare for your interview. Particularly for cases that are document intensive—breach-of-contract cases, for example— do your best to obtain the critical documents ahead of time. Sometimes there is very little room for error or time to conduct additional research when you are attempting to read, interpret, and analyze contractual language and its ramifications while sitting across from the client.

(a) ***Formulate an Agenda***

Now that you have a good basic idea of the case and the players, formulate an agenda for the meeting. This is the roadmap for what topics you intend to cover with the client, and it will help you to stay organized. In most instances, the agenda should be very basic and consist of only a handful of topics. As with the outline described below, it will avoid your walking out the door not having discussed an important item and having to backtrack with your client. A sample meeting agenda is included as **Checklist 4.2**.

(b) ***Create a Chronology***

Armed with what you have learned about your client, the adverse party, the potential witnesses, the facts, and the legal issues, you should have a pretty good understanding of the basic elements of the case and the flow of the most significant events. Although there is no shortage of organizational strategies, working from a chronology is highly recommended. Nearly all legal problems have a time element to them. As a result, our brains tend to do their best at processing information, including the credibility of conflicting accounts, when that information is presented in a time sequence. In addition, many witnesses, particularly if they have an emotional attachment or a reaction to the case, will not relay the information in a linear fashion, so this exercise can help you ensure that you have received all the important information. Moreover, working from a chronology provides you with a centralized location from which to view and refine your information as more is gathered. It can also be a handy place to list witnesses and their roles in the case. A sample chronology is included as **Exhibit 4A**. For illustrative purposes, further evolved chronologies are included as **Exhibits 4B** and **4C**.

(c) ***Make an Outline***

The best way to avoid forgetting something once the interview gets underway is to make an outline for your interview and to refer back to it periodically. This document is similar to an outline that you might make in preparing for a deposition. The level of detail will undoubtedly vary depending on your experience as a practitioner, your note-taking style, and the complexity of the case. In some cases, a general outline may be sufficient; in others, you may want to consider including specific questions, to address, for example, the names of potential witnesses, missing documents, or inconsistencies. A sample interview outline is included as **Checklist 4.3**.

(d) ***Where Should You Meet?***

Where you meet with your client can be an important decision. The primary options—your office or the client's office or home—have potential benefits and drawbacks. Give thought to what best serves the purpose of your interview.

Your Office

Meeting in your office can have the benefit of avoiding interruptions and keeping your client focused. Depending on your office, it may also lend an air of professionalism to the meeting and help instill your client's confidence in you. Support services, such as the copying of documents that the client brings to the meeting, will be close at hand.

The rule of first impressions definitely applies: everything from how the client is greeted to the physical setting of your meeting will play a role in your client's perception, not only of your competence as an attorney but also of the level of importance you attach to the client's problem. Make sure that someone is there to greet your client in a professional manner immediately upon arrival and that the physical location of your meeting—whether a conference room or your own office—is both professional and inviting. The space should be neat and uncluttered, there should be a comfortable place for your client to sit, and all efforts should be made to limit unnecessary interruptions.

The Client's Office

On the other hand, meeting at your client's office or home lets you evaluate your client's environment. Such an opportunity can provide additional clues about the person or business you will be representing. Particularly if the case involves the work environment—for example, a defect in the manufacturing process or a claim of workplace harassment—being able to see the process in operation or the layout of workspaces may be invaluable. Even if the workplace does not play a role in the case itself, it may still tell a story: for example, an office littered with stacks of unfiled papers suggests that your client may be less than organized, which could impact your representation. And meeting in your client's office puts your client in proximity to relevant files and staff, which may be convenient depending on what documents or electronically stored information are needed. The potential downside is that meeting in the client's environment increases the possibility of interruption.

The Client's Home

Your client's home may provide a relaxing setting for your meeting and provide insights into the person you are representing.

A Public Place

Meeting in a public place for this type of interview carries very little benefit and several disadvantages. Such a meeting sacrifices privacy and may even compromise the privileged nature of your communications. It may also create an appearance of lack of professionalism. Unless there is no other option, this is not recommended.

(e) ***Who Should Be Present—Or Not Present?***

Think about who should be present for all or part of your interview.

With limited exceptions, any direct communications between you and your client will be protected by the attorney-client privilege, and the content of those communications will not be discoverable. That privilege, however, can be lost if nonclients are present. For example, if the client's brother (whom the client brings along to the meeting) was a witness to the accident, he should not remain in the room during your discussions with your client, or the privilege will be lost. This is particularly critical with respect to any discussions of strategy or strengths and weaknesses of the case.

(f) ***Taking Notes and Making Recordings***

As you plan for the interview, give advance thought to its mechanics, and in particular how you will capture what your client tells you.

In light of the likely breadth of your interview, it is almost certain that you will be unable to retain all of the conveyed information in your memory, especially while you are also thinking about the answers you have just heard, and formulating followup

questions. Taking notes is therefore commonplace and appropriate, and you should use whatever style allows you to record the information you need without unduly interfering with your efforts to develop a rapport with your client.

What about the possibility of recording your conversation and forgoing note taking entirely? In Massachusetts, recording without the permission of all participants in the conversation subjects the recording party to both civil and criminal penalties. Even if your client will consent, however, recording may not be a good choice. The primary benefits are obvious: doing away with the distraction and delay of note taking and creating a permanent record that can be referred to as your investigation and case unfold. The primary disadvantage is the subtle message it can send to your client: your request to record may be viewed as a self-protective effort on your part, not one designed to advance a trusting collaboration. A lesser drawback is that a recording is at best a clumsy tool; to be useful, it must be listened to or transcribed, and the recording is likely to be more cumbersome than a good set of notes. All things considered, recording your client is not likely to be the best path.

(g) ***Envision Your Next Steps***

As your final preparatory task, give some advance thought to what the next steps will be after the interview. No doubt your client will want to know your plan, and you will instill confidence by having a considered response. While your plan needs to be flexible to incorporate whatever may come up during the interview, walking in with a rough idea of the road ahead should serve you well.

§ 4.3.3 The Client Interview

To some, interviewing is a natural talent. To most, effective interviewing, whether in a legal setting or otherwise, is an acquired skill. But even a first-timer can conduct a productive interview with the proper preparation and knowledge of technique. The points discussed below, and reproduced as **Checklist 4.4** should be kept in mind throughout the interviewing process.

(a) ***Learn to Listen***

First and foremost, put aside your lawyerly tendencies to talk and learn to listen. As lawyers, we are taught to analyze a situation, form opinions, and express those opinions. Before you can analyze a situation, however, you must know what the facts are. You are not going to find them if you are the only one doing the talking.

At the same time, do not forget the importance of body language in conveying your interest and the seriousness with which you take the client's problems. This is not the time to check your texts or emails. Some ways to nonverbally communicate include the following:

- Lean forward. No slouching!
- Maintain eye contact throughout the interview (with appropriate breaks so it does not appear that you are oddly staring or glaring).
- Take notes—but remember the advice in § 4.3.2(f), above, and find a style of note taking that allows you to capture the necessary information while continuing to develop a rapport with your client. Consider using different colors of ink in preparing your outline and taking notes during the interview, so it is clear whose words are whose.
- Nod your head at appropriate times.
- Use appropriate facial expressions in response to what is said.
- Keep your posture open and your arms unfolded.

(b) ***Find an Icebreaker to Put the Client at Ease***

It is likely that both you and the client will have some degree of nervousness about the interview and the serious topics you will be discussing. See if you can find a safe icebreaker to ease that tension. Depending on the client, it could be about the adequacy of the directions to your office, the weather, or, if you are meeting at the client's office or home, some item you noticed ("I saw the framed photograph of you and Larry Bird on the way in—are you a Celtics fan?"). While you do not want to overdo it, this type of preliminary casual conversation can go a long way.

(c) ***Encourage Your Client to Tell the Story***

Encourage your client to tell the story in narrative fashion, in the client's own words. Discard any preconceived notions and let the story take you where it will. At the same time, be an active listener. Your inquiries during the initial portion of the interview should be open ended and should include a considerable number of "what happened next" questions. Interrupt only to get clarification—who a person is, what a term means, how that part of the story connects to the last part. Do not interrupt

to show how smart you are. Your goal is to encourage the free flow of information, redirecting or reining it in only when the story begins to repeat itself or wanders too far afield.

(d) ***Recognize the Need for Empathy and Your Client's Need to Vent***

Aside from what you have to accomplish from the legal perspective, recognize your client's need to vent frustration, anger, or confusion. Be empathetic and hear the client out.

Be supportive but be careful not to become mired in emotional detours. Also, be careful not to let the client's emotions drive your analysis and strategy into a place that subverts your independence and objectivity or oversteps your moral and ethical obligations. As reflected in the preamble to the Massachusetts Rules of Professional Conduct, "[a] lawyer should use the law's procedures only for legitimate purposes and not to harass and intimidate others."

With that cautionary note, listening attentively will help build a rapport with the client, make the client feel more at ease, and pave the way for a relationship founded in open communication.

(e) ***Follow a Chronological Sequence***

As noted above, in most instances a chronological sequence is the best organizational approach. Encourage your client to tell the story "from the beginning" and update your initial timeline based on the client's account. See **Exhibits 4A**, **4B**, and **4C**.

(f) ***Follow Up on Key Points and Ask the Tough Questions***

Do not be afraid ask for clarifications and challenge your client on key points. As you hear the client's story, make note of the topics on which you want to follow up. After the first telling, go back over the client's story. Using your notes and outline as a guide, address issues your client did not raise or glossed over the first time. You will not do your client any favors in the long run by avoiding tough issues.

When returning to important topics, use your common sense to guide the style of your questions. Early in a relationship with a new client, while you are still trying to build a rapport, it may be necessary to soften the lead-in to tough questions. You might preface such questions with phrases such as "the other side might ask ...," or "wouldn't the other side say that ...," or "what would you say to the allegation that ..."

Whether or not you feel the need to adjust the lead-in to tough questions, the questions themselves should be pointed:

- How does that align with what you said before?
- Why would the other side have done that?
- Why didn't you react in a different manner?
- Do you really remember that, or are you just assuming it?

Make sure your questions are clear. Avoid "double barreled" or multipart questions, such as "Did the manager fire the plaintiff and did you tell the manager to do that?" Such questions are confusing and often result in equally unclear answers. If you feel yourself asking a poorly formulated question, or you sense that your client is confused, have the confidence to stop yourself and rephrase it.

Direct questions are also useful here:

- Were you present when ... ?
- Is that document in your possession?
- Were you aware that the company's client list was attached to the email?

When an answer does not ring true or seems incomplete, do not shy away from moments of silence in which you let your client's last answer hang for a few seconds. Silence often creates a psychological space that encourages people to talk and sometimes yields the most useful, unexpected information.

While you are obviously trying to avoid making your questioning feel like a crossexamination or a government interrogation, striking the right balance between tough and empathetic will go far, both in building your client's confidence and in building your case.

(g) ***Continue to Identify Legal Issues***

Although you may have identified many of the relevant legal issues during your preparation, do not be surprised if unanticipated or tangential issues come up during the interview. When such issues present themselves, do not shy away from asking about

them simply because your initial sense was that they were not part of the case. Be sure to note these issues for reference and further development.

(h) ***Find Out Who the Other Players Are***

Ask who witnessed or participated in the key events, and go back over names the client has mentioned.

- Who is that person?
- What is that person's role?
- Where is that person now?
- Did you part company on good terms?
- Can that person be contacted?
- Is there anything I should know about that person?
- Is there anything I should know about your relationship?

(i) ***Find Out What Documents or Electronic Records Exist, and Take Steps to Preserve Them***

Push your client on what documents or electronic files exist and how those documents or files were or are maintained. Have your client identify the good ones and the bad ones. It is better to find out early what "time bombs" exist so you can explore whether there is something that will help explain them or minimize their significance. Ask the following types of questions about potentially relevant documents:

- Is your position reflected or recorded in any document?
- Is your opponent's position reflected or recorded in any document?
- Have any documents been destroyed or deleted? When? Why? In the normal course of events?
- Do you have a written document retention or destruction policy? Was it followed?

Electronically stored data has become ubiquitous, and with many clients has almost entirely supplanted paper documents. Whether in the form of email, draft documents, text messages, tweets, digitally preserved voicemails, or the like, it is critical that you discuss this issue in depth with your client and, in the case of a corporate client of some size, the client's manager of that data. You need to know how information comes into and goes out of the organization, and how it is preserved. You also need to know whether the client runs any automatic deletion programs or purges its system in any routine way. It is critical that these programs and purges be understood and that steps be taken to interrupt them to preserve relevant data before it is lost or stored in a manner that may be extremely expensive to recover.

In 2006, the Federal Rules of Civil Procedure, specifically Rules 26 and 34, were substantially rewritten to comprehensively codify detailed procedures for the handling of electronically stored data in federal litigation. Rule 26 of the Massachusetts Rules of Civil Procedure was amended in 2014 to address discovery procedures related to electronically stored information in state court litigation. *See* Mass. R. Civ. P. 26(f). The major change was the insertion of Rule 26(f), which sets forth a framework for the management of e-discovery. While the state and federal rules are similar in many respects, there are significant differences, and you would be well advised to familiarize yourself with these rules before your initial interview.

Failure to preserve electronically stored data can result in sanctions for spoliation. If you have not previously done so, make sure the client understands the parties' obligations to preserve documents. Soon after your meeting, document your communication of those obligations to the client and others for whom your client may be held responsible if documents or data "go missing." *See* Mass. R. Civ. P. 26(f)(2)(C). For a detailed discussion of electronic discovery and related preservation and spoliation issues, see chapter 20 of this book.

(j) ***Size Up the Client as a Possible Witness***

Assess how you think your client will perform if the matter progresses and your client is required to testify at a deposition or trial. Some of the questions you should be considering are the following:

- Can the client focus on the issue under discussion?
- How quickly is the client able to grasp what you are saying and process it to formulate an answer?
- Does the client have a tendency to get bogged down in too much unimportant detail?
- Does the client's manner of speaking, vocabulary, and tone come across well?
- Can the client articulate a position logically?
- Can the client articulate a position persuasively?

- Can a listener understand what the client is saying?
- Does the client's personality come through?
- Is the personality on display a good thing?
- Are there any distracting or off-putting mannerisms or tics?
- Does the client assume too much about the listener's knowledge base?
- Can the client modulate and control emotions?
- Is the client naturally nervous or high-strung?
- Is the client too cavalier?
- Is the client likable?
- Is what the client says credible?
- Does the client appear trustworthy?

Use this assessment to evaluate the strength of your case and identify the tasks that lie ahead to improve your client as a witness.

(k) ***Size Up the Client as a Decision Maker***

There are many different types of clients. Some cannot stand the pressure of decision making and want you to relieve them of the burden. Others cannot let go of any decision and will mandate courses of action regardless of your advice. The best clients are the ones who fall in the middle—persons who are willing to

- listen to counsel;
- ask good questions;
- take advice on procedural and strategic issues; and
- arrive at a rational decision that combines the legal factors with the practical and the financial.

The sooner you can determine what type of client you have, the better you can fashion the role you will have to play.

Practice Note

Be mindful that you have an independent responsibility as an officer of the legal system to act honestly and ethically at all times. There are times when that may mean refusing to do what your client demands and, if necessary, withdrawing from representation (also known as “firing the client”). If litigation has begun and you have entered an appearance, withdrawal may be accomplished only with the permission of the court and in accordance with the rules of professional conduct.

Ethics Commentary

A lawyer's obligation is to represent a client zealously “within the bounds of the law.” Mass. R. Prof. C. 1.3. A client's wishes may conflict with the lawyer's ethical obligations. In litigation, such conflicts will usually arise in the context of frivolous claims (Rule 3.1), unreasonable delay (Rule 3.2), perjury, falsification or destruction of evidence, and unfairness to the opposing party (Rules 3.3 and 3.4). Depending on the circumstances, a lawyer may elect to or be required to withdraw from the representation. Any withdrawal should be in accordance with Mass. R. Prof. C. 1.16.

(l) ***Assess External Factors***

Assess whether there are external factors that may be at work and ascertain what role they play in the process. Is your client under the gun from other stresses that make attention to this matter difficult? These can be personal, physical, medical, or financial. Are there other persons, such as a spouse or other relative, business advisor, or accountant, who may be exercising influence over the client's decision making relative to the matter? Listen for clues as to whether such things are at work and try to anticipate how they will impact your working relationship with the client.

Practice Note

If other individuals are part of this equation, do not include them in your discussions with your client without first considering that this will most likely preclude application of the attorney-client privilege. If for some reason you are considering including them, this should be a topic of conversation with your client and the risks should be explained before going forward.

§ 4.3.4 The Postinterview Game Plan

When you conclude, have a game plan. What is to happen next? What are you going to do? What is the client supposed to do? What is the time frame? Both you and the client should leave the interview with an understanding, if not a list of action items.

(a) ***Before You Leave: Assign Homework with Realistic Deadlines***

Inform your client of your preliminary legal assessment and your plan of action. There will inevitably be additional documents or information needed. You should therefore assign homework to both yourself and your client.

- Let your client know what information or follow-up to expect from your office, and when to expect it.
- Identify the additional documents and information your client has promised to get to you and when those materials will be forthcoming.

Deadlines, even if informal, are important. Setting deadlines for yourself will demonstrate that you consider the client's problem a priority deserving of your attention. Setting deadlines for your client will send a similar signal: that you are eager to move the case forward and will give your client—who may be very emotionally vested in the issues—specific tasks to accomplish.

At the same time, make sure deadlines are realistic, both for yourself and for your client. Nothing says "you're not a priority" like missed deadlines on your part. Instead, be honest with your client. If you have a trial or other major case events coming up that will require all of your focus for a period of time, tell your client so. It will be reassuring to know that you will devote the same undivided attention to the client's case when the time comes.

(b) ***After You Go: Review and Update Your Notes***

As mentioned above, do not attempt to write down every word your client says during an interview, as this may inhibit your client from speaking freely and lead you to overlook nonverbal cues. Instead, spend time after the interview updating your notes with important facts, impressions, follow-up questions, and issues. You may want to transfer your notes into electronic form to facilitate their future accessibility and modification and/or draft a memo to the file summarizing the interview. One of the advantages of such a conversion is that your summary will then be searchable. Developing and supplementing a chronology, as discussed above in § 4.3.2(b), is also recommended. Particularly if your notes are only marginally legible, your review should occur as soon as possible, while the full store of information is in your mind. A useful rule of thumb is not to let the next day's sun come up before you have done your review and update.

(c) ***Send a Follow-Up to Your Client***

Follow up your interview with a brief letter or email thanking your client for the meeting and memorializing your homework assignments. You may be able to provide a more detailed game plan and legal advice than you were able to impart upon conclusion of the interview. This is also a good opportunity to refer to the document preservation discussion.

§ 4.3.5 Special Issues in Initial Client Contacts

(a) ***Representation of Multiple Clients***

It is not unusual in a multiparty case to be asked to represent more than one individual or entity at the same time. Obviously, there will be circumstances— a husband and a wife in a divorce case, for example—where one cannot undertake such representation.

Practice Note

> Practitioners should be fully conversant with the conflict-of-interest provisions set forth in Rules 1.7 through 1.10 of the Massachusetts Rules of Professional Conduct.

One of the most common examples is where you are asked to represent both a corporation and one or more individuals affiliated with that corporation. *See* Mass. R. Prof. C. 1.13. If the individual in question is the sole shareholder of the corporation, the representation question is relatively straightforward, at least at that moment. Where the individual is simply one of multiple shareholders or an employee of the corporation, however, you must undertake an inquiry to determine whether you can ethically undertake that representation.

Rule 1.7(b) of the Massachusetts Rules of Professional Conduct provides as follows:

> (b) Notwithstanding the existence of a concurrent conflict of interest under [Rule 1.7(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.

There are certainly situations in which no impermissible conflict exists and dual representation is allowed. However, recognize that you have identical ethical obligations to both clients, even if only one of them is paying your bills. *See* Mass. R. Prof. C. 7 cmt. 13.

Practice Note

A helpful discussion of this thorny area is contained in an ethics opinion of the Massachusetts Bar Association Committee on Professional Ethics (Op. 2004-2 (Sept. 29, 2004)). The cases cited in this opinion are also helpful in analyzing this highly fact-specific area.

If your analysis is that the representation is permissible, there are certain precautions you should consider taking.

Recommend an Independent Analysis on the Question of a Potential Conflict

You might consider recommending to one or both of the potential clients that they consult with their own attorneys on the question of whether there is a conflict and whether they should be separately represented. While this may seem like overkill, if a problem were to arise in the future (for example, a judgment against one client and not the other), the independence of your initial advice as to whether a conflict existed and how you subsequently handled the case could be called into question.

Obtain Consent to Representation in Writing from Both Parties

As part of the required consultation and consent, you should obtain that consent *in writing* from both parties. When coupled with the suggestion to seek independent advice on the conflict issues, written consents can provide some measure of protection. You should also consider whether to use a joint representation agreement that includes such consents. An example is included as **Exhibit 4D**.

Plan for a Potential Future Conflict

Even if there appears to be no conflict at the present time, that does not preclude one arising in the future. In your joint representation agreement, you should anticipate what happens to your role if such a conflict does arise. In this regard, your joint representation agreement may provide for your withdrawal from the representation of one client and that client's consent to your continued representation of the other. This may provide protection in most instances, although in some situations it may not be permissible to continue to represent either client. *See* Mass. R. Prof. C. 1.7 cmts. 4-5; Mass. R. Prof. C. 1.9.

Be Aware of Potential Conflicts During Settlement Discussions

A potentially ticklish situation may arise in the context of settlement discussions. For example, if you are jointly representing two plaintiffs, and the defendant proposes a gross settlement figure without allocation between the two plaintiffs, you must determine whether you can properly participate in how that amount is to be apportioned. There may be two courses of action appropriate in this scenario. The first is to insist that the defendant make separate proposals to each plaintiff, which you can then independently evaluate. If the defendant, for whatever reason, is unwilling to do that, the wisest course of action may be to suggest that each plaintiff obtain independent advice relative to the fair value of the plaintiff's claim and its relationship to the aggregate settlement proposal. If the plaintiffs are unwilling to seek independent counsel, you should at a minimum request written acknowledgement from each that the issue creates the potential for a conflict, that they have been advised to seek independent counsel, and that they have proceeded knowingly and willingly without seeking that independent counsel.

Judicial Commentary

In multiple-client situations, consider whether you should (or must) bring the issue of multiple representation to the court's attention or put the clients' consent on the record in some way. In criminal cases, generally you must do so, and the court must conduct a colloquy directly with the client to ensure the client's knowing waiver of potential conflicts. In civil cases this is not generally required, but at times it may be advisable.

Even where you jointly represent a sole shareholder and the shareholder's corporation, and there is no present conflict, the nominal representation of the corporate entity may come back to haunt you later on. This could occur if the shareholder sells the corporation and there are issues that spawn litigation between the corporation and the former owner. Where such dual representation has previously occurred, a court will often look to the relationship of the current litigation under the "substantial relationship" test to determine whether Mass. R. Prof. C. 1.9 requires disqualification. *See New England Pro Tour v. Hebb*, 22 Mass. L. Rptr. 413 (Super. Ct. 2007) (representation of an individual in an adverse action against a corporation formerly represented by the same firm was impermissible). Central to the concerns embodied in Rule 1.9 is whether confidences gained in prior representation could be used in the instant matter for an unfair advantage. A court will focus its concern on protecting both the interest of the formerly represented party and the public perception of the practice of law against appearances of impropriety.

(b) ***Privilege Issues Relating to Corporate Clients***

When one is representing an individual, the attorney-client privilege issues are pretty straightforward. With some unusual exceptions, any discussions between you and your client dealing with legal issues will be privileged and protected against discovery by your opponent. This privilege cannot be waived by you; it can be waived only by the client.

The application of the privilege becomes more complicated when your client is a corporation. This complication arises when your discussions stray from matters related to legal issues into matters pertaining to business affairs. The attorney-client privilege applies only when the client is looking to the attorney for legal advice. *See* *Purcell v. District Attorney for the Suffolk District*, 424 Mass. 109, 116 (1997). When the attorney's advice is sought on business issues unrelated to legal interests or legal rights, the privilege does not shield those conversations. *See America's Growth Capital, LLC v. PFIP, LLC d/b/a Planet Fitness*, No. 12-12088-RGS, 2014 WL 1207128, at *2-3 (D. Mass. 2014).

As set forth above, dual representation of an individual and an associated corporation may also implicate ethics considerations that might result in future disqualification. *See New England Pro Tour v. Hebb*, 22 Mass. L. Rptr. 413 (Super. Ct. 2007) (representation of an individual in an adverse action against a corporation formerly represented by the same firm was impermissible) (citing Mass. R. Prof. C. 1.9).

§ 4.4 WORKING WITH OTHER WITNESSES

§ 4.4.1 Identifying Potential Witnesses

Potential witnesses come in all shapes and sizes. They may be friendly, hostile; cooperative, reluctant; near, far; important, peripheral. Some may have a language barrier. Some may have their own agendas. Most do not want you to bother them.

Once you have decided who the potential witnesses are, you should start the sorting process. First, separate your potential witnesses into three categories:

- the ones who are essential to speak with,
- the ones who clearly need not be spoken with, and
- the ones who fall somewhere in between.

Then discuss with your client the value to be gained from speaking with each group, having the case budget in mind, and determine which witnesses you should approach. Within this group, you should determine whom to depose and whom to approach informally. As described more fully below, this analysis includes an assessment of the trustworthiness of the witness, whether ex parte communications are permitted (this topic is discussed in detail below in § 4.4.5), and, again, your budget.

§ 4.4.2 Interview Preparation

Once you have identified the witnesses you plan to approach, you should prepare for each interview before making initial contact. Although the initial contact may lead to a meeting or a subsequent phone conversation, in many instances the first contact may be your only chance to speak with this person.

Practice Note

Sometimes witnesses are willing to speak with you if you catch them by surprise, but if they know you are on their trail, they may place obstacles in the way of your getting a second contact. You should, therefore, have thought about and scripted, or at least outlined, your interview before making that first contact.

What should that preparation include? From your earlier efforts in the case, you should know

- the role you believe this witness played;
- the documents the witness may have prepared, received, or reviewed;
- the witness's relationship with other participants; and
- whether the witness might gain or lose from the disposition of the case.

These clues should merely be starting points. Listen to the witness carefully so you can pursue leads to other potentially meaningful facts, witnesses, and documents.

§ 4.4.3 Interview Process

Once you have identified certain witnesses to contact informally, you must determine how to undertake that interview. Keep in mind that your conversations with a third-party witness are not privileged and are discoverable.

Ask yourself the following types of questions:

- Is this a person who needs to be met with personally and handled with kid gloves?
- Could this witness be at risk (criminal prosecution and/or civil liability) as a result of involvement in the case?
- Can the witness's agenda be identified?
- Do you need to isolate the witness from interference or distractions from the witness's own life or from other persons involved in the case?
- Is an interpreter necessary and, if so, who should be chosen? (Be wary of any friends or relatives whose personal agendas may color the translation.)
- Are there biases that need to be addressed?
- Has the other side already interviewed this witness?

Practice Note

As referenced in the ethical commentary to § 4.2.2(a), Internet Resources, above, throughout this process, you must be sure not to "state or imply that the lawyer is disinterested" or fail to clear up any misunderstanding of your role on the part of the unrepresented person. Mass. R. Prof. C. 4.3.

In addition, a lawyer cannot give advice to a person who is not represented by a lawyer, 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." Mass. R. Prof. C. 4.3.

Sometimes a witness needs some prodding to cooperate. Often, simply keeping a reluctant witness talking without directly confronting the witness's reluctance will accomplish your goal of obtaining the information you seek. With other witnesses, you can appeal to their sense of fairness or desire to help others.

Some witnesses may require you to take a firmer hand by suggesting that their reluctance may leave you no choice but to compel their attendance with a subpoena for a deposition.

Practice Note

Be careful in such an exchange that the witness does not conclude that speaking with you is a quid pro quo for your agreement not to depose. After speaking with the witness, you may decide that a deposition is essential to lock in the testimony. While the witness certainly could not legally or practically ignore a validly issued subpoena, the result of a perceived misrepresentation may be a hostile witness whose testimony becomes unfavorably shaded.

Ethics Commentary

Any knowing misrepresentation to the witness regarding future deposition obligations would constitute a violation of Mass. R. Prof. C. 4.1 ("In the course of representing a client a lawyer shall not knowingly ... make a false statement of material fact or law to a third person ...").

In dealing with nonparty witnesses, the saying that "one gets more flies with honey than with vinegar" could not be more apropos. It is therefore usually to your benefit to be extremely accommodating (obviously, within reason and within your budget).

What if the witness refuses to speak with you without being compensated? Certainly, if the witness is located some distance away, it is appropriate to pay the witness's out-of-pocket travel expenses. Setting aside expert witnesses—for whom a different set of rules generally applies—in certain circumstances it might also be appropriate to pay a reasonable sum to compensate for the witness's time. You should try to avoid this type of payment because it can be used by your opponent to suggest that the witness is not credible or that you paid for the witness's testimony. This possibility is heightened if you pay a sum disproportionate to the fair value of the witness's time. If you are faced with a witness who is attempting to extract an unreasonable sum from you, chances are you are better off steering clear of informal contact with the witness and simply proceeding with a deposition.

Practice Note

Be sure to keep in mind Rule 3.4(g) of the Massachusetts Rules of Professional Conduct, which provides that a lawyer may not

> pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
> (1) expenses reasonably incurred by a witness in preparing, attending or testifying,
> (2) reasonable compensation to a witness for loss of time in preparing, attending or testifying, and
> (3) a reasonable fee for the professional services of an expert witness ....

Judicial Commentary

Keep in mind that your communications with a witness other than your client—including the fact, circumstances, and content of the communications—are discoverable and may be admissible at trial. Anticipate that the witness may be asked at a deposition or at trial what you stated or asked in an interview. This is another reason, in addition to the obvious one, for you to start the interview by indicating that you want the witness to tell the truth. Because you may later want to prove what the witness said to you, it is generally advisable to have someone else present during the witness interview or to have someone other than yourself (e.g., an investigator) conduct it. An independent investigator is often a good choice for either role.

§ 4.4.4 Use of Witness Statements

As discussed above, a tactical choice must be made as to whether that first contact is informal or by deposition. A statement made by a third party, whether at a deposition or on the phone, can be very important to your case, but only if the witness repeats it at trial or you have it in a form that can be used at trial.

If the statement you get is favorable, obviously you would like to use it at trial. If the witness takes the stand and repeats it, terrific. Suppose, however, the witness takes the stand and cannot recall the earlier statement. Worse yet, suppose the witness changes the statement to something unfavorable.

You can try to refresh the witness's recollection with a reminder of the earlier conversation. With this approach, you risk incurring the wrath of the trial judge, who may openly question what role you are playing—counsel or witness. Your attempts to refresh may in any event be unsuccessful.

With respect to the recanting witness, you can try the same approach. If this is someone you have called, however, you may run straight into the restrictions on impeaching your own witness. Even if you are able to sidestep that issue, you are stuck with the following eyebrow-raising line of questioning:

Q: So, you are now saying that the light was red when my client entered the intersection?
A: That's right.
Q: Are you sure about that?
A: Absolutely.
Q: Have you ever said anything different?
A: No.
Q: Do you recall that I called you on the phone a couple of weeks after the accident?
A: I remember speaking with somebody. Was that you?
Q: It was me. Do you remember describing the accident for me?

A: Not really.
Q: Don't you remember telling me that the traffic light was green when my client entered the intersection?
A: No, and I can't imagine I would have said that because that's not what happened.
Obviously, this is a less than satisfactory turn of events. You have not only caused harm to your own case by highlighting unfavorable testimony, but also undermined your own credibility by including yourself in the picture and then having the witness essentially call you a liar.
Unfortunately, the dilemma of the waffling witness cannot ever be totally overcome. There are steps that can be taken, however, that may diminish the chances of it occurring, or at least soften its negative impact if it does.

(a) ***Consider Reducing the Witness's Statement to Writing***

Reducing a statement to writing and obtaining the witness's signature on that statement verifying that it is accurate will often be all the deterrent you need to avoid the 180-degree turn. Obtaining such a statement gives you an outwardly credible document with which to refresh a forgetful witness's memory.

Practice Note

Recognize that written witness statements may be discoverable. While you may be able to successfully assert a work product objection, when deciding whether to reduce statements to writing you should assume that you will be required to produce them. In the event that you may be in a situation where you try to introduce such a statement into evidence, attempting to shield the document from discovery could backfire and preclude you from admitting it.

(b) ***Dealing with Unfavorable Witness Statements***

If the statements you get are unfavorable, what do you do with them? Your first instinct may be to cross your fingers and hope your opponent does not find out (recognizing that fulfillment of your discovery obligations will almost ensure that your opponent finds out). That can be a risky approach. If the witness is an obvious one, or your initial round of written discovery has revealed your opponent's awareness of this witness, you have no real choice but to fully explore what that witness has to say. This will allow you to lock in those statements so that they will not get worse at the time of trial. It will also enable you to probe for the means to attack the damaging testimony.
Although this probing can in theory be done informally, followed by reducing the statements to a document to be signed by the witness, it can be extraordinarily difficult to accomplish. In many cases, your best approach will be to take a formal deposition.

Judicial Commentary

The problem of proof can be solved in two ways. First, you can obtain a written statement from the witness, which works at trial as long as the witness acknowledges the signature on the statement or you can otherwise prove it. Keep in mind that such a statement will be discoverable. Second, if you had someone with you during the interview, that person becomes your witness to the statement made. Keep in mind, however, that if such a person is a potential witness at trial, then that person's expected testimony will be discoverable just like the expected testimony of any other witness. Furthermore, that person should not be another lawyer or a paralegal from your firm, because using that person to testify to the witness's statement at trial might invite a motion to disqualify you as trial counsel; although Mass. R. Prof. C. 3.7(b) generally allows a lawyer to act as an advocate at a trial in which another lawyer in the firm is likely to be called as a witness, the rule has exceptions. In addition, testimony from a colleague on an issue of fact may appear less credible to a jury than testimony from a more independent source.

(c) ***When to Proceed Directly to a Deposition***

With a witness from whom you receive strong vibrations of unpredictability, you may want to proceed directly to a deposition. The formality of the deposition process creates a powerful deterrent against a change of heart on the witness stand. With either approach, you have the favorable statement in a form that can be used for effective impeachment if the witness recants and is called as a witness by the other side.

§ 4.4.5 Ex Parte Contact with Employees of a Corporate Opponent

In some instances, a party will desire to speak on an ex parte basis with present or former employees of a corporate opponent without the corporation's knowledge. There is considerable case law in Massachusetts on this topic, notably *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*, 436 Mass. 347 (2002) (ex parte contacts with present employees); *Patriarca v. Center for Living & Working, Inc.*, 438 Mass. 132 (2002) (ex parte contacts with former employees); and *Clark v. Beverly Health & Rehabilitation Services, Inc.*, 440 Mass. 270 (2003) (ex parte contacts with former employees). All three cases have as their common root Rules 4.2 and 4.3 of the Massachusetts Rules of Professional Conduct, which address contacts by counsel with persons whom counsel knows to be represented by an attorney.

Rule 4.2 forbids ex parte communications by a lawyer with a person known to be represented by counsel: "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 by law to do so." The Supreme Judicial Court, in *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*, 436 Mass. 347 (2002), established that, subject to certain exceptions, an attorney for a party may make ex parte contact with employees of a corporate opponent. To preserve and protect the attorney-client privilege between the corporate party and its own counsel, the court carved out three exceptions: opposing counsel may not contact "employees [[(1)] who exercise managerial responsibility in the matter, [(2)] who are alleged to have committed the wrongful acts at issue in the litigation, or [[(3)] who have authority on behalf of the corporation to make decisions about the course of the litigation." *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll.*, 436 Mass. at 357.

Although the *Messing, Rudavsky* case recognized that ex parte contact could be made in many circumstances, counsel will need to look to future cases for assistance in determining precisely where the line of permitted versus prohibited contacts will be drawn with respect to these three exceptions of current employees. Clearly, ex parte contact may be made with nonsupervisory employees whose conduct is not in issue. The case of supervisory employees, however, is less clear. While there is no blanket prohibition of ex parte contact with supervisors of the corporate opponent, many supervisors will have sufficient responsibility to fall within the prohibitions of Rule 4.2. *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll.*, 436 Mass. at 361; *see also Groppo v. Zappa, Inc.*, No. 03-CV-10384-MEL, 2005 WL 768652 (D. Mass. Mar. 30, 2005) (ex parte contact with supervisory employees violated Rule 4.2, but no sanctions ordered because of potential exception under Jones Act).

A later case, *Clark v. Beverly Health & Rehabilitation Services, Inc.*, 440 Mass. 270 (2003), addressed ex parte contact with former employees who otherwise fell within one of the three exceptions. The court in *Clark* held that such ex parte contact was not in violation of the disciplinary rule. The court responded to the potential for abuse as follows:

> "[C]ounsel must, of course, be assiduous in meeting other ethical and professional standards found outside rule 4.2." Without limitation, counsel conducting the ex parte interview must pay particular attention to avoid transgressing Mass. R. Prof. C. 4.1, governing a lawyer's duty of truthfulness to a third party; Mass. R. Prof. C. 4.3, governing a lawyer's dealings with unrepresented persons; and Mass. R. Prof. C. 4.4, requiring the lawyer to refrain from using unfair or illegal tactics to obtain evidence. Further, counsel must also be careful to avoid violating applicable privileges or matters subject to appropriate confidences or protections.

Clark v. Beverly Health & Rehab. Servs., Inc., 440 Mass. at 278-79 (quoting *Patriarca v. Ctr. for Living & Working, Inc.*, 438 Mass. 138, 139 (2002)) (citations and footnote omitted); *see Curley v. N. Am. Man Boy Love Ass'n*, No. 00-10956-GAO, 2003 WL 21696547 (D. Mass. Mar. 31, 2003) (ex parte contact with former member of defendant organization's steering committee not prohibited by Rule 4.2). As a concluding cautionary note, the court warned, "existing attorney disciplinary procedures should adequately address any less than scrupulous professional conduct." *Clark v. Beverly Health & Rehab. Servs., Inc.*, 440 Mass. at 279.

A District Court Appellate Division case addressed an interesting twist in this area. In *Cruickshank v. Commerce Ins. Co.*, 2004 Mass. App. Div. 103, (Mass. Dist. Ct. App. 2004) counsel had contact with a former employee who remained on a corporation's articles of organization as its president and treasurer. After the former employee's private counsel consented, counsel for the defendant contacted and obtained an affidavit from the former employee. Ignoring the formal indication in the corporate documentation that there was still a relationship between the former employee and the corporation, the court found that the contacted individual was a former employee and thus Rule 4.2 was not violated by the contact.

Practice Note

A detailed analysis of the impact of *Messing* and *Patriarca* can be found in Gerard J. Clark, "Navigating the Investigation Quagmire After *Messing* and *Patriarca*," 88 *Mass. L. Rev.* 62 (2003). For the perspective of plaintiffside attorneys on this issue, see Ellen J. Messing & James S. Weliky, "Contacting Employees of an Adverse Corporation Party: A Plaintiff's Attorney's View" (2019), https://www.americanbar.org/content/dam/aba/events/labor_law/2019/annual-conference/papers/contactingemployees.pdf.

What should counsel unsure of the reach of these opinions do? Future cases certainly will be viewed on their own unique facts. Those facts include the following:

- the issues in the case;
- the wrongful conduct complained of;
- the role of the individual in the conduct at issue;
- the position of the individual within the corporation;
- the supervisory responsibilities of the individual generally and with respect to the acts complained of; and
- the managerial responsibilities of the individual in matters pertaining to the litigation.

Before any conclusions can be drawn, counsel must assess how much knowledge they have about the witness to be interviewed. If counsel is unsure of the facts surrounding the corporate employee's position, responsibilities, or role in the facts of the underlying dispute, the safe course would be to first attempt to fill the gaps through written discovery or depositions of other corporate officials. If the analysis remains inconclusive, counsel is left with the following three choices:

- throw caution to the wind and make the ex parte contact;
- forget the idea and proceed with a deposition of the corporate employee; or
- seek advance permission from the court.

Conversely, what can the corporate party do to attempt to prevent overreaching by opposing counsel? With respect to current employees, the most effective solution would be to notify all employees with any involvement in the matter that they will be provided legal counsel and that they should not speak with any other attorney. As with any other instruction, the employer would be entitled to enforce this with appropriate discipline in most instances. The employer must recognize, however, that any discipline arising from an employee's ignoring such an instruction may be argued to be illegal retaliation for "whistleblowing" if some strong public policy is implicated.

With respect to former employees, the employer can make the similar offer of legal counsel and request that the former employee not speak to opposing counsel without the employer-paid lawyer present. With respect to a former employee as opposed to a current employee, clearly the employer has no enforcement mechanism.

An alternative approach may be to seek a protective order from the court. Counsel seeking the court's assistance should identify the specific individuals to be protected and explain why they fit within the *Messing, Rudavsky* exceptions.

For those employees outside the *Messing, Rudavsky* exceptions, the employer may propose a required process for any ex parte interviews to be conducted by opposing counsel. In *Kaveney v. Murphy*, 97 F. Supp. 2d 88 (D. Mass. 2000), counsel proposed that the court require opposing counsel at the outset of any interview to identify the subject matter of the litigation, the role of counsel, and the purpose of the interview.

An interesting question may remain as to whether Rule 4.2 allows counsel to contact a corporate employee who falls within the *Messing, Rudavsky* exceptions if that individual has obtained legal representation. One court has ruled that where there is independent representation and consent by that counsel, Rule 4.2 is not violated by the ex parte contact. *Edwards v. MBTA*, 12 Mass. L. Rptr. 395 (Mass. Super. Ct. 2000) (employee may have separate and distinct interests from employer, and if there is a conflict, employee's rights govern).

§ 4.5 USING PRIVATE INVESTIGATORS

There are a variety of other resources available to you in the investigation of your case. A common form of assistance is the utilization of a private investigator. Investigators can be valuable in locating missing witnesses, interviewing reluctant witnesses, investigating assets, and even performing surveillance if the case warrants it.

Be mindful, however, that the quality of persons holding themselves out as investigators varies widely and that investigators can be very costly. You should never engage an investigator without first discussing the benefit and the cost with your client.

§ 4.5.1 Services Provided

(a) *Location of Witnesses*

In many instances, you may know the name of a witness but do not have an accurate address or phone number and have not been successful using the Internet locator services such as

- Whitepages (http://www.whitepages.com);
- AnyWho (http://www.anywho.com); and
- Superpages.com (http://www.superpages.com).

An investigator can often successfully locate a current address and phone number for that witness.

(b) *Tracking Down Reluctant Witnesses*

Even if the address and phone number that you have for a witness is current, some witnesses will avoid you at all costs. In such instances, it may be a better value to your client to hire a persistent investigator who will track down the reluctant witness and, through that persistence, convince the witness to speak.

(c) *Witness Interviews*

For the reasons set forth above, you may decide you need someone to testify as to statements by the interviewee. Obviously, if you conduct the interview, it will be difficult for you to testify about your conversation with that witness. *See* Mass. R. Prof. C. 3.7. If an investigator conducts the interview, however, the testimony may be available at trial.

Practice Note

Your level of interaction with the investigator in the preparation stage will depend on your past experience with the investigator and your level of confidence. With some, you need only describe the facts of your case and the anticipated involvement of the witness for your investigator to know what questions to ask. With others, you may want to prepare more fully, even going so far as to provide your investigator with a suggested script.

(d) *Asset Investigation*

Many investigators provide asset investigation services. Whether you are considering taking a case in the first place or attempting to collect a judgment that you have received, the assets of your opponent may be very important information.

Practice Note

Be wary of asset investigation services that you suspect might be using illegal means to obtain information. Not long ago, a well-publicized firm was investigated and closed down for doing just that. It does not take much imagination to arrive at a scenario where an individual who believes that privacy rights have been violated by an asset investigation firm also sweeps the attorney into that dispute.

§ 4.5.2 Choosing an Investigator

Choose your investigator wisely. Investigators are required to be licensed by the Commonwealth. The Massachusetts Department of Public Safety publishes a list of licensed private investigators at https://www.mass.gov/doc/active-private-investigators/download.

Also consider that an investigator who is bonded and insured may be more reputable than one who is not. You should be particular in your inquiries, because not all investigators have the same skills, experience, and abilities. For example, one talented in finding missing individuals may not be the best interviewer. One of the best ways to acquire information is to ask other attorneys about the investigators they use.

Judicial Commentary

If there is any possibility that the investigator will become a trial witness, such as to prove a statement made to the investigator or in the investigator's presence, selection of the investigator should involve careful consideration of what sort of impression the investigator is likely to make at trial, particularly in comparison to any witnesses on the other side who might be viewed

as having an analogous role (e.g., police officers who may testify as to witness interviews or investigative processes or methods).

§ 4.5.3 Work Product Issues

Generally, the work product of the investigator will be protected from discovery, particularly if you (as opposed to your client) have retained the investigator. Some type of retention agreement reduced to writing will help to evidence this fact. An appropriate precaution is to make sure your investigator identifies the name of the case and its docket number in any written reports and places a legend such as "protected work product" at the beginning of all such reports and on any notes.

An exception to this rule is that a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial if a showing can be made that the party seeking the information has substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent by other means. Mass. R. Civ. P. 26(b)(3). This could encompass, for example, photographs taken by an investigator relatively soon after the events at issue. Such a showing might also be made for statements taken from a now-deceased, incapacitated, or missing witness.

Practice Note

It is possible that an investigator could be deposed in an attempt to unearth statements by a witness about the events in question. Generally, such inquiry would be within the scope of discovery. In support of a motion for a protective order, however, a strong argument could be made that inquiry into your discussions with the investigator are protected by the work product privilege.

§ 4.6 THE LIVING INVESTIGATION

As set forth above in § 4.2.6, an investigation is dynamic. You will continually learn new facts, discover documents or witnesses, or be presented with conflicting information. With each development, new avenues may be revealed that warrant exploration, or at least the consideration of further exploration. It may be obvious that some are dead ends or cover ground you have already exhausted. With others, however, that last mile of your investigation may turn up critical additional facts that strengthen your case or present new challenges. As with other elements of your investigation, give thought to the potential benefits and costs of acquiring the additional information, and communicate with your client about whether expanding your investigation is justified.

§ 4.7 BEYOND ZEALOUS ADVOCACY: AN ATTORNEY'S RESPONSIBILITY

One final and extremely important comment must be made. Given that informal investigations generally take place outside the view of the court and the party opponent, it creates a potential opportunity to take advantage of unrepresented or vulnerable individuals. Every attorney should therefore embrace an ideal of treating all persons honestly and with courtesy, respect, and professionalism.

Ethics Commentary

Rule 4.4 of the Massachusetts Rules of Professional Conduct requires a lawyer to act with respect for the rights of third parties.

MCLE thanks Eva M. Zelnick for her previous contributions to the text of this chapter and the Honorable Leila R. Kern (Ret.) for her previous contributions to the judicial commentary.

✓ CHECKLIST 4.1—**Investigation Game Plan**

Client—John Doe Matter—Auto Accident Claim

Claims/Defenses:	John was the passenger in an automobile that was struck by a hit-and-run driver. John suffered physical injuries, incurred medical expenses and has permanent scarring.
Issues:	□ Was the driver, Bill Jones, negligent? □ Can the other driver be identified? □ Is there a claim against John's insurer?

Preliminary Homework:	□ Search John Doe
	□ Search Bill Jones
	□ Any social media?
	□ Any news reports?
Information Sources:	□ John (has he given a statement to anyone?)
Other Information Sources:	□ Bill Jones (is he represented yet?)
	□ Unknown driver
	□ State and/or local police (Is there a police report? Are any witnesses identified? Are there any traffic cameras where the accident occurred? Is any investigation being performed?)
	□ Other witnesses
	□ John's doctors
	□ John's employer (any time from work lost?).
Documents:	□ Medical records
	□ Medical bills
	□ Insurance policy
	□ Police report
	□ Was an accident report filed by Bill?
	□ Pay stubs
	□ Statements to insurers?
Other:	□ Dangerous intersection? Prior accidents there?
	□ PTSD articles
Notes:	

✓ CHECKLIST 4.2—**Client Meeting Agenda**

Client—John Doe Matter—Auto Accident Claim

1. Discuss flow of meeting and agenda topics
2. Get narrative from client
3. What do we know about the other side?
4. What witnesses are there?
5. What documents?
   □ hard copy

□ electronically stored information (emails, etc.)
□ social media posts
6. Discuss any skeletons in the closet
7. Give the client the opportunity to ask questions and give thoughts/reactions to situation (consider moving this earlier in the agenda if the client cannot meaningfully provide information without first venting/explaining).
8. Discuss initial thoughts/reactions to situation
9. Litigation hold
10. Discussion of engagement and terms of representation
□ engagement letter signed
□ contingent fee agreement signed
11. Follow-up game plan
□ what I am going to do
□ what client is going to do

✓ CHECKLIST 4.3—**Outline of Client Interview**

PART A

□ I. Introductions
□ Introduce yourself and provide your client with the same opportunity.
□ Make certain your client is comfortable.
□ II. Roadmap
□ Explain to your client what you hope to accomplish during the meeting
□ Hear the story/problem in the client's own words.
□ Learn as many facts as possible about the events at issue.
□ Identify any additional individuals you should speak to.
□ Identify relevant documents that are in the client's possession or that must be obtained through discovery.
□ Accomplish tangential tasks (get fee agreement, authorization(s) for release of records, etc., signed).
□ III. The Story in Your Client's Own Words
□ Remember: it may be important to your client to explain the specific problem before giving a detailed chronological account of the facts leading up to the problem and after the problem arose. If this is the case, follow the client's lead and then go back and walk through the events chronologically.
□ Open-ended questions—"and then what happened?"—are important here.
□ IV. Follow up on Specific Issues.
□ This is your opportunity to go back over the events in detail.
□ V. Review any Documents/Electronic Records in the Client's Possession; Take Steps to Preserve Them.
□ This may include notification to your client that you will be issuing a Litigation Hold Letter to the client's organization (and to your opponent), and then following up with a written letter upon conclusion of the interview.
□ VI. Take Care of Tangential Tasks.
□ Have your client read and sign fee agreement.
□ Have your client sign authorization(s) for release of records.
□ VII. Explain What Happens Next.
□ This may include first or next steps in litigation, or scheduling a time to follow up with your client. Make sure that the dates you set are realistic!!!

PART B

Now let's take a look at how your outline might play out in a hypothetical client interview setting.

Hypothetical

You are meeting with a new client, Mr. George Stanley. Mr. Stanley claims that he was discriminated against by his former employer, a publishing company, PCM Press, when he was fired from his position as Assistant to the Vice President for Northeast Sales and Distribution. According to what he has told you so far, Mr. Stanley claims he injured his back last year (July 3, 2015). He indicates he was out of work for just over a month. When he returned to work, he found performing his usual duties to be uncomfortable—even painful. Mr. Stanley asked his employer— specifically his supervisor, CEO Nancy Smith, to provide him with an ergonomic chair and desk and to work from home on occasion. Shortly thereafter he was provided with the desk and chair, but his request to work from home was denied. Later that month he was fired. Mr. Stanley says he was a "top notch" VP, and a devoted employee. He feels strongly that he was fired because of his back injury, and wants to explore bringing a discrimination suit against PCM, and possibly against CEO Smith individually. Mr. Stanley knows he has a number of his work emails, and copies of his annual reviews, but is unsure of any other documents related to his employment at PCM in his possession.

Here is an outline of how your interview might proceed:

□ I. Introductions
  □ Ice breaker—"You came in from Grafton, correct? Not a bad trip into Worcester. Did you have any trouble with my directions?"
□ II. Roadmap
  □ Want to hear George's story in his own words
  □ Work together to determine who else to speak to
  □ Work-related emails and other documents
  □ Medical and personnel file authorizations
  □ Fee agreement
□ III. George Stanley's Story

[Here your client may jump right into his story, or you may begin to walk him through chronologically. If your client jumps in, continue to encourage him with open-ended questions, such as "what happened next?"]

  □ Commenced employment in 2009, what position?
  □ Other positions at company? (Go through chronologically.)
  □ Responsibilities in each position?
  □ Coworkers?
  □ Annual reviews?
  □ Back injury—circumstances surrounding
    □ Was it a work-related injury?
    □ How long was he out of work for?
    □ Where was he treated?
    □ FMLA?
  □ Request for accommodation
  □ Termination
□ IV. Follow-ups

Here you may have identified additional topics you know in advance you will want to discuss, but you should be adding to this list as you listen to your client tell his story. Because in this hypothetical Mr. Stanley provided very little beyond basic information up front, your initial list of topics will be relatively short going into the interview, but will become more developed as you learn about other back injuries or slumping sales, for example.

  □ Supervisors in each of his positions
  □ Coworkers
  □ Other witnesses?
  □ Marital status?
  □ If married, did wife care for him while injured?
□ Other back injuries? If so:
  □ When?

- □ Work-related?
- □ Missed work?
- □ Witnesses?
- □ Medical Providers?

□ History of working from home?
□ Job Performance Reviews? Documentation?
□ Relationship with Supervisor?
□ V. Documentation
- □ Was he able to locate work-related emails?
- □ Performance Reviews

□ VI. Tangential Tasks
- □ Medical Authorizations
- □ Request for personnel file
- □ Contact info for other witnesses (depending on relationship with PCM)
- □ Fee Agreement

□ VII. Next Steps
- □ Obtain medical records
- □ Obtain personnel file
- □ MCAD

✓ CHECKLIST 4.4—**Checklist for Client Interview**

□ Learn to listen
□ Find an icebreaker to put the client at ease
□ Encourage your client to tell the story
□ Recognize the need for empathy and your client's need to vent
□ Follow a chronological sequence
□ Follow up on key points and ask the tough questions
□ Continue to identify legal issues
□ Find out who the other players are
□ Find out what documents or electronic records exist and take steps to preserve them
□ Size up the client as a possible witness
□ Size up the client as a decision maker
□ Assess external factors

EXHIBIT 4A—Initial Chronology

INITIAL CHRONOLOGY

George Stanley v. P.C.M. Press

Date	**Event**
08/06/09	*Date of Hire*—Commissioned salesperson
???	Med Exam by employer
06/01/12	Promotion to Sales Manager
???	Mild back injury—zip lining (no time lost)
07/15/12	Promotion to Asst. VP for Northeast Sales and Distribution
08/30/12	Tweaks back—misses no work; but postpones sales trip to Buffalo

06/12/13	ER at Baystate for back
06/12/13	Out of work note
07/03/15 - 08/10/15	Back injury—out of work
08/10/15	RTW note—"return to usual work duty"
???	Request for accommodation (chair / desk)
08/ /16	Ergonomic chair and desk provided
08/25/16	Date of Termination

Witnesses:
1. George Stanley
2. Nancy Smith, PCM, CEO

EXHIBIT 4B—Updated Chronology

UPDATED CHRONOLOGY

George Stanley v. P.C.M. Press

Date	**Event—Client (GS) Version**	**William Livingstone (former coworker) Version**
08/06/09	*Date of Hire*—Commissioned salesperson	
???	Med Exam by employer	
06/01/12	Promotion to Sales Manager	
06/15/12		Hired as commissioned salesperson; supervised by GS
???	Mild back injury—zip lining (no time lost)	Was zip lining with GS— witnessed injury
07/15/12	Promotion to Asst. VP for Northeast Sales and Distribution	Passed over for promotion to GS former Sales Manager position— was GS decision-maker?
08/30/12	Tweaks back—misses no work, but postpones sales trip to Buffalo	George had hurt back, but he also said that he wasn't prepared for the trip
06/12/13	ER at Baystate for back	
06/12/13	Out of work note	
2014		New CEO Smith hired and carefully watching GS
Early 2015		PCM financial issues

07/03/15 - 08/10/15	Back injury—out of work— FMLA leave	
08/10/15	RTW note—"return to usual work duty"	
09/ /15		CEO Smith asking about seriousness of GS back injury at co. picnic
04/15/16		Livingstone laid off—angry (thinks 15-20 laid off in total)
???	Request for accommodation (chair / desk)	
08/ /16	Ergonomic chair and desk provided	
8/25/16	Date of Termination by CEO	

Witnesses:
1. George Stanley
2. William Livingstone, coworker
3. Satra Minervee, MD
4. Nancy Smith, PCM CEO

EXHIBIT 4C—Litigation Chronology

LITIGATION CHRONOLOGY

George Stanley v. P.C.M. Press

Date	**Event—Client (GS) Version**	**William Livingstone (former coworker) Version**	**CEO Smith Version (from Deposition)**
08/06/09	*Date of Hire*— Commissioned salesperson		
09/01/09	Med Exam by employer		
06/01/12	Promotion to Sales Manager		
06/15/12		Hired as commissioned salesperson; supervised by GS	
	Mild back injury— zip lining (no time lost)	Was zip lining with GS— witnessed injury	
07/15/12	Promotion to Asst. VP for Northeast Sales and Distribution	Passed over for promotion to GS former Sales Manager position— was GS decisionmaker?	
08/30/12	Tweaks back— misses no work; but postpones sales trip to Buffalo	George had hurt back, but he also said that he wasn't prepared for the trip	
06/12/13	ER at Baystate for back		

06/12/13	Out of work note		
11/13/13			Fired from last position for "philosophical reasons" about workforce management
04/15/14	CEO Smith hired; tough task master; doesn't trust her		Hired as CEO
Summer 2014	Tough conversations with CEO Smith about PCM sales performance; sales actually consistent with prior year but slow growth		Believes GS is a slacker and promoted because of tight relationship with former CEO (golf, Red Sox, fishing)
2014		New CEO Smith hired and carefully watching GS	
Early 2015	PCM financial issues due to operational issues	PCM financial issues	Denies PCM financial issues in early 2015
07/03/15 - 08/10/15	Back injury—out of work—FMLA leave		Doesn't recall GS being out of work
08/10/15	RTW note—"return to usual work duty"		
09/01/15	Was at picnic— CEO Smith drunk	CEO Smith asking about seriousness of GS back injury at co. picnic	Recalls picnic being a waste of co. time and money—no recall of discussion about Gs
Early 2016	Sales ticking up, but operational issues still hurting performance		PCM financial losses due to poor sales revenues—increased pressure on sales team to boost revenues "or else"
04/15/16	No recall of being read the riot act; recalls layoffs from his team; how to sell without salespeople?	Livingstone laid off—angry (thinks 15-20 laid off in total)	"read riot act" to GS—last chance to get his team moving
07/15/16	Request for accommodation (chair / desk)		No recollection of request
08/01/16	Ergonomic chair and desk provided; no recall of seeing any others		Same chair and desk provided to 3 others—all still employed
08/25/16	Date of Termination by CEO		Sales still not improving thru summer—decision to make a change to get inspired sales leadership

Witnesses:
1. George Stanley

2. William Livingstone, coworker
3. Satra Minervee, MD
4. Judy Barrett, Physical Therapist
5. Barry Judith, Occupational Therapist
6. Nancy Smith, PCM CEO
7. Michael St. James, PCM CFO
8. Marvin Johnson, PCM Natl. Sales Manager
9. Sheila Echeverria, coworker @ PCM picnic

EXHIBIT 4D—Joint Representation Agreement

JOINT REPRESENTATION AGREEMENT

This Agreement made this day of, 20, between and among the undersigned individuals and Mirick, O'Connell, DeMallie & Lougee, LLP ("Mirick O'Connell") witnesseth that:

1. The Defendants are named as defendants in an action filed in the Worcester Superior Court, *Dorothy Smith et al. v. John Smith (Trustee) et al.*, Civil Action 98-0000 ("the litigation"). All of the Defendants deny all liability in the litigation. While the interests of the Defendants on other matters are not identical, and on some matters are or could be in conflict, all of the Defendants share an overriding common interest in the successful defense of the claims made in the litigation. The Defendants recognize that the most efficient and cost effective defense of the litigation is for a single law firm to represent all of them in a joint defense of the litigation. The Defendants wish to retain Mirick O'Connell for that purpose.

2. The Defendants, while each denying any liability in the litigation, recognize that there is risk and uncertainty in any litigation, and that there is a possibility that one or more of the plaintiffs could recover judgment against one or more of the Defendants, for which there could be a claim for contribution or indemnification against one or more of the Defendants. The Defendants recognize that a contingent claim for contribution or indemnification could be stated as a crossclaim in the litigation, but recognize that it is in their common interest to concentrate on the joint defense of the claims made by the plaintiffs, and to defer to some later date, after the litigation has come to a complete and final end, any such claims which may exist for contribution or indemnification.

3. While the Defendants will deal openly with each other in connection with the joint defense of the litigation, the parties to this Agreement recognize that the attorneyclient relationship with Mirick O'Connell for the joint defense of the litigation could require one or more of the Defendants to provide confidential information to Mirick O'Connell which, while necessary for the joint defense, would not otherwise be made available to other defendants. The parties to this Agreement further recognize that a defendant providing confidential information to Mirick O'Connell for the joint defense may wish to have that confidential information held in confidence by Mirick O'Connell and not disclosed to any of the Defendants, except in so far as disclosure is necessary for the joint defense of the litigation.

4. Some of the Defendants have previously retained Mirick O'Connell to provide legal services on other matters, and have on-going relationships with Mirick O'Connell. Those defendants would ordinarily expect Mirick O'Connell to report to them any information which Mirick O'Connell acquired which affected their interests, and to use all such information for their benefit.

5. After review and analysis of the allegations in the litigation, and after preliminary discussions with individual defendants, Mirick O'Connell believes that the retention of Mirick O'Connell for joint defense of all of the Defendants in the litigation will not adversely affect the existing relationships between Mirick O'Connell and those defendants who are currently clients. Mirick O'Connell further believes that the joint defense of all Defendants in the litigation will not be materially limited by the ongoing responsibilities of Mirick O'Connell to those defendants who are currently clients.

NOW, THEREFORE, for the good and valuable consideration which each of them receives as a result of this Joint Representation Agreement, the receipt of which is hereby acknowledged, the parties agree as follows:

1. The Defendants collectively retain Mirick O'Connell to defend the litigation. During the joint defense, Mirick O'Connell shall consult with the Defendants (and when requested, with personal counsel of any defendant), file such pleadings and take such steps as Mirick O'Connell determines to be necessary for the joint defense, and report to the Defendants on the progress of the joint defense. Generally, Mirick O'Connell shall provide each of the Defendants with copies of all correspondence concerning the joint defense, and copies of all pleadings.

2. Mirick O'Connell shall provide detailed monthly invoices for its out of pocket expenses and its services, charging for those services at the usual hourly rates of the attorneys and paralegals at Mirick O'Connell providing the services. Should any defendant have any question concerning any invoice or the services provided, Mirick O'Connell will respond promptly. The invoices shall be sent to William Smith, who shall have the responsibility of obtaining from each defendant that defendant's share of each invoice.
3. Each defendant agrees to provide Mirick O'Connell with any information which that defendant has which Mirick O'Connell requests for the joint defense. If instructed by a defendant, Mirick O'Connell shall not disclose specified information supplied by that defendant to any other defendant, except in so far as such disclosure is required for the joint defense.
4. The Defendants agree that no crossclaim, or separate suit, for indemnification or contribution, or for any other cause of action arising out of the events alleged in the litigation, shall be filed against any other party in the litigation, except as provided in this Agreement. By entering into this Agreement, no defendant waives or releases any claim which that defendant may have against any other defendant for indemnification or contribution or for any other cause of action arising out of the events alleged in the litigation. In the event that any defendant believes that there is a claim against any other defendant for indemnification or contribution, or for any other cause of action arising out of the litigation, all suits for such claims may be filed within 120 days after entry of a final judgment in the litigation. The Defendants agree that, for purposes of the defenses of laches and of the statute of limitations, any suit filed within that time period shall be treated as if it had been filed at the time of the joint defense answer to the litigation.
5. Mirick O'Connell shall not represent any of the Defendants in connection with any possible claims against any other of the Defendants for contribution or indemnification, or for any other cause of action arising out of the events alleged in the litigation. All communications which any of the Defendants had with Mirick O'Connell during the joint defense shall be considered to be confidential attorney-client communications, and shall not be admissible in any proceedings, which any defendant may bring against any other defendant for contribution or indemnification, or for any other cause of action arising out of the events alleged in the litigation. The Defendants recognize, and consent, that Mirick O'Connell will not report to any of them any confidential information which Mirick O'Connell acquires during the joint defense that may affect their individual interests, but shall only use such information for the joint defense.
6. Any defendant at any time may withdraw from participation in the joint defense of the litigation, and thereafter be represented by personal counsel in the litigation. Any such withdrawing defendant shall have no responsibility to contribute to the invoices for legal services provided by Mirick O'Connell after such termination. Any such withdrawing defendant consents to Mirick O'Connell continuing to represent the remaining defendants. In all other respects, the provisions of this Agreement shall remain in effect and be binding on any such withdrawing defendant.
This Agreement may be signed in one or more counterparts.

_____
JOHN SMITH (Trustee)

_____
JOHN SMITH

_____
LOUIS SMITH
ALBERT SMITH
Mirick, O'Connell, DeMallie & Lougee, LLP
By: _____
Richard C. Van Nostrand, Esq.
Mirick, O'Connell, DeMallie & Lougee, LLP

FNa1. Judicial commentary for this chapter was provided by the Honorable Paul D. Wilson.

FNa. BRIAN M. CASACELI is an associate of Mirick, O'Connell, DeMallie & Lougee LLP in Westborough. He focuses on the representation of employers in claims of discrimination, retaliation, wrongful termination, breach of contract, and wage payment violations in the federal and state courts and before the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission. He also counsels employers on day-to-day employment issues and is experienced in drafting employee handbooks and policies. Mr. Casaceli is a graduate of Suffolk University Law School and Stonehill College.

FNb. RICHARD C. VAN NOSTRAND is general counsel and a partner of Mirick, O'Connell, DeMallie & Lougee LLP in Westborough. His practice includes business and general litigation; commercial litigation; employment litigation; and alternative dispute resolution. He is a member and former president of the Massachusetts, Worcester County, and New England Bar Associations. He is also a member of the American Bar Association. Mr. Van Nostrand is a graduate of Duke University School of Law and Binghamton University.

End of Document

91-JUN A.B.A. J. 28

ABA Journal
June, 2005

McElhaney on Litigation [a1]
James W. McElhaney [a2]

SPOTTING THE LOSERS
Sometimes the Best Way to Handle a Case Is Not at All

BILL BRICKMAN--WHO IS A VERY SOLid lawyer--walked over to the corner table in the Brief Bag, tired and disheveled. He dropped himself in a chair and looked around. “I'm in trouble,” he said. “Bad trouble. I'm in way over my head.”

“What's wrong?” said Mike Pirelli. “You been indicted?”

“Nothing that simple,” said Bill. “My practice is out of control. I stayed up all night evaluating every active file in my office, taking notes on what needed to be done. At about 5 o'clock this morning I came to a terrible realization. A year ago, I left Randolph & Wheeler--a perfectly fine law firm-- to try to get some control over my professional life. To march to my own drummer. Now here I am, a solo practitioner, and I'm not even in charge of my own office. So every day I just get mired deeper in the pit.”

“What's the real problem?” said Beth Golden. “Are you overwhelmed with too many cases, or are you stuck doing stuff you just can't stand?”

“Kind of a combination of the two,” said Bill. “While I've got about two dozen cases that I feel on top of ...”

“Congratulations,” said Myra Hebert. “I wish I were on top of any of my cases.”

“Anyway,” said Bill, “I've got another dozen that make me feel seriously inadequate. Some because I'm too far behind, or because I don't really have a grasp of the facts or the law.

“But others are genuine dogs. Losers. Cases I never should have taken. They sit in piles scattered throughout the office, starting to compost like old piles of leaves. Except for what absolutely has to be done, I neglect them--and I know it. The clients call, wanting to know what's happening in their cases. I've even begun waking up in the middle of the night, worrying about them. I've got piles of cases in my office that are absolutely flea-ridden, mangy dogs, and I need to figure out how to get rid of them.”.

“Don't worry,” said Flash Magruder. “It's in the great tradition of the practice of law. All the lawyers I know have albatross files--cases that weigh them down.”

“What Bill needs is a strategy for how to deal with them,” said Angus.

“Like they have at Mason & LeClerq,” said Margaret Anderson. “My first day in the office, I had a pile of files on my desk a foot-and-a-half tall--I measured it. Every case was a dog. And every one had been on at least one other lawyer's desk before it got to mine. Some had been kicking around the office for years. I was able to deal with a couple of them. The rest I passed on to someone else a few months later. That's how you handle it--just dump your problem cases on the next lawyer to join the firm.”

“Somehow I don't think that's going to work for a solo practitioner like me,” said Bill.

RESORTING TO LEGAL TRIAGE

“WHAT YOU NEED TO DO,” ANGUS SAID, “IS A SERIOUS TRIage.”

“Like the battlefield medics?” said Bill.

“Right,” Angus said. “They would divide the wounded into three basic groups. The first ones were beyond hope. All the medics could do was give them some morphine and try to make them comfortable. Second were the walking wounded, the ones who could wait for medical attention. And then there were the genuine emergency cases--the gravely wounded soldiers who might be saved if they got immediate medical attention.

“You've got to do something like that with the cases you have,” said Angus. “You're the only doctor in your office, and you don't have unlimited time to give to every case. But when you conduct your legal triage, the groups are a little different.

“First are the genuine losers. They're the ones that--after some discovery and legal research--you realize don't have the facts or the law that would let them win. But that doesn't mean you throw them out in a heap next to your door. Call the client into your office and explain the situation, treating the client with the respect he or she deserves--whether or not you charge for the time you spent on the matter.

“And be careful how you send people away. Tell them they're welcome to get a second opinion, especially if it's a doubtful area of the law or if they have a technically valid claim that you feel doesn't have much economic value.

***29** “Otherwise, some other lawyer may figure a way to make the case pay after the statute of limitations has run by making you the defendant in a malpractice suit. So it's a good idea to write a letter explaining that your client is welcome to a second opinion and suggesting prompt action so the statute of limitations won't run out first.”

CAREFULLY SIFT CASES FROM THE START

“THE SECOND GROUP IS MADE UP OF MISPLACED CASES. When the little corporate case came into the office, you were sure this was an area you would enjoy. Only you missed signing up for that great seminar on close corporation battles. And when that real estate acquisition dispute walked in the door, it looked like the perfect opportunity to expand your practice in that direction. But now that you're so busy learning about defending age discrimination cases, you don't have the time or inclination for it.

“Dogs are in the eyes of the beholder,” said Angus. “These cases would be fine in the hands of the right lawyers, but not in your office. So your job is to help this kind of case find a good home and then talk to the client about you dropping out.”

“Wait,” Bill said. “I've got a question: If you send a case like this to someone else, do you ask for a referral fee?”

“Some do,” said Angus, “but not me. I'm a lawyer, not a broker. I only take money for work I've actually done that benefits the client. That does not include finding another lawyer. Period.”

“Fool,” said Myra Hebert under her breath, which made Beth Golden give Myra a look and toss her head with a sniff.

“The third group is the troubled or difficult cases that present special problems but may well be worth your effort,” Angus said. “These are the ones that might profit from a creative approach to proving some key facts or new way--for you, at least--to argue the case or make the evidence come alive. After all, you took the case because you thought you could do something with it. Now is the time to brainstorm it looking for some fresh ideas.”

“That's impressive,” said Bill. “I almost feel like going back to the office right now.”

“Wait,” Angus said. “There's more to albatross files than just conducting a triage on the cases you already have.”

“Prevention is still more valuable than cure,” said Angus. “Start picking your cases more carefully. Understand that every time you commit yourself to take on a case, you are evaluating the facts, the law, the client and yourself.

“Lots of cases depend on facts you may not be able to prove. So there are times when you should make it clear from the beginning that whether you will stick with a case may be contingent on what you learn in trial preparation and discovery.

“The same is true when the case depends on what happens on the cutting--or sometimes raggedy--edge of the law. When the appellate court suddenly changes the rules, you need to re-evaluate the situation.

“Then there's the client and you. Lots of clients are difficult people--which is how they got involved in disputes like the ones that brought them to see you. Can you stand to work with this person in a demanding relationship that may last for years and requires trust, confidence and patience?

“Finally, don't carry any of these ideas to excess. There are some law firms that have the reputation of taking only ‘perfect’ cases with wonderful clients who never act difficult and who always make a good impression with the judge and jury. Some of these firms never take on a hard case or represent an annoying client for any reason. They are lawyers who never know the satisfaction of having made a contribution to the development of the law, or never feel the pride of having given some of their time to make the world a little more fair.

“Not every deserving case is a popular cause or earns a big fee,” said Angus. “There are times when you need to take the albatross that walks in your office just because it's the right thing to do.”

Footnotes

a1

McELHANEY AT HIS BEST

The ABA Journal *is occasionally reprinting some of James McElhaney's most popular columns from past years. This article originally appeared in the* Journal*'s November 2001 issue under the headline “Staying Away From the Dogs.”*

a2 *James W. McElhaney is the Baker and Hostetler Distinguished Scholar in Trial Practice at Case Western Reserve University School of Law in Cleveland and the Joseph C. Hutcheson Distinguished Lecturer in Trial Advocacy at South Texas College of Law in Houston. He is a senior editor and columnist for* Litigation, *the journal of the ABA Section of Litigation*.

91-JUN ABAJ 28

92-MAR A.B.A. J. 32

ABA Journal
March, 2006

Corner Office
Terry Carter

TELL US WHAT YOU WANT
The Art of Managing Client Expectations Begins With a Series of Questions

LATELY, SMART LAW FIRMS HAVE adopted the practice of follow-up interviews and surveys of clients when the work is done, hoping to find out how to better serve them the next time.

Smarter ones might do more of that up front and throughout the engagement to ensure there will be a next time.

Every client has expectations when hiring lawyers, as do lawyers when taking on clients. And while this might not be a men-women/Mars-Venus thing, every client and every lawyer is different. Each needs to know exactly what the other means in matters such as communication protocols, timeliness, responsiveness, reporting and other aspects of legal representation.

“We all process information differently, and you need to probe deeper with follow-up questions at the outset to be sensitive to the client's expectations,” says Patrick J. McKenna, an Edmonton, Alberta-based consultant with Edge International.

The structure and formality of approaches for this may differ depending on the kind of legal practice. Some may use formal checklists and plans while others instinctively tease out the details. For example, some clients want to communicate by e-mail only. Others never use it. Some want weekly reports and updates on Fridays or Mondays. Others just want to hear about significant developments.

“This is an issue a lot of the time because some clients just hand a matter off to a lawyer and say ‘litigate this' or ‘handle this,”’ says Robert L. Haig of New York City's Kelley Drye & Warren, who has written extensively on relationships between law firms and in-house counsel. “If there is more conversation at the beginning of the matter about the client's goals or expectations, there would be a better relationship and less unhappiness.”

The checklist approach is adaptable to almost any kind of law practice. Karen Samuels Jones uses one for her real estate transaction practice in the Denver office of Seattle-based Perkins Coie.

“The first thing we do is generate a checklist of responsibilities, not only who is responsible but the expected scheduling for delivery,” Jones says. That checklist details who on the legal team will be doing what work, from partners to associates to paralegals, and often includes a list of preferences in matters such as mailings—over-night or second-day, for example.

“I bet a lot of us wade into this without having that discussion,” Jones says.

A PERSONAL PLAN

THE CLIENT CHECKLIST AT THE EIGHT-LAWYER HARRIS Law Firm's family practice in Denver is lengthy. First a “personalized legal plan” is developed in writing to set out clients' goals and strategies. Then the clients detail their preferences, weighing in on things such as frequency and method of contact with their lawyers and others who can be consulted about the case.

The initial screening is by Heidi Culbertson, the firm's director of client development. “That takes me about 20 minutes, and I usually end up with a lawyer in mind,” she says. “I try to match them up on taste and personality. If it doesn't work out, we make another match.”

A personalized approach means asking questions instead of making assumptions, says David Maister, a Boston-based consultant to professional service firms. “Any sentence that begins with ‘what clients want’ is wrong no matter how you finish it,” he says. “Law firms that adopt policies such as returning phone calls within two hours totally misunderstand the concept of client service. That mentality misses the key point that each client is different.”

Lawyers' questions must be probing. “I recommend asking the same question over and over,” McKenna says. When a client says he or she wants “something like ‘responsiveness,’ you'd think an accomplished litigator would probe a little deeper and ask, ‘what would a law firm look like that's really responsive to your needs?”’

92-MAR ABAJ 32

50 Cap. U. L. Rev. 1

Capital University Law Review
September 23, 2022
Nancy L. Schultz [2]

WHAT DO LAWYERS REALLY DO? [1]

I. INTRODUCTION

Nearly thirty years ago, I wrote the article *How Do Lawyers Really Think?,* in which I explored my frustration with the apparent divide between skills and doctrine in the teaching of law. Since then, there has been much progress in developing the teaching of lawyering skills and in understanding that one cannot teach skills in any meaningful way without teaching law at the same time. [3] Nevertheless, a recent study concluded that law schools have--to some extent--replaced core education with specialized and "boutique" courses that fit the desires of faculty. [4]

Now, as we have faced the most recent crisis in legal education, [5] with fewer students applying to law schools and a job market that struggles to accommodate those who do graduate, we have heard the increasing call to ***2** graduate "practice-ready" lawyers. [6] What does that mean exactly? [7] There has been a great deal of thoughtful scholarship on this topic [8] and calls from ***3** various sources to teach particular skills. [9] A relatively recent American Bar Association task force report concluded that "law schools have a basic societal role: to prepare individuals to provide legal and related services. [Many, if not most,] law schools today do not sufficiently develop core competencies that make one an effective lawyer, particularly those relating to representation of and service to clients." [10]

The idea of core competencies is an important one for education. [11] It questions what basic functions students must be able to perform as lawyers and what they need to be able to do to excel at their chosen profession. "[A] law school moving toward a 'competency-based curriculum' can provide graduates who have more of the competencies that legal employers need." [12] One article looked at empirical studies of the skills law firms want in their employees, and compared those to the skills useful for forming a professional identity. [13] The article lists the "values, virtues, capacities, and skills" that employers and clients want (beyond "technical legal skills") as: [14]

> Internalized commitment to grow toward excellence in all competencies, plus initiative/ambition/drive/strong work ethic; integrity/honesty/trustworthiness; seeks feedback and is responsive to feedback to foster self-development; good judgment/common sense/problem-solving; pro bono/community/bar association involvement; client relationship skills including dedication to client ***4** service/responsiveness to client, business development/marketing/client retention; initiates and maintains strong work and team relationships; project management; effective written and oral communication skills. [15]

The most comprehensive study of the skills new lawyers need was conducted by the Institute for the Advancement of the American Legal System. [16] As the title *The Whole Lawyer and the Character Quotient* suggests, some of the most important skills relate to character. [17]

In this article, I focus on what I believe may be the most important core competency of all: advocacy. I fear that the increasing complexity of the definitions of "practice ready" and the increasing focus on discrete aspects of teaching and learning may become overwhelming to both teachers and students. So, I take a step back in this article and look at the big picture of what lawyers really need to do effectively: advocate.

As I discussed in a previous article, [18] I am a coach. I teach advocacy. I also taught Legal Writing for about 15 years. [19] I have taught communication, in one form or another, for my entire teaching career. As it happens, my undergraduate major at the University of Wisconsin was Speech Communication, and I began my competitive speaking career in high school. Thinking about communication and advocacy has occupied a large part of my life.

I coach teams in appellate advocacy, trial advocacy, pretrial advocacy, arbitration, mediation, negotiation, and client interviewing and counseling. Some of my coaching colleagues think I am a bit (or a lot) crazy for trying to coach teams in so many disciplines. They know that they have their hands full coaching trial teams, appellate moot court teams, or dispute resolution ***5** teams. And they do. I hope to build bridges that will allow us all to share what we know for the benefit of our students. [20]

My approach comes back to what I said earlier about the challenges of focusing on complexity and specificity. For me, it is all about advocacy and communication. While one can get very deep into discrete aspects of advocating to judges, juries, clients, and colleagues, one can also take a step back and work from the idea that it is all an exercise in figuring out who your audience is and what you are trying to accomplish with that audience. This article explores that bigger picture approach, while simultaneously understanding and respecting the viewpoints and accomplishments of those who dig deeper and focus on specifics.

It is my hope that having an umbrella concept, under which to conduct the more detailed explorations, will offer a useful perspective and a means of encouraging transfer from one advocacy context to another. The goal is that students can take lessons in advocating effectively in one context and build on them in another context, rather than starting from scratch every time. When I have students who have competed in one context express concern about having to do something brand new in a different competition, I often say, "all communication begins with thinking about who your audience is and what you are trying to accomplish--so, let's start there." Students frequently respond with something along the lines of "that's true," and it seems to take the edge off.

II. THE IMPORTANCE OF ADVOCACY TO BEING A LAWYER

Few would dispute the importance of communication skills to the practice of law. [21] Advocacy is the essence of lawyering; even the word ***6** lawyer frequently suggests as much--twenty-seven different languages equate lawyer to advocate. [22]

I suggest that a simpler focus on audience and purpose offers a unified way to think about all of our communications. If we teach students to consider their audience and the purpose of their communication reflexively as a starting point when they open their mouths or touch their keyboards, we could move them more efficiently along the road to effective advocacy.

While we must obviously further develop the ability to communicate effectively once we determine audience and purpose in a specific context, having a clear idea of your overarching communication goals can simplify that process. It is easier to communicate a well-thought-out, clearly designed message than it is to communicate ideas that have not been thoughtfully developed in a focused way. So how do we do that effectively and consistently to allow our students to internalize the lessons we teach in a way that they can apply when we are not there?

III. ADDING RESEARCH ON LEARNING TO THE MIX

My teams do well in new competitions. I believe this may be at least in part because in my coaching, I am consistently applying basic audience/purpose analysis. As time goes on, competitions--like other communication contexts-- develop their own traditions and modalities, where continued success depends on learning those. [23] But, as an early guiding principle, using big-picture, abstract skills is a highly successful strategy. As it happens, the science of learning supports that conclusion. [24] Here, I offer brief glimpses into some of the research that has been done, emphasizing that it all supports a holistic approach to teaching that uses spaced repetition to ensure that true internalized learning is happening.

*7 *A. Teaching for Transfer*

One of the big challenges we all face is how to show students that skills they learned in one context apply in another.[25] A couple of years ago, I had an exceptionally intelligent student who competed on a moot court team. She then competed in client counseling and was really struggling, feeling like she had to learn a whole new skill set. I explained to her that all lawyering falls on a continuum of client representation and that the skills we worked on in the appellate context, like maintaining a conversational approach and using simple language, applied at least as much in the client counseling context. Similarly, asking and answering questions are an important part of both contexts. The proverbial light bulbs were flashing all over. In her words, "I never thought of it that way!".

On the other hand, students can try to transfer skills from one context to another in ways that do not work. For example, I recently had a client counseling team turn in a superb performance in one practice, only to do the exact same thing in another practice with disastrous results. They were looking for a formula and thought they had found one. But, even in the same general context of client counseling, they discovered that clients are different and have different problems that require different approaches. The umbrella approach I advocate for here is not a formula--it is a starting point.

"Teaching for transfer" is something that educators aim for, and there has certainly been plenty of research on how to accomplish it.[26] Here, I describe a few articles that detail and summarize research on the subject, with the purpose of exposing the commonalities in the research that can help our teaching achieve more effective transfer. Those who are interested in the details of the research can read the articles; here, I merely attempt a brief introduction to the concepts.

One study of third-grade math students found that teaching for transfer improved student learning.[27] Teaching for transfer was accomplished by using broad categories to group problems together, and then prompting ***8** students to search for these broad categories in new problems.[28] In other words, teachers give students big picture concepts to help them organize their work, and then challenge them to look for those concepts in new assignments.

Another article offers similar thoughts on accomplishing transfer in the areas of planning and problem management skills, computer programming instruction, and literacy-related cognitive skills.[29] Transfer depends on extensive practice and occurs when the learner takes something that has been learned in a previous context and applies it in a new one.[30] Such transfer can either be of the forward-reaching kind, where one learns elements in anticipation of later application, or of the backward-reaching kind, where one faces a new situation and searches for relevant knowledge already acquired.[31] The latter is the situation my previously-described student found herself in.

An additional article explores the cognitive science literature of the transferability of skills.[32] The literature reveals that skills are transferable under certain conditions.[33] That is, learning principles and concepts facilitates transfer because it creates more flexible mental representations, while rote learning of facts discourages transfer.[34] Training in reasoning and critical thinking is only effective for transfer when abstract principles and rules are coupled with examples.[35] Transfer is also enhanced where learning takes place in a social context and where there is feedback on performance with specific examples.[36] Furthermore, transfer is improved if students are shown how problems resemble each other, if they are aware of how to apply skills in different contexts, if their attention is directed to the underlying goals of comparable problems, if examples are varied and are accompanied by rules or principles--especially if the rules and principles are discovered ***9** by the students--, and if students are required to articulate the lessons learned.[37]

Scholars in legal education report similar findings:

> Before transferring information or ideas from a class to a new situation, one must first anchor the concept in the mind. To do this, the student must attach the new information to the existing scaffolding in the student's memory. Attached to the wrong structure, the new information cannot easily be used in a later application.

> In reaching backward, a student thinks back to past experiences or concepts to find existing mental scaffolding that can be used to "bear the weight" and provide an accessible resting place for the new material that is being taught. In stretching forward, a student consciously envisions potential future applications of the material being learned. [38]

This article explored the same concepts twenty years ago:

> Over and over again, researchers have found that transfer is more likely to occur when students have been presented with a number of different examples that have similar underlying structures and problem solutions but different surface features. In such situations, students are likely to develop general schemata that are not tied to specific facts, which increases the chances that the student will be able to retrieve an analogous example during the search process. [39]

> If we want our students to be able to transfer what we have taught them to a new situation, we must change the ways in which we teach. We must provide our students with multiple examples, we must teach the underlying structures of those examples, and we must teach our students to look for the similarities between the problem that they are working on and other problems that they have encountered. ***10** If we teach in this way, instead of simply teaching our students how to research a particular issue or how to write a specific memo, we will be teaching them how to research a variety of issues and to write a wide array of memos and briefs. [40]

It seems fairly obvious that these approaches work beyond the context of applying them to new issues and new forms of written expression. They work across all forms of advocacy. Note that the research on transfer consistently emphasizes the importance of multiple opportunities to practice, accompanied by explicit instruction on the umbrella principles. [41] The science also reinforces the importance of self-guided learning, in a social setting, with feedback. [42] It is hard to come up with a better description of how advocacy classes and competitions work. For those looking for a step-by-step guide to teaching for transfer, one organization has come up with one. [43]

If we can be more effective at teaching our students to transfer advocacy skills from one context to another, we can help them learn that understanding basic principles of communication and advocacy in one setting puts them on the road to being more effective lawyers across the board. For example, being a good trial lawyer gives you more negotiating leverage, understanding your client as much as possible makes you a better advocate, and, as one of my students wrote in a paper, being a lawyer is much more than writing a legal brief--it requires constant practice of communication skills and empathy.

B. Interleaving/Spaced Repetition

Interestingly, and consistent with the research on transfer, studies show that "interleaving"--teaching concepts in a way that is spread out over time and woven into the teaching of other concepts--is more effective at ensuring ***11** long-term retention than teaching everything once in a "massed" approach. [44] Here are excerpts from a posting by one expert on the subject:

> The silo approach (a unit on the Commerce Clause, followed by a unit on the Spending Clause, and so on) presumes that it would be unduly confusing for students to shift gears, hurting their comprehension. But, studies show the opposite: interleaving the presentation of related but distinct topics results in better mastery of each topic. Learners understand the relationships among silos better, and also--perhaps unexpectedly--they understand each silo better.

> However, the studies showing the power of interleaving also reveal a cognitive illusion: students who learn interleaved material routinely underestimate their progress when compared to the silo method. This is largely because the advantages of interleaving tend to reveal themselves slightly later in time.
>
> In my experience, students actually do not dislike the type of interleaving described in these blog posts and in my casebook, so long as I am transparent with them about the logic. A few months into the semester they can feel the benefits of better comprehension and retention as they solve problems across silos. By the end of a semester, they know they are further ahead than they would have been, despite the initial feeling of unfamiliarity.
>
> Why is spaced practice more effective than massed practice? It appears that embedding new learning in long-term memory requires a process of consolidation, in which memory traces (the brain's representations of the new learning) are strengthened, given meaning, and connected to prior knowledge--a process that unfolds over hours and may take several days. Rapid-fire practice leans on short-term memory. Durable learning, however, requires time for mental rehearsal and the other processes of consolidation. Hence, spaced practice works better. The ***12** increased effort required to retrieve the learning after a little forgetting has the effect of retriggering consolidation, further strengthening memory. [45]

This research suggests that teaching advocacy skills throughout the curriculum, on a regular basis, is much more likely to ensure that students retain the lessons and can apply them later in a wider variety of contexts. The same logic, as explained by the author, applies to learning content--i.e., the law. [46] When we consciously incorporate advocacy opportunities with learning the law, we enhance the learning, retention, and performance in both aspects.

Another way of describing the teaching process that enhances transfer by embedding lessons over time is spaced repetition. Louis Schulze is a major advocate for spaced repetition who has written copiously on the subject. [47] Here, I reproduce some of that analysis:

> Spaced repetition is the simple fact that learning is enhanced when information is distributed over time instead of learned in a "massed" (or crammed) fashion. This phenomenon is one of the most consistently replicated effects in experimental psychology, and a robust literature exists confirming the effect in many different contexts. It works like this: If students learn a concept on September 14th and ignore that concept until just a week before their exam on December 2nd, that approach constitutes massed practice and is dramatically inferior to interleaving multiple retrievals at certain specific intervals.
>
> The neuroscience behind this effect is instructive. Neurogenesis is the generation of neurons over time in the areas of the brain involved in learning. Between the neurons are spaces called synapses, whose job is to communicate between neurons. This is the basis of memory. If unused, ***13** synaptic connections weaken. But, if more learning occurs, the strength of the signal (called synaptic plasticity) returns.
>
> By spacing repetitive memory interventions, the learner essentially keeps the neurons, and the synaptic signals between them, alive by repeatedly activating them ... It turns out that as the neurons are reactivated and the synapses again carry signals to each other, they increase their durability and need less frequent stimulation until they begin to decline again; this is known as "the lag effect." Also, materials that the learner knows well require less review than the materials students know less well, thus allowing yet more spacing. These two features--

> longer intervals and prioritizing less well-known material--make the spaced repetition process more efficient than otherwise would be the case.
>
> [W]e know that spaced repetition not only positively impacts memory, but also aids understanding. Learning occurs not through some literal recording mechanism but instead by the relationship between the meaning of one bit of information to the meaning of and associations with preexisting knowledge. [48]

Schulze and Caplan are essentially saying the same thing: spaced repetition of learning opportunities makes it more likely that the lessons will end up in long-term memory and be retrievable by the learner. More efficient retrieval means less time spent by teachers trying to reteach things we think we have already taught. It also means less frustration on the part of students who can now see both the relationships among contexts and the big picture principles that will allow them to build bridges to enhance their own learning.

IV. APPLYING THE SCIENCE

All of this science gives us a blueprint for our approach to training advocates. The science applies both to teaching content and the means of ***14** expression. [49] This article focuses more on the latter, but they are inextricably intertwined in many ways. You cannot communicate effectively about the law without understanding it, and you will understand the law better by communicating about it.

If we use the science of learning and transfer to train our students more effectively and consistently to be better advocates, we give them a number of advantages: bigger picture understanding of the lawyer role; greater confidence moving between the phases of a case; greater flexibility in adapting to different audiences and contexts; and greater employability.

Before getting into specific methodologies, we need to take a look at those umbrella concepts that that will make transfer easier for our students. Science tells us that we need to be explicit about teaching these concepts.

V. THE FUNDAMENTALS OF COMMUNICATION--AUDIENCE AND PURPOSE

As alluded to earlier, if we hope to communicate effectively, we must always consider to whom we are communicating and what we hope to accomplish with our communication. Trying to win an argument with a significant other involves different communication strategies than trying to convince a boss we deserve a raise. The level of formality of the discourse, the nature of the arguments we believe will be persuasive, and the tone of the argument are all likely to vary widely in these two examples. Lawyers need to communicate with a variety of audiences, but all communications involve the same elements: a sender, a receiver, and a message. [50] The trick is making sure the message gets from the sender to the receiver in such a way that the receiver perceives the message as intended, and hopefully reacts as desired.

A. Audience

1. General Audience Categories

When studying communications in college, we learned that different strategies and techniques apply depending on the size of the audience--we learned about interpersonal, small-group communications and about public ***15** speaking. [51] You use a different approach when speaking to one person than when speaking to an auditorium full of people.

Lawyers engage in various forms of communication. We talk one-on-one with clients, colleagues, and opposing counsel. We have small, group communications in negotiations and mediations. We use our public speaking skills in court and in presentations of various kinds. Tone, volume, and vocabulary should all be adapted to the size and type of audience.

2. Legal Audiences

Lawyers communicate with clients, judges, juries, other lawyers, mediators, and arbitrators. [52] Legal education has traditionally focused on communicating with judges, juries, and--to some extent--clients. [53] More recently, communications with other lawyers, mediators and arbitrators have been added. [54] Each of these audiences presents a different context for advocacy. [55] You use a different vocabulary with a judge than with a client or a jury. [56] You also use a different tone depending on your audience and your purpose. [57] Different audiences have different expectations. [58]

These communications take place in offices, courtrooms, hearing rooms, conference rooms, and in written forms: briefs, memos, letters, emails, texts. [59] Without building bridges between the various forms of communication, we can overwhelm our students if we try to teach them detailed strategies for communicating with all of these audiences in different scenarios. While students need to learn all the facets of communication, ***16** learning will be easier if we can give them an overarching set of principles that apply in all contexts.

Thus, we can teach the similarities in communication between clients and juries and between judges and arbitrators. We can also show our students that all communications with a particular audience have commonalities. This can help create that scaffolding that they can build upon in specific contexts.

B. Purpose

1. General Purposes

In teaching communication skills, we also need to examine our purpose: do we seek to inform our audience, persuade them, entertain them, or some combination of all three? Again, lawyers need to know how to perform all of these functions, sometimes in a single communication task, such as a trial.

2. Legal Purposes/Contexts

Lawyers engage in advocacy in many contexts: client interviews and consultations, mediation, negotiation, litigation, arbitration, meetings with colleagues, and settlement conferences with opposing counsel and judges. [60] In general, the purpose of communication in each context is to inform and persuade. [61] We sometimes add entertainment to the mix--we do not want to bore juries, for example. [62] But, we fundamentally want our audiences to understand the case we are discussing; therefore, we inform them as to the facts and the law. We try to persuade as well: should the client accept the settlement, should the jury convict our client, should the judge grant our motion?

Again, the process becomes overwhelming if we get too deep into the nuances of informing and persuading in every context in such a way that our students perceive that they are all completely different, potentially causing them to give up and believe they can never master everything that is required to be a lawyer.

***17** We make the process feel more manageable if we teach them that the fundamental question is determining the purpose in communicating with a specific audience and that there is only a limited range of available purposes.

VI. COMMUNICATION, ADVOCACY AND DISPUTE RESOLUTION, AND LAW SCHOOL

We should all understand and acknowledge the importance of advocacy and dispute resolution to being a lawyer; [63] the question is, what can law school do to put our graduates in the best position to advocate effectively? Law school has traditionally focused on advocacy in the litigation context, with a special emphasis on appellate litigation, an activity that very few of our graduates will ever engage in. [64] Over the last several years, the recognition that non-litigation and transactional skills are at least equally important has grown. [65]

Almost all law schools have advocacy programs of one kind or another. Some focus on trial advocacy, while others focus on appellate advocacy; some treat all forms of advocacy with equal respect and attention. Here, I argue for a broader definition of advocacy and for recognition that it is the most important part of a lawyer's required communication arsenal. I also argue for a broader definition of dispute resolution, a key context in which advocacy happens.

Law schools tend to separate advocacy and dispute resolution. Here, I try to bring them together. This is consistent with my sense and experience that we should look for bigger picture concepts that will allow our students to build bridges between lessons and enhance their overall learning.

A. What is Advocacy?

As mentioned, all law schools teach advocacy; the question is, what do they mean when they use the word? Trial practice teachers tend to mean trial advocacy; moot court coaches tend to mean appellate advocacy; others may ***18** use the term more generically. [66] Many people distinguish advocacy functions from other lawyering functions, such as client counseling or negotiation. [67] The term "soft skills" often includes the latter. [68] A moment's thought should reveal that advocacy is present in all of these contexts; i.e., it's all advocacy.

How is advocacy generally defined?

- The act of pleading for, supporting, or recommending; active espousal.
- The act or process of supporting a cause or proposal.
- Support for, backing of, promotion of, championing of. [69]

Lawyers advocate in all of the following contexts: advocating a strategy or a settlement to a client; advocating on behalf of a client in settlement or transactional negotiations, where such advocacy may take place face to face, in demand letters, in redlined documents, etc.; advocating in mediation to either the mediator, the opposing party or counsel, or the client; advocating in arbitration; advocating in trial to the judge or the jury; or advocating on appeal. [70]

B. What is Dispute Resolution?

Similar to my broad view of advocacy, I have a very broad view of dispute resolution (and I include it in my conception of advocacy). Simply ***19** put, it is all dispute resolution. Way back in history, we resolved disputes by fighting: duels, trial by combat, etc. [71] We developed courtrooms in an effort to take a more civilized approach. [72] As the court system became overloaded, we developed alternative approaches, such as arbitration and mediation. [73] Interestingly, in 2019, a party to a divorce requested trial by combat. [74] Although this is an isolated incident, it suggests that in some way (or for some people) we may have come full circle in our view of how to resolve disputes. All of this suggests to me that attempts to separate advocacy and dispute resolution do not make much sense--there is advocacy in dispute resolution and dispute resolution in advocacy, and both are part and parcel of effective client representation.

C. Advocacy and Dispute Resolution Across the Curriculum

What does it look like to teach advocacy more broadly, using the fundamental principles discussed previously? It means that we look for opportunities to talk about communication and advocacy regardless of what we are teaching.

If we are teaching a communication-focused course, such as Trial Advocacy or Client Interviewing and Counseling, we can get deeper into the nuances of communicating specific messages to specific audiences, though the fundamental question of audience and purpose should provide the initial framework for teaching. If we are teaching a doctrinal [75] course, we can always take a moment in discussing cases, rules, and statutes to create a communication context; beyond the traditional approach of arguing both sides of the case, we can ask students to explain a decision to a client, to use ***20** the case in advocating for a settlement, or to explain how they might have counseled a client to avoid litigation in the first place. Not only will this reinforce the importance of all forms of communication to being a lawyer, but it will also ensure that the students really understand the material--you cannot communicate clearly about something you do not understand. In doing so, we should specifically reference the broader principles of advocacy that apply in all contexts.

These are some of the ways students may be learning communication skills in law school: making arguments in doctrinal classes; [76] negotiating in contracts class; representing clients in clinics; competing on interscholastic teams; making oral presentations in seminary; or handling a case from start to finish in legal research and writing. [77]

There are plenty of opportunities for teaching communication throughout law school, and students are certainly taking advantage of these opportunities-- some more consistently than others. But, if students perceive the communications opportunities as discrete events involving separate sets of rules and content, they may not be internalizing the umbrella concepts discussed in this article and may be missing opportunities to use one communication opportunity to build on another. If they can begin to understand the key importance of good communication skills to every aspect of lawyering, perhaps they can start seeing the commonalities, using one communication success to create another, and developing better communication habits overall.

D. Recognizing the Skills Overlap in Various Advocacy Contexts [78]

The possibility of transferring lessons from one advocacy context to another becomes even more obvious when we look at the extensive overlap between skills used in the various settings. Here is a brief comparison of advocacy skills that may not initially seem connected.

CLIENT INTERVIEW	DIRECT EXAMINATION
Build rapport	Build rapport
Ask open questions	Ask open questions
Listen	Listen
Follow up	Follow up
Develop a story/theme about the client's case	Weave in a story/theme about the client's case

MEDIATION/NEGOTIATION	TRIAL/ARBITRATION
Allow parties a chance to tell their story	Allow parties a chance to tell their story (or for their lawyer to tell it)
Provide someone on party's side	Provide someone on party's side
Allow parties to face their opponent (not always the case in negotiation, since lawyers typically negotiate without their clients present)	Allow parties to face their opponent
Allow parties the opportunity to develop an understanding of their opponent's position	Allow parties the opportunity to develop an understanding of their opponent's position
Seek a resolution to the problem	Seek a resolution to the problem
Acknowledge and understand opponent's motivations, goals, pressures, etc.	Acknowledge and understand opponent's motivations, goals, pressures, etc.
See beyond this one meeting from both the parties' perspective and the attorneys'	See beyond this one meeting from both the parties' perspective and the attorneys'
Opportunities for information gathering	Opportunities for information gathering
Allow for creative solutions for a possible win/win* [79]	Allow for more limited solutions that will produce a win/loss*
Give parties control over the outcome** [80]	Give control of outcome to judge/jury or arbitrator**

MOTION PRACTICE	APPEALS
Conduct legal research	Conduct legal research
Write memorandum of law to support motion; includes law and facts	Write brief to support appeal; includes law and facts
Judge will ask questions to test understanding of law and facts	If oral argument is allowed, judges will ask questions to test understanding of law and facts
Lawyers must think on their feet to respond to questions and hypotheticals posed by the judge	Lawyers must think on their feet to respond to questions and hypotheticals posed by the bench

***22** Showing students these similarities helps them see how the questioning skills they learn in client interviewing can be applied to direct examination in a courtroom. Students can see that the research and writing skills they apply in motion practice are not that different from the skills they apply in appellate practice.

Once the students can see the similarities, they can better appreciate and isolate the differences. For example, a major difference is the fact that, in litigation, the client hands over control of their matter and that there is going to be a win-loss outcome.

In the next two sections, I explore ways to create context that will hopefully allow students to see the larger picture of being a lawyer. I firmly believe that this approach will enhance learning in a way that discrete, isolated learning experiences cannot.

E. The Life Cycle of Representing a Client

In my years of teaching Legal Writing, I learned that students were more engaged, and delivered better work product, when they understood how their tasks fit into the representation of a single client. I described the way I taught the course in a recent article.[81] Fundamentally, it helps if we orient our students to where their communication task fits into the stages of client representation: initial review; research; client letter or other communications about the results of research results; communication with the opposing ***23** counsel or party; negotiation; mediation; litigation or arbitration, including discovery, motion practice, and trial; and appeal.

Obviously, not all of these stages will take place in any given client matter. But, the communication tasks take on greater meaning if we understand the possibilities and the sequence. For example, I learned that if I had my students negotiate after writing their research memoranda, they understood the need to research adverse case holdings in order to respond to opposing counsel's arguments. Overall, the memoranda were better written, the analysis was clearer and more thorough, and I received fewer questions throughout.

Legal educators and practitioners over the years have bemoaned the absence of the client in much of legal education.[82] Traditional legal education typically presents legal issues as if they somehow magically appear in appellate courts.[83] We discussed "facts" as if they had nothing to do with people, when they have everything to do with people and their stories.[84] The importance of storytelling to being a lawyer has been written about extensively.[85] When I tell my negotiation teams they need to be prepared to talk about their clients' stories, they look confused. They just want to get straight into negotiating. But, how can you negotiate without context? You need to know what your client needs and wants, and what their interests are. Otherwise, how will you explain your proposed solutions?

Law students also somehow internalize that the facts are unimportant in appellate advocacy--that appellate courts only care about the law. But, every time you walk into a courtroom of any kind, you are there because you are advocating for a client. That client has a story, needs, and interests. Your ***24** job is to connect those elements to the law and explain how the law supports your client.

One of the most frequent complaints I hear from judges is that lawyers do not know what they want. I get occasional texts from former advocates sitting in courtrooms telling me how frustrated judges are when lawyers do not answer their questions or do not know what relief they are seeking. It all comes back to audience and purpose--who are you talking to, and what are you trying to accomplish? If you do not know that, you have missed the point of why you are there.

The more we disentangle the law from the people we advocate for, the harder it becomes to answer these simple questions. The questions I always begin moot court practices with include: Who is your client? What does your client want? Why should your client get what they want? It is a hard sell to convince moot court teams that the answer to every question is not a court decision. I once had a student--whom I tried very hard to convince of that fact--say to me, "but doesn't it give me more credibility when I cite a case?" The obvious answer is that it does not when the answer to the question depends on your client's facts and circumstances, rather than a court decision.

F. Building Other Bridges for Transfer

Using the concepts of audience and purpose to build bridges for our students should enhance their ability to transfer skills from one context to another. One mantra I have used for many years is, "context is everything." That is to say, if you have a sense of context, which clearly includes audience and purpose, that bird's eye view allows you to make good choices in planning strategy and tactics. Below are some additional, specific ways to build contextual bridges that will hopefully improve our students' understanding of how to advocate effectively.

We can build bridges using skill sets. I mentioned earlier my student who used moot court skills to build her client interviewing skills. Looking at the chart presented earlier, we can use skills from direct examination to build client interviewing skills, and vice versa. Understanding the purpose associated with asking and answering questions provides the connective context.

Similarly, we can use the persuasive writing skills from motions as a foundation for writing appellate briefs. Using the facts and law to build a persuasive argument on behalf of a client is the underlying skill set. If the students can see the connection, they can then focus on adding the aspects that are specific to the individual contexts.

***25** In all of these examples, we need to be explicit about contextualizing what we are asking our students to do. We need to help them see the connections and understand that they already know how to do much of what is required.

VII. CONCLUSION

We speak of teaching important concepts by the pervasive method: ethics, professionalism, and professional identity. [86] Clearly, advocacy needs to be taught pervasively, which is relatively simple if you keep the big picture in mind. Use the science: identify the context, find the target, and practice hitting it, all while improving lawyer effectiveness and client representation along the way.

Footnotes

1 This article is a sequel of sorts to my 1992 article, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57 (1992). I want to thank EIC Kelsey Gee for really thoughtful, skillful editing. The article is better because of her.

2 Kennedy Professor of Dispute Resolution at Fowler School of Law, Chapman University.

3 *See generally* William M. Sullivan, *After Ten Years: The Carnegie Report and Contemporary Legal Education*, 14 UNIV. ST. THOMAS L. J. 331 (2018); Susan J. Hankin, *Bridging Gaps and Blurring Lines: Integrating Analysis, Writing, Doctrine, and Theory*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 325 (2011); Russell Engler, *The MacCrate Report Turns 10: Assessing its Impact and Identifying Gaps We Should Seek to Narrow,* 8 CLINICAL L. REV. 109 (2001).

4 William J. Carney, *Curricular Change in Legal Education*, (Emory Univ. Sch. Of Law Research Paper No. 20-15), https://ssrn.com/abstract=3642875 [https://perma.cc/6ZQ8-Q8E7].

5 Richard E. Redding, *The Legal Academy Under Erasure*, 64 CATH. U. L. REV. 359, 416 (2015) (arguing for a legal education model that more closely approximates medical education); for the argument that this is just the latest downturn in a cyclical process, *see* Deborah M. Hussey Freeland, *The Demand for Legal Education: The Long View*, 65 J. LEGAL EDUC. 164, 164 (2015).

6 *See generally* Margaret Martin Barry, *Practice Ready: Are We There Yet?,* 32 B.C. J. L. & SOC. JUST. 247 (2012); Jay Gary Finkelstein, *Practice in the Academy: Creating Practice Aware Law Graduates*, 64 J. LEGAL EDUC. 622 (2015); Kate Walter, *Six Ways Law School Can Make Students More Practice Ready*, THOMSON REUTERS (Jan. 23, 2017), https://www.legalexecutiveinstitute.com/six-ways-law-schools-students/ [https://perma.cc/CK89-BZAD]; Chad Asarch & Phil Weiser, *Why Law Schools Need to Teach More than the Law to Thrive (Or Survive)*, ABA J. (June 23, 2016, 8:00 AM), https://www.abajournal.com/legalrebels/article/why_law_schools_need_to_teach_more_than_the_law_to_thrive_or_survive [https://perma.cc/46P4-CYZ2].

7 "[S]tudents need to recall and apply what they have learned in law school not just at the end of the class or even for the bar exam, but for the benefit of their clients years later. The call for 'practice-ready attorneys' that has pervaded discussions about improving legal education for decades is directly tied to long-term learning. In short, the 'practice-ready' attorney is one whose legal education has 'stuck.'" Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. J. LEGAL ETHICS 355, 357 (2016). Echoes of this point will appear in the current article as well.

For practical answers to this question, *see* Eli Salomon Contreras, *The Skills We Wish We Learned in Law School*, ABA J. https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/professional-life/the-skills-we-wish-we-learned-in-law-school/ [https://perma.cc/YP5N-77PZ]; Mark Cohen, *Skills and Education for Legal Professionals in the 2020s*, FORBES (July 1, 2020,7:54 AM), https://www.forbes.com/sites/markcohen1/2020/07/01/skills-and-education-for-legal-professionals-in-the-2020s/?sh=1a7fe7472702 [https://perma.cc/8TM7-ATRC].

8 *See generally* Joni Larson, *To Develop Critical Thinking Skills and Allow Students to Be Practice-Ready, We Must Move Well Beyond the Lecture Format*, 8 ELON L. REV. 443 (2016); Christine Cerniglia Brown, *Is Experiential Education Simply a Trend in Law School or is it Time for Legal Education to Take Flight?*, THE FED. LAW. (Aug. 2013), https://www.fedbar.org/wp-content/uploads/2013/08/feature1-aug13-pdf-1.pdf [https://perma.cc/J9SY-XVXY]; Michael R. Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. REV. 1515 (2012); Robert J. Condlin, *Practice Ready Graduates: A Millennialist Fantasy*, 31 TOURO L. REV. 75 (2014); Neil J. Dilloff, *Law School Training: Bridging the Gap Between Legal Education and the Practice of Law*, 24 STAN. L. & POL'Y REV. 425 (2013); Sheldon Krantz & Michael Millemann, *Legal Education in Transition: Trends and Their Implications*, 94 NEB. L. REV. 1 (2015) https://digitalcommons.unl.edu/nlr/vol94/iss1/2/ [https://perma.cc/J84J-57BQ]. *But see,* Peter Toll Hoffman, *Teaching Theory Versus Practice: Are We Training Lawyers or Plumbers?*, 2012 MICH. ST. L. REV. 625, 627-28 (2012).

9 *See generally* Lynnise Pantin, *Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum*, 41 OHIO N.U.L. REV. 61 (2014); Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training Debiasing?* 21 HARV. NEGOT. L. REV. 1 (2015), https://www.hnlr.org/wp-content/uploads/sites/22/HNR101_crop-1.pdf [https://perma.cc/89L2-GZP3].

10 Jay Conison, *The Report and Recommendations of the ABA Task Force on the Future of Legal Education: Its Significance for Bar Admissions and Regulation of Entry into the Legal Profession*, 83 THE BAR EXAM'R, 12, 15 (2014), https://ncbex.org/assets/media_files/Bar-Examiner/articles/2014/830414-abridged.pdf [https://perma.cc/5RMF-A3H2].

11 Neil W. Hamilton et al., *Encouraging Each Student's Personal Responsibility for Core Competencies Including Professionalism*, 21 PROF. LAW. 1, 1-2 (2012).

12 Neil Hamilton, *Law Firm Competency Models & Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6, 7 (2013).

13 *Id.* at 32.

14 *Id.*

15 *Id.*

16 *See generally* Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, 1 (2016), https://iaals.du.edu/sites/default/

files/documents/publications/foundations_for_practice_whole_lawyer_character_quotient.pdf [https://perma.cc/A5J8-WYFT].

17 *Id.*

18 Nancy L. Schultz, *Lessons from Positive Psychology for Developing Advocacy Skills,* 6 J. MARSHALL L.J. 103, 106 (2013).

19 Nancy Schultz, *The Integrated Curriculum of the Future: Integrating First-Year Legal Writing with Other Lawyering Skills*, 7 ELON L. REV. 405, 407 (2015). In truth I still teach it in all my classes and to all my teams--I just do not teach the first-year class anymore.

20 NALAE (National Association of Legal Advocacy Educators) is a new national organization bringing together advocacy teachers from all disciplines. This exemplifies a growing recognition that we can all learn from each other, and that we have much in common. *See* Kent Streseman, *The National Association of Legal Advocacy Educators*APP. ADVOC. BLOG (Sept. 11, 2021, 7:06 PM), https://lawprofessors.typepad.com/appellate_advocacy/2020/07/the-national-association-of-legal-advocacy-educators.html [https://perma.cc/XNW3-Y3GS].

21 Audra Petrolle, *Communication Tips for Young Lawyers,*PRAC. POINTS (Jan. 5, 2017), https://www.americanbar.org/groups/litigation/committees/consumer/practice/2017/communication-tips-for-young-lawyers/ [https://perma.cc/4FMN-M2QX].

22 Here, I note that the word lawyer equates to advocate in at least 27 languages. *See, e.g.*, Jonathan Goldberg, *Attorney, Lawyer, Barrister, Solicitor and Notary (English),*LE MOT JUSTE EN ANGLAIS (May 9, 2010), https://le-mot-juste-en-anglais.typepad.com/le_mot_juste_en_anglais/2010/05/this-article--was-originally-published-in-its-french-version——————————in-several-languages-the-words--meaning.html [https://perma.cc/D885-DVY2].

23 *See A Primer to Oral Argument*, TIPS ON ORAL ADVOC. https://law.duke.edu/life/mootcourt/tips/ [https://perma.cc/7976-ZGK9] (last visited Mar. 24, 2022) (discussing the tips and tricks for new Moot Court competitors).

24 *See* Josette Akresh-Gonzales, *Spaced Repetition: The Most Effective Way to Learn,*NEJM KNOWLEDGE+ (May 17, 2019), https://knowledgeplus.nejm.org/blog/spaced-repetition-the-most-effective-way-to-learn/ [https://perma.cc/G827-G9RH] (explaining the efficacy of spaced repetition for learning new information).

25 *See* Jose Mestre, *Transfer of Learning: Issues and Research Agenda*, REP. OF A WORKSHOP HELD AT THE NAT'L SCI. FOUND, 4 (2002) https://www.nsf.gov/pubs/2003/nsf03212/nsf03212.pdf [https://perma.cc/44JR-NY4L].

26 Winston Sieck, *How to Promote Transfer of Learning*, GLOB. COGNITION: GC BLOG (Sep. 16, 2021), http://www.globalcognition.org/transfer-of-learning [https://perma.cc/V8AY-7PEB].

27 Lynn S Fuchs et al., Explicitly Teaching for Transfer: Effects on Third-Grade Students' Mathematical Problem Solving, 95 EDUC. PSYCH. 293, 301 (2003).

28 *Id.* at 293.

29 Gavriel Solomon & David N. Perkins, *Rocky Roads to Transfer: Rethinking Mechanisms of a Neglected Phenomenon*, 24 EDUC. PSYCH. 113, 113 (1989).

30 *Id.*

31 *Id.*

32 David Billing, *Teaching for Transfer of Core/Key Skills in Higher Education: Cognitive Skills*, 53 HIGHER EDUC. 483, 483 (2007).

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 Shaun Archer, et al., *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. LEGAL EDUC. 258, 259 (2014).

39 Laurie Currie Oates, *I Know That I Taught Them How to Do That*, J. LEGAL WRITING INST. 1, 7 (2001).

40 *Id.* at 16.

41 Y.B. Chung & Mantak Yuen, *The Role of Feedback in Enhancing Students' Self-Regulation in Inviting Schools,* 17 J. OF INVITATIONAL THEORY AND PRAC. 22, 22 (2011).

42 *Id.* at 23.

43 *Tips on Teaching for Transfer: A "BDA" Framework*, DEL. SOC. STUD. EDUC. PROJECT RSCH. CORNER, https://www1.udel.edu/dssep/transfer/Tips%20***o***n%C20Teaching%C20for%20Transfer.pdf [https://perma.cc/NTV5-9YZ3].

44 Steven C. Pan, *The Interleaving Effect: Mixing It Up Boosts Learning*, SCIENTIFIC AM. (August 4, 2015), https://www.scientificamerican.com/article/the-interleaving-effect-mixing-it-up-boosts-learning/ [https://perma.cc/E64T-2D8X].

45 Aaron Caplan, *Strange Bedfellows #12: Closing Thoughts on The Science of Learning*, PRAWFSBLAWG (June 30, 2015, 11:38 AM), https://prawfsblawg.blogs.com/prawfsblawg/2015/06/strange-bedfellows-12-closing-thoughts-on-the-science-of-learning.html [https://perma.cc/3W83-GAH8].

46 *Id.*

47 Scott Fruehwald, *Weekly Legal Education Roundup*, TaxProf Blog (Dec. 30, 2016), https://taxprof.typepad.com/taxprof_blog/2016/12/weekly-legal-education-roundup-3.html [https://perma.cc/LJ8J-LY7E].

48 Louis Schulze, *Using Cognitive Psychology to Improve Student Performance, Part Three: Spaced Repetition*, FACULTY LOUNGE (Oct. 12, 2016, 2:41 PM), https://www.thefacultylounge.org/2016/10/using-cognitive-psychology-to-improve-student-performance-part-three-spaced-repetition.html [https://perma.cc/5ECV-AFY3].

49 Chris Loper, *Spaced Repetition*, NW. EDUC. SERV. (Jan. 4, 2016), https://www.nwtutoring.com/2016/01/04/spaced-repetition/ [https://perma.cc/4S6G-QRLD].

50 Richard Nordquist, *The Basic Elements of the Communication Process*, THOUGHTCO. (Apr. 6, 2020), https://www.thoughtco.com/what-is-communication-process-1689767 [https://perma.cc/6QV8-6SHR].

51 Stephen Lucas, THE ART OF PUBLIC SPEAKING 103 (13th ed., McGraw Hill 2019). I should note here that I took multiple courses from Steve Lucas when I was an undergraduate student at the University of Wisconsin. To say that I learned a great deal from him is a gross understatement.

52 Jacqueline M. Nolan-Haley et al., *ADR and the Professional Responsibility of Lawyers*, 28 FORDHAM URB. L.J. 887, 892 (2001).

53 A.B.A., LEGAL EDUC. AND PRO. DEV.: AN EDUC. CONTINUUM 6 (1992).

54 Katherine R. Kruse et al., *Client Problem Solving: Where ADR and Lawyering Skills Meet*, 7 ELON L. REV. 225, 226-227 (2015).

55 *Id.* at 226.

56 *Id.*

57 Tenielle Fordyce-Ruff, *Know Your Audience: Writing to Non-Lawyers*, 58 ADVOCATE 44, 45 (2015).

58 Susan R. Kaplan, *Finding Your Audience*, 183 N.J. LAW 34, 34 (Mar./Apr. 1997).

59 RICHARD K. NEUMANN, JR. ET AL., LEGAL REASONING AND LEGAL WRITING 61 (Wolters Kluwer, 8th ed. 2017).

60 *A Lawyer's Responsibilities,*TEXAS CENTER FOR LEGAL ETHICS (last visited Apr. 3, 2022. 8:21 AM), https://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct/Preamble-(1)/A-Lawyer-s-Responsibilities [https://perma.cc/TL8E-D6KT].

61 *See* Edmund J, Sikorski Jr., *The Difference Between Litigation Advocacy and Mediation Advocacy*, 22 ALT. DISP. RESOL. 20, 21 (2018); Julius Glickman, *Persuasion in Litigation*, 8 LITIG. 30 (1982).

62 *See generally* Sonya Hamlin, *Who Are Today's Jurors and How Do You Reach Them?*, 27 LITIG. 9 (2001).

63 *See generally* Curtis H. Barnette, *The Importance of Alternative Dispute Resolution: Reducing Litigation as a Corporate Objective*, 53 ANTITRUST L.J. 227 (1984); Lee E. Teitelbaum, *The Advocate's Role in the Legal System*, 6 N.M. L. REV. 1 (1975).

64 *See generally* Paolo Butturini & Susan L. DeJarnatt, *Taking on the Role of Lawyer: Transactional Skills, Transnational Issues, and Commercial Law*, 44 S. ILL. U. L.J. 225 (2020); Eric J. Gouvin, et al., *Teaching Communication Skills in Transactional Simulations*, 20 TRANSACTIONS: TENN. J. BUS. L. 429, 431 (2018).

65 Butturini, *supra* note 64, at 228; Gouvin et al., *supra* note 64, at 450.

66 *See* Gerald Lebovits, et al., *Winning the Moot Court Oral Argument: A Guide for Intramural and Intermural Moot Court Competitors*, 41 CAP. U. L. REV. 887, 889 (2013); Steven Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123, 126 (1987).

67 Andrew Elowitt, *A Hard Case for Soft Skills*, LAW PRACTICE TODAY (Feb. 12, 2021), https://www.lawpracticetoday.org/article/hard-case-soft-skills/ [https://perma.cc/4CGV-ERUE].

68 *Id.*

69 *Advocacy*, Merriam-Webster Dictionary.com, https://www.merriam-webster.com/dictionary/advocacy [https://perma.cc/S65G-XP5E] (last visited Apr. 3, 2022); *Advocate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/advocate [https://perma.cc/R73B-SBSZ] (last visited Apr. 3, 2022); *Advocacy*, Dictionary.com, https://www.dictionary.com/browse/advocacy [https://perma.cc/5LYC-7ZQU] (last visited Apr. 3, 2022).

70 *See generally* Grant Gisondo, *What Does It Mean to Advocate for Your Client?*, GISONDO LAW (Sep. 20, 2018), https://gisondolaw.com/what-does-it-mean-to-advocate-for-your-client/ [https://perma.cc/HTT4-BW29]; *What Is Advocacy?*, LAWYER PORTAL, https://www.thelawyerportal.com/free-guides/legal-careers-deciding-on-law/what-is-advocacy/ [https://perma.cc/3RRN-QFBK] (last visited Apr. 3, 2022).

71 Alex Mayyasi, *A Brief History of Trial By Combat*, PRICEONOMICS (Jul. 11, 2016), https://priceonomics.com/a-brief-history-of-trial-by-combat/ [https://perma.cc/9HHH-SJ86].

72 Frank M. Johnson, Civilization, Integrity, and Justice: Some Observations on the Function of the Judiciary - In Honor of Judge Irving L. Goldberg, 43 SW L. J. 645, 646-648 (1989).

73 Michael McManus & Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States*, CADMUS, Nov. 1, 2011, at 100, http://www.cadmusjournal.org/article/issue-3/brief-history-alternative-dispute-resolution-united-states [https://perma.cc/KRS5-WPBE].

74 Anna Spoerre, *Man Requests 'Trial by Combat' with Japanese Swords to Settle Dispute with Iowa Ex-Wife*, DES MOINES REGISTER (Jan. 29, 2020, 10:50 AM), https://www.desmoinesregister.com/story/news/crime-and-courts/2020/01/13/iowa-courts-david-ostrom-requests-trial-combat-swords-settle-dispute/4456079002/ [https://perma.cc/K3FV-GKGZ].

75 Or whatever word one wishes to use--"podium," "casebook," etc.

76 *See generally* Stephen A. Newman, *Discussing Advocacy Skills in Traditional Doctrinal Courses*, 65 J. LEGAL EDUC. 207 (2016).

77 *See generally* Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193 (2015).

78 Thanks to Kelly Feeley of Stetson University College of Law and Lou Fasulo of Pace University School of Law. These comparisons were included in a presentation we did at the Coaches Clinic at American University Washington College of Law in August of 2019. The presentation was entitled "The Mediator and the Trial Lawyer Should Be Friends."

79 *Where the processes begin to diverge.

80 **Where the processes clearly diverge.

81 *See* Schultz, *supra* note 19.

82 *See* John Lande, *Study Finds That Law Schools Fail to Prepare Students to Work With Clients and Negotiate*, BEST PRACT. FOR LEGAL EDUC. BLOG (Nov. 9, 2020), https://bestpracticeslegaled.com/author/johnmlande/ [https://perma.cc/3ZJG-YNEM]; Howard Miller, *Legal Education for the 21st Century*, CAL. BAR J., https://www.calbarjournal.com/April2010/Opinion/FromthePresident (Last visited Apr. 3, 2022) [https://perma.cc/7ML7-VD9T].

83 Miller, *supra* note 82.

84 *Id.*

85 *See* J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 53 (2008); *See generally* Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRECTORS 63 (2010); Lori D. Johnson, *Redefining Roles and Duties of the Transactional Lawyer: A Narrative Approach*, 91 ST. JOHN'S L. REV. 845 (2017); Yadav Vikrant Sopan, *Importance of Storytelling in Legal Education and Profession: An Analysis*, 6 JETIR 60 (2019).

86 *See generally* Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL. EDUC. 31 (1992); Roger C. Cramton & Susan P. Koniak, *Rule, Story and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145 (1996); Paula Schaefer, *Building on the Professionalism Foundation of Best Practices in Legal Education*, 14 U. ST. THOMAS L.J. 320 (2018); Louis D. Bilionis, *Bringing Purposefulness to the American Law School's Support of Professional Identity Formation*, 14 U. ST. THOMAS L.J. 480 (2018); Larry O. Natt Gantt & Benjamin V. Madison, *Self-Directedness and Professional Formation: Connecting Two Critical Concepts in Legal Education*, 14 U. ST. THOMAS L.J. 498 (2018); Omar Madhloom, *Educating for Well-Being in Law: Positive Professional Identities and Practice*, 54 LAW TEACH. 304 (2020); Charlotte S. Alexander, *Learning to Be Lawyers: Professional Identity and the Law School Curriculum*, 70 MD. L. REV. 465 (2011).

50 CAPULR 1

End of Document

Revised Statutes Annotated of the State of New Hampshire
New Hampshire Court Rules
New Hampshire Rules of Professional Conduct

Rules of Prof.Conduct, Rule 4.2

Rule 4.2. Communication With Person Represented By Counsel

Currentness

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.

Credits
[Adopted July 25, 2007, effective January 1, 2008. Comment amended January 31, 2020.]

Editors' Notes

ETHICS COMMITTEE COMMENT
When an organization--a corporation, governmental body, or other entity--is represented by counsel, *ex parte* communications with certain personnel of that organization will be prohibited by the Rule. Other jurisdictions have adopted a variety of tests for determining which personnel are off-limits, which include the “control group”, “managing/speaking”, “alter ego”, “balancing”, and “blanket ban” tests. As of this writing, the New Hampshire Supreme Court has not clarified which test applies in this jurisdiction and trial court opinions conflict. *Compare Totherow v. Rivier College,* No. 05-C-296, 2007 WL 811734 (N.H. Super. Ct. Feb. 20, 2007) (applying the control group test) with *XTL-NH, Inc. v. New Hampshire State Liquor Commission,* No. 2013-CV-119 (N.H. Super. Ct. Dec. 31, 2013) (applying a modified managing/speaking test). ABA Comment 7, below, endorses a hybrid of the managing/speaking test and the alter ego test. Bear in mind that New Hampshire employs the control group test in applying the attorney-client privilege where an organization is the client. N.H. R. Evid. 502(a)(2).

2004 ABA MODEL CODE COMMENTRULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rules of Prof. Conduct, Rule 4.2, NH R RPC Rule 4.2
State court rules are current with amendments received through January 1, 2024. Some rules may be more current; see credits for details.

End of Document

Will Contests § 11:3 (2d ed.)

Will Contests, Second Edition | June 2023 Update
Eunice L. Ross and Thomas J. Reed

Chapter 11. Pretrial Planning

§ 11:3. Client interviewing and counseling considerations: Contestant

This section is devoted to general principles and special concerns in interviewing the contestant in a will contest. Much of what is discussed here will be useful to counsel representing the proponent, and to avoid duplication, reference will be made to this discussion in ensuing sections of this chapter.

The initial intake interview with the contestant will require the gathering of usual client data. [1] It will also require gathering data on the testator and on the principal beneficiaries of the testator's will or other dispositive instruments. [2] In addition to a perusal of relevant documents, the initial interview should draw from the client all relevant facts about the size and nature of the estate, the identity and relationship of all beneficiaries of the purported will, of prior or later testamentary instruments or of the intestate estate. This information is essential to a determination of standing and for purposes of notification. [3]

In particular, counsel should ask the contestant a series of pertinent questions about the testator. Counsel should elicit the testator's work history, even though the testator may have been retired for years, since long-time associates from the workplace would be one of the best sources for lay observations of the testator's demeanor and mental state when the testator's mental state was unquestioned. [4] The relationship of any beneficiary or a third party to execution of the document should also be revealed. It should be determined whether there is a surviving spouse and whether a spouse's election against the will and other testamentary transfers has been or might be filed. A full family tree for the testator should be constructed, including all marriages and all the testator's children, grandchildren, great-grandchildren, siblings, parents and collateral relatives. [5] It may be that one or all of these will become necessary parties to the contest. More importantly, it will provide a list of potential lay witnesses who had significant relationships with the testator.

A full medical history of the testator should be obtained from the contestant, if possible. If that cannot be accomplished, the client interview should be immediately followed up by interviews with cooperative physicians, psychiatrists and other persons who may have treated the testator. This medical history should be particularly accurate and probing with regard to the testator's mental illness, if any, and the testator's substance abuse, since these conditions are more likely to affect testamentary capacity than physical illnesses. [6]

The contestant's attorney should also obtain as detailed a picture as possible of the testator's assets at death, including their location, market value, if possible, and any joint ownership relations in which the testator may have participated during life. [7] A trip to the courthouse to consult tax records and land records may be advisable at this stage of investigation, since the relevant probate documents may not yet be filed with the court having probate jurisdiction.

Do not neglect to ask the contestant to describe the testator's educational background, military service and other relevant associational information that may lead to other documents and witnesses necessary to evaluate the case. [8]

Counsel should discuss with the contestant the contestant's version of the facts giving rise to a potential contest. The decedent's mental and physical state at or about the time of execution should be discussed as should all surrounding circumstances having

a bearing on any ground for contest. The contestant should be asked for the contestant's version of medical data concerning testator's mental and physical health at or about the time of execution, as well as any opportunity for others to take unfair advantage of decedent. [9] Time limits should be ascertained so that statutes of limitation are not violated. Contestant should be asked to supply genuine examples of the testator's signature to compare with the signature on major dispositive instruments. [10] The general appearance of the will should be scrutinized.

This general gathering of knowledge from the contestant will enable the attorney better to counsel the client as to expectations to be entertained and the game plan to be followed in the quest for successful conclusion of the will contest.

It is essential before a will contest is initiated that counsel thoroughly explore with the contestant not only the latter's motivation for the action but also the hazards inherent in litigation, its economic impact upon the client, the extent of counsel's authority and the fee arrangement to be arrived at between attorney and contestant. [11]

Since most wills contravene the laws of intestacy which, in the experience of most people, express the most equitable way to distribute the estate of a decedent, there is implicit in almost every will some unfairness as to heirs and next of kin. In some way the laws of intestacy have been interfered with and someone has been deprived of a usual expectation.

When children are given unequal shares in an estate which would have passed equally by intestacy, or when the young wife of a few years takes to the detriment of children of the first marriage, or when a charity or a stranger to the blood disinherits the next of kin, or when one side of a family is favored over another, outraged feelings of the disappointed beneficiaries surface. It is difficult to believe that the testator voluntarily chose to favor one child or a charity or a stranger or one set of relatives over those with a defined intestate share. The stepchildren may reject the notion that the young wife might take the share of their mother. [12]

The feelings are just as intense when the beneficiary of an earlier will is deprived by a later document of an expected inheritance.

Hurt feelings and outrage must be aired through the skillful efforts of counsel, for it is the rare will contest where the contestant does not feel cheated in some way. Outrage may be exacerbated because it is believed decedent could have done this act only because of undue influence or some other wrongdoing or because of mental incapacity. The explanation is satisfying. Decedent would not have diminished the contestant's share had not this malevolent influence intervened. [13]

Counsel should explore with the contestant this motivation. How realistic is it? Were there other reasons upon which the alteration of intestacy or a prior will might be based? Was the decedent showing gratitude to a charity that once aided him? Are the disappointed beneficiaries so well-off financially that the decedent may have tried to do equity by giving diminished shares to the affluent kin and enhanced shares to the poor relations? Who took care of the decedent in times of sickness or adversity? The decedent's motivation must be examined and placed side by side with that of the contestant.

Counsel should discuss family harmony and the damage that can ensue from any contest between relatives. The potential for an amicable family settlement should be laid before the contestant. A contest may be the catalyst for turning a small family rift into a permanent estrangement. The contestant should be questioned about feelings of vindictiveness and revenge and whether motives other than the will contest are at work. Had there been a business relationship with proponents that went sour?

If the contestant displays a high motivation for pursuing the contest and understands that it may permanently rupture prior relationships, counsel may then proceed to indicate the potential for success and the cost of the contest.

The preliminary information gathered by counsel helps in an initial determination whether facts exist that might support a contest. These facts and the documents garnered must be used in careful research into the legal basis for a potential contest. Do the documents and facts indicate that decedent properly executed a will that contained dispository clauses? Did the deceased know what assets were owned, who the natural objects of testamentary bounty were and what dispositive scheme was desired? Did unfair persuasion or fear-induced threats rather than free volition impel testator toward a will? Was the deceased laboring under a substantial mistake of fact or misled by the knowing misrepresentations of another?

Once the documents and facts are weighed in the balance against the law of contests, contestant's counsel can express to the client a reasonable opinion as to the viability of the contest and the chances for success, as well as an opinion as to the weaknesses of the case and the potential for failure.

If the client, understanding the potential for lost family harmony and for failure, still is highly motivated to proceed with the contest, then hard economic facts must be laid on the table for perusal. In most contests there are many costs and much discovery. Expert witnesses must be found. They will be paid for their opinions and testimony. Every pleading filed with the surrogate or court entails a cost. Discovery by depositions involves paying for the transcript or video, if requested, and for the expenses of witnesses. Depositions may be taken live and in person, telephonically or by videoconference. Another service provided by court reporters that may be utilized is interactive real-time transcription between the reporter and parties. This is instant translation that may be accessed by those present, computer to computer, or even provided on-line via streaming text and/or video. Discovery by written interrogatories is cheaper but interrogatories and every other pre-trial procedure or pleading involve attorney time. Often investigatory work is necessary. Although lay people may be utilized for this, their time must be compensated. Family trees may have to be constructed and supported by vital statistic documents all secured at a price. There may be the cost of a bond to be filed during the proceeding. Pleadings filed by the contestant require answer and sometimes legal argument adding to counsel time. An unsuccessful initial contest may lead to argument before the court en banc, the cost of printing an entire record and even an appeal through the appellate courts, all of which may be costly.

These expenses must also be considered in the light of the size and nature of the estate. A contest over an insolvent or very small net estate might not be practicable even though wrongs might be vindicated by a victory. The victory is Pyrrhic. Yet there always exists the possibility that after-discovered assets will enhance the estate to one worth the fight.

Counsel must also discuss attorney's compensation beginning with the basis for assessment of fees.[14] There might be a contingent fee tied to a percentage of the recovery made for the client over and above costs, which usually are borne by the client. Fees might alternatively be related to the time and labor involved, the hourly stipend being grounded upon such factors as the difficulty of the legal issues, the size of the anticipated recovery, the effort necessary to contest the will, the time limitations imposed upon counsel as to acceptance of other work, counsel's reputation, experience and legal expertise in the field of will contests and the customary fees charged by other comparable counsel for work of a similar nature. The exact basis for the fee should be communicated in writing to the client before or shortly after representation commences. Thereafter, a written agreement setting forth the exact basis of compensation for counsel should be executed by the attorney and contestant.[15]

In addition, it is desirable that authority granted to counsel by the client should be reduced to writing delineating the scope of authority and any time or other constraints imposed in the exercise of such authority.[16]

After the initial counseling sessions are resolved in favor of pursuit of the will contest and all economic and other drawbacks are made known to the client who has executed an agreement as to attorney authorization and fees, it is time to develop a game plan for contestant.

Footnotes

1 9 Am Jur Trials 601, Will Contests. See also Appendix 2.

2 9 Am Jur Trials 601, Will Contests, §§ 10 to 14. See also Appendix 3.

3 See §§ 3:1 et seq.

4 For a detailed explanation of the methods of interviewing witnesses, see 2 Am Jur Trials 229, Locating and Interviewing, §§ 45 to 87. See also Appendix 3.

5 See Appendix 3 for a system for constructing a family tree.

6 9 Am Jur Trials 601, Will Contests §§ 15 to 19. See also Appendix 3.

7 An analysis of estate assets may show that the testator executed inter vivos transfers of substantial property to the proponent, which will be significant in determining whether undue influence has been exercised. See Appendix 3.

8 Appendix 3 sets out a brief summary checklist for seeking information on the testator's educational background and military service.

9 See Appendix 3 for client's version of the case, and for client's version of execution of last will.

10 Green: *Modern Scientific Evidence*§§ 19.6 to 19.11 (2d ed. 1974). See also the excellent illustration of the techniques employed by questioned document examiners in 9 Am Jur Trials 601, Will Contests, § 21.

11 9 Am Jur Trials 601, Will Contests, §§ 8 to 9.

12 Shaffer: Undue Influence, Confidential Relationship, and the Psychology of Transference, 45 Notre Dame Lawyer 197 (1970) makes the same point in approaching the reasons why courts set aside wills as the product of undue influence.

13 This is an example of the psychological phenomenon of transference at work. The complicated psychological response to the fact of the loved one's death, followed by disinheritance leads the typical contestant to project his or her bad feelings outward on another person, in this case the person who was principal beneficiary of the will. For a detailed explanation of this phenomenon at work, see Watson: *The Lawyer in the Interviewing and Counseling Process* (1976).

14 9 Am Jur Trials 601, Will Contests, § 8.

15 For appropriate forms for retainer contracts see 3 Am Jur Legal Forms §§ 30.15 to 30:19.

16 3 Am Jur Legal Forms §§ 30.15 to 30:19.

End of Document

Will Contests § 11:4 (2d ed.)

Will Contests, Second Edition | June 2023 Update
Eunice L. Ross and Thomas J. Reed

Chapter 11. Pretrial Planning

§ 11:4. Client interviewing and counseling considerations: Proponent

The decedent's personal representative is often depending on the state, the proponent of the will. The personal representative commonly has a legal right to defend the will from attack. [1] Failure to defend the will is often a breach of fiduciary duty, making the personal representative liable to those who would have benefited by taking under the will. [2]

Counsel for the proponent normally will be counsel for the estate. Estate counsel is retained by the personal representative. Even decedent's directions that specific counsel be retained to represent the estate cannot prevail if the personal representative determines to employ other counsel. [3] The individual executor often is also a legatee under the probated will and, therefore, has a dual interest in the estate as fiduciary and as beneficiary. A corporate fiduciary may act as executor and trustee of a testamentary trust.

It is a primary duty of estate counsel to ascertain initially if decedent died testate or intestate. If counsel has no direct knowledge, a search must be made of all decedent's documents, and legal and business advisers and associates of the deceased must be approached to ascertain whether a will exists that must be probated. If a testamentary document that is prima facie valid is found, it is the duty of estate counsel to produce the document for probate. [4]

So long as no contest develops, the role of estate counsel does not go much beyond advice to the personal representative concerning fiduciary duties of marshaling assets, paying valid debts and expenses and, after proper accounting, making distribution to the correct beneficiaries. During the no-contest stage counsel's duty also extends to the probate of any prima facie valid will and the effectuation of its provisions. If the proponent and executor are the same person, the representation of counsel at the no-contest level is dual but proper. [5]

Once a contest develops, estate counsel must make a choice. As counsel for the personal representative and the estate, the attorney represents a stakeholder with no partisan interest in the outcome of the litigation. The parties entitled to distribution will be determined by the contest adjudication. Estate counsel, however, may not also represent one who advocates a partisan position as either proponent or as contestant in the will contest. Such adversary representation would breach the duty of impartiality and constitute a conflict of interest vis-a-vis the stakeholder position of estate counsel.

The personal representative and the attorney for the estate are fiduciaries as to creditors and beneficiaries. They may not favor distribution to one beneficiary over another adverse claimant in their fiduciary role. The executor, who actively pursues a position in favor of the will as proponent, may not have to resign and may continue with administration but is constrained from making distribution to beneficiaries until termination of the contest. [6] After all, debts and taxes must be promptly paid to prevent the running of interest or penalties. All liquid assets must be converted to cash at the opportune moment.

If estate counsel decides to represent a partisan in the will contest, then counsel's role becomes dual and a conflict of interest. The attorney must resign as estate counsel. Two masters cannot be served. [7] This decision must be the same whether the personal representative is an individual or corporation with a stake in the outcome of the suit or a non-partisan individual or

corporate fiduciary. [8] The attorney must choose whether to represent the contest party or the estate. The decision to sever estate representation and to appear for a proponent should be made after a preliminary conference with the prospective client adduces facts and documents that support proponent's position and raise good defenses to the attack on the will.

Assuming that counsel has agreed to represent the proponent and to defend against a will contest, counsel and the proponent must make time for a detailed review of the testator's mental status at the time of execution of each dispositive instrument and a corresponding review of the testator's plan for disposition.

Estate counsel will be required to examine the will that is subject to challenge and every codicil, noting for future reference the contents of each in summary form. Counsel should request and perform the same examination for every dispositive instrument executed by the testator prior to the will at issue. [9] At the end of this process, counsel will have a complete picture of the testator's dispositive plan, and the interrelationships between each instrument executed by the testator that purports to dispose of the testator's estate. No instrument, however informal, should be neglected in this searching inquiry, as each instrument may support the validity of the will under attack by demonstrating a cogent plan for distribution on the testator's part.

The proponent should help counsel gather data on the testator and on the principal beneficiaries of the testator's will or other dispositive instruments. In addition to a perusal of relevant documents, the estate counsel should draw from the proponent all relevant facts about the size and nature of the estate, the identity and relationship of all beneficiaries of the purported will, of prior or later testamentary instruments or of the intestate estate. This information is essential to a determination of standing and for purposes of notification. [10]

As in the case of the contestant, the proponent should be asked to supply the testator's work history. [11] The relationship of any beneficiary or a third party to execution of the document should also be revealed. It should be determined whether there is a surviving spouse and whether a spouse's election against the will and other testamentary transfers has been or might be filed. A full family tree for the testator should be constructed, including all marriages and all the testator's children, grandchildren, great-grandchildren, siblings, parents and collateral relatives. [12] Such attention to detail will provide a list of potential lay witnesses who had significant relationships with the testator.

The proponent should assist counsel in obtaining a full medical history of the testator. It may be necessary to have the proponent sign consent forms to allow information to be released by the testator's physicians or by hospitals or other facilities where the testator received some type of treatment. The proponent should facilitate the location of bills for medical services as well. Counsel should then schedule interviews with cooperative physicians, psychiatrists and other persons who may have treated the testator. [13]

The proponent must help in obtaining an accurate picture of the testator's assets at death. By the time objections to probate are filed, however, a formal estate inventory and tax returns may not have been prepared. The proponent should disclose the location of principal assets, their market value, and the state of the title or ownership interests in each. [14]

Counsel should also obtain a statement as to the testator's educational background, military service and other relevant associational information that may lead to other documents and witnesses necessary to evaluate the case. [15]

Counsel should discuss the decedent's mental and physical state at or about the time of execution with the proponent. Counsel should ask the proponent to disclose the circumstances surrounding preparation and execution of the testator's will and pertinent other documents transferring assets to others, so that counsel can assess the probability that contestant may be able to prove undue influence, fraud or duress in the execution of the will. [16] Counsel should be prepared to request genuine examples of the testator's signature to compare with the signature on major dispositive instruments if fraud in the execution of the will is an issue. [17]

Counsel must then lay out for the proponent the strengths and weaknesses of the contestant's case for setting aside the will. Counsel should indicate through the client's and other lay, legal or medical evidence the grounds for finding due execution, mental competence, freedom from undue persuasion or threats and the non-existence of mistake or fraud or forgery. Counsel

must set forth to the client the strengths and weaknesses of the defense of the will and the economic costs of pursuing the contest, as well as the non-economic hazards, such as lost family unity, that might be restored by a family settlement.

The fee arrangement for representation for the estate is settled by court rule in most jurisdictions. Although an additional fee may be allowed for defense of a will contest, even in those instances where the defense was unsuccessful, [18] counsel needs to advise the proponent of the possibility of additional expenses for depositions, medical expert witnesses, other expert witnesses and for further investigation, since these costs usually will be charged to the estate and will be a pertinent factor to review in considering the possibility of a negotiated settlement.

Counsel for the estate will need to follow up the conference with the proponent by further investigation and contact with the principal beneficiaries under the will, to the extent that such contact is feasible, considering the possibility of conflicts of interest between the various interested parties.

Such detailed development will enable counsel for the estate to construct a game plan to counter the contestant's strategies.

Litigants should be told that the award of fees and costs depends upon the circumstances of each case. The successful proponents of a Washington will were not awarded counsel fees and costs when the contestants in good faith raised a number of close, valid and debatable factual issues of competency, fraud and undue influence revolving around the extreme age of the testator, who executed the will just prior to death. [19] The executor who defends a will invalidated by his exercise of undue influence cannot have his attorney fees paid out of the estate. [20] A Florida court awarded appellate costs to the beneficiaries of a decedent's last known will rather than to the contestant, who prevailed at trial but was neither a personal representative nor a proponent of the last known will, nor did she seek to have the last known will admitted to probate. [21] But the loser generally bears costs in the absence of court direction otherwise. [22]

Footnotes

1 An executor has a general duty to defend the estate against any claim or demand, including a challenge to the will under which the executor is empowered to act. 31 Am Jur 2d, Executors and Administrators, § 409 (1989). An executor has authority to contest another will on behalf of the persons who would take under the will that appoints the executor. 3 *Page on Wills*§ 26.55 at 126 (Bowe-Parker rev. 1960). The executor is generally a necessary party to any will contest. 3 *Page on Wills* § 26.67.

A minority of jurisdictions constrain the role of the executor in defending the will. Pennsylvania prohibits the executor, who is not also a beneficiary of a will, from prosecuting an appeal from a decree of the Register of Wills refusing probate. See In re Thompson's Estate, 416 Pa. 249, 206 A.2d 21 (1965); 20 Pa. Cons. Stat. Ann. § 908(a). An executor, however, is entitled to notice of the contest and may elect to become a party. See Yardley v. Cuthbertson, 108 Pa. 395, 1 A. 765 (1885); Appeal of Royer, 13 Pa. 569, 1850 WL 5793 (1850).

2 31 Am Jur 2d, Executors and Administrators, §§ 398 to 410.

3 In re Pusey's Estate, 321 Pa. 248, 184 A. 844 (1936); Estate of Younger, 314 Pa. Super. 480, 461 A.2d 259 (1983) (disapproved of on other grounds by, In re Estate of Pedrick, 505 Pa. 530, 482 A.2d 215 (1984)); 20 Pa. Cons. Stat. Ann. §§ 908(c); Uni. Prob. Code § 3-401; Restatement Second, Trusts § 126 cmt. (b) (1959).

4 3 *Page on Wills* § 26.55.

5 ABA Code of Professional Responsibilities EC 5-14 (multiple clients); ABA Rules 1.7 and 1.8 Model Rules of Professional Conduct (1985); Pa. Rules of Professional Conduct (1988), Rules 1.7, 1.8.

6 The executor is personally liable for a distribution made to beneficiaries under the will, although made in good faith, without authority. 31 Am Jur 2d, Executors and Administrators, § 1062.

7 Rule 1.7(b) of the Model Rules of Professional Conduct states that "a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client …." The exceptions stated in Rule 1.7(b) do not condone representation of a major partisan in a will contest, whether contestant or proponent of the will, and the personal representative.

8 In Pennsylvania, an executor without other standing may not appeal from a denial of probate. 20 Pa. Cons. Stat. Ann. § 908(a). An executor who is also a trustee under the will is entitled to appeal from the probate of a codicil revoking such gift. In re Thompson's Estate, 416 Pa. 249, 206 A.2d 21 (1965).

9 See Appendix 3.

10 9 Am Jur Trials 601, Will Contests § 14. See also Appendix 3.

11 Appendix 3.

12 Appendix 3.

13 This information should be carefully recorded. The personal representative should be able to identify treating physicians and psychologists. See Appendix 3.

14 Appendix 3.

15 Appendix 3. In Pennsylvania, costs and counsel fees in a will contest are not chargeable to the estate. A will contest is treated as a dispute between competing legatees of two testamentary writings, or between competing next of kin and legatees. If the executor becomes a party, counsel fees and costs on behalf of such personal representative will not be paid out of the estate. See Appeal of Mumper, 3 Watts & Serg. 441, 1842 WL 4740 (Pa. 1842). The only exception to the rule of no charge on the estate for legal representation of the executor as proponent arises when the testator by will imposed the duty upon the named personal representatives to defend the will and the sole legatee retained no counsel but acquiesced in the defense. See In re Bennett's Estate, 366 Pa. 232, 77 A.2d 607 (1951).

16 9 Am Jur Trials 601, Will Contests §§ 12 to 14. Appendix 3.

17 9 Am Jur Trials 601, Will Contests § 21.

18 Formal fee agreements for an excess over computed estate fees set by the probate court are usually not required to prove and establish the need for additional compensation at the conclusion of resistance to a will contest. The court will generally require submission of an hourly billing schedule setting out the time spent on the will contest, and allow an additional fee, based on expert appraisal of the worth of services. See 31 Am Jur 2d, Executors and Administrators §§ 458, 461 to 65.

19 In re Estate of Kessler, 95 Wash. App. 358, 977 P.2d 591 (Div. 1 1999); Wash. Rev. Code § 11.24.050.

20 In re Estate of Herbert, 91 Haw. 107, 979 P.2d 1133 (1999); Haw. Rev. Stat. Ann. § 560:3-720.

21 Furlong v. Raimi, 735 So. 2d 583 (Fla. 3d DCA 1999); Fla. Stat. Ann. § 733.106(2).

22 In re Kreider's Estate, 444 Pa. 604, 281 A.2d 645 (1971).

End of Document

Will Contests § 13:3 (2d ed.)

Will Contests, Second Edition | June 2023 Update
Eunice L. Ross and Thomas J. Reed

Chapter 13. Discovery

§ 13:3. Client interviews

Most lawyers do not think of client interviews as discovery devices. A moment's reflection shows, however, that discovery begins with the client's version of the facts of the case, which emerges from the initial intake interview and from follow-up interviews. A sound approach to client interviewing in will contest cases has already been laid out in Chapter 11. A systematic client interview that follows the general outlines of the client interview worksheet that appears in Appendix 3 will obtain vital information that will be the basis for later informal and formal discovery.

For example, the section on the testator's personal data should identify all family members, former spouses and every other potential interested party to the will contest. It should also tell counsel whether there are any outstanding unlocated wills, trust instruments, contracts or deeds that may affect the outcome of the case. [1]

The section of the worksheet that asks for the testator's work history and assets should give counsel a picture of the kind of person the testator was, and the nature and extent of the testator's assets at death, as well as hints for location of incident witnesses, such as bank trust officers, who may have dealt with the testator on a regular basis. [2]

The comprehensive medical history portion of the worksheet asks the client to supply information on the testator's medical history. These items will lead to discovery of the actual medical and hospital records of the testator. [3] Usually, the client will be able to supply some information during the intake interview on the testator's medical history, but a second follow-up interview will be needed to give the client time to consult records and to talk to other people.

Multiple client interviews further along in discovery are often very useful. The deposition of the opposing party may be a trigger to further information from your client, because it may start a chain of associations in the client's mind that lead to additional witnesses. Documents recovered from the opposition by interrogatories and notices to produce should also be copied and sent to the client, to let the client evaluate them.

Hospital records, bank accounts, and other such documents may start chains of recall in the client's mind that lead to additional, important evidence. Since the client is an interested party, and consciously or unconsciously distorts information received to fit the desires of the client, confrontation with adverse evidence is a useful device in assisting counsel to evaluate the strength of a client's position. It may lead the client to change his or her version of the facts.

In most instances, will contest clients prove to be valuable resource persons after the initial intake interview. Counsel ought to take advantage of the resources provided by the client and put the client to work responding to adverse interrogatories, depositions and documents in order to work up an accurate picture of the testator's mental state at the time of execution of the testator's will.

The Petitioners in *In re Fuller* were the natural objects of their father's bounty who were cut out of his will and codicil, save for a small cash legacy. There were no apparent conflicts of interest between Melvin Fuller and Sarah Fuller Banks, hence joint representation was permissible. Unfortunately, Melvin Fuller had been convicted of a misdemeanor drug offense and Sarah Fuller Banks had run away from home to a commune at age 17. These acts could supply in the mind of the court and jury a rational basis to disinherit them.

The Respondents, Southeastern National Bank and Veronica Fuller, enjoyed some legal presumptions. Since the 2007 will and the 2010 codicil were properly signed and witnessed the documents were presumed to be executed with testamentary capacity and without undue influence.

Petitioners' counsel would have several interviews with its clients. The first, the intake interview, covered the entire case from beginning to end and was in reality a search for witnesses who had a long-term familiarity with Godfrey Fuller. The second and third interviews occurred as the case developed after pleadings were in. The motion for summary judgment required affidavits from Melvin and Sarah Fuller to counter the Respondents' assertion that there were no triable issues of fact.

Footnotes

1 See Appendix 3 for suggested format for client interview.

2 This is very important to the economic conditions for settlement of a will contest. Both sides need to know how much the estate is worth in order to determine what a reasonable settlement amount may be to avoid the pain and suffering of a trial.

3 Usually, these records will be maintained by persons who have no legal claim of privilege, such as hospital administrators or clinic staff.

31 No. 08 Westlaw Journal Professional Liability 09

January 20, 2022

Business Development

Westlaw Journal Professional Liability

By Sateesh Nori, Esq., The Legal Aid Society [aa1]

Communicating with clients: three lessons from the pandemic

Sateesh Nori of The Legal Aid Society discusses the ways in which traditional forms of attorney-client communication changed during the pandemic, increasing the frequency of contact and helping to break down barriers to trust.

An attorney-client relationship, like all relationships, requires communication. It is not controversial to write that lawyers are not the best communicators. Many of us may be persuasive writers, or even convincing arguers, but on a personal level we tend to be stoic, distant, cold, unemotional, and sometimes just unlikeable. These traits seem to transfer across the legal profession, from law professors to corporate lawyers, from judges to junior associates. Perhaps the legal profession, and its need for logic and risk aversion, attracts these wallflowers, droids, and Macy's mannequins. I'm not casting stones here — I'm guilty of these traits too.

Pre-pandemic, at least lawyers could attempt human interactions in physical spaces, like offices, conference rooms and courtrooms. We could look our clients in their faces and describe their legal options to them. We could listen to them and help them make decisions. We could also consult with our colleagues, who were often nearby in other physical spaces.

During the pandemic, we all lost the ability to communicate with our clients in the traditional ways. Our methods, like in-person intake, face-to-face meetings, and negotiations and hearings in physical spaces, were mostly replaced by Zoom and similar technologies. Our tools, talking to people, discussing legal issues together, and literally standing beside our clients, were taken away. And the collegiality and spirit of working with and beside comrades on shared issues and goals, celebrating achievements and sympathizing over losses, seemed to disappear.

In this transformed state, did communication with clients suffer? In my experience, during the pandemic, lawyers got better at communicating with their clients. Here are three ways:

First, we started texting with clients. Many of us realized that emails are too formal, too slow, and often go unread. Emails from lawyers tend to turn into legal briefs or office memos — TLDR (Too Long; Didn't Read). And phone calls meant endless games of phone tag. Through SMS (Short Message Service) and MMS (Multimedia Messaging Service), clients would send photos of documents, messages about the factual details of their legal issues, and often just check in with us.

Texting also allowed us, for the first time, to be available to our clients outside of the 9-5 hours of our physical offices. Ironically, although we couldn't meet our clients in person, we connected with them as a friend or family member would: in simple, bite-sized pieces of relevant information. Texting with clients allowed plain language to break through attorney-client communications. It allowed clients to see their lawyers as ordinary human beings, who talk (and text) like they do.

As a caveat, note that many lawyers text clients on their personal devices (guilty!), and any IT security professional would caution against doing so because of the risk of data breaches. Use a safe texting platform like Signal or one that is approved by your firm's IT.

Second, the frequency of our communications with clients and with each other increased. Because of texting and because of the ease of use of Zoom and other platforms, we were able to chat with clients more often. Clients were able to share information as it arose.

For example, we got updates in real time as the facts of our clients' cases unfolded. Lawyers were able to set up times to talk and send and receive communications as needed. This sounds so obvious and simple, but it isn't. It's a common scenario — before the pandemic, a lawyer would call a client to set up in-person meetings — often calling numerous times. Sometimes, clients would be unable to make the agreed upon meeting because of other events in their lives. So the lawyer would call to reschedule, and the cycle would begin again. For whatever reason, traditionally, lawyers have been reluctant to discuss important issues in ways other than in-person, so all key contact would occur in formal settings like offices and courts.

Increasing the frequency of communications also helped bring down the barriers to trust that often exist between lawyer and client. For example, during the pandemic, many of our clients learned to trust us because we would respond to their messages and be able to give them legal guidance in real time. Also, frequent communication also helped take away the needless formality that exists between lawyer and client. Each communication, because there would be more of them, would carry less import and more appropriate gravity.

Another caveat here is that allowing more frequent communication may also bring down important boundaries between lawyer and client. Clients may reach out on non-legal issues, develop a reliance or expectation of friendship or dependency. Lawyers may also be sacrificing their own personal time in order to allow more frequent communication with their clients. Thus, lawyers need to find balance between increasing the frequency of client communication and setting appropriate professional boundaries.

Third, eliminating in-person contact as a default restores a power balance to attorney-client relationships. Recently, I perused a hornbook on client interviewing in the NYU law library, and it cautioned an attorney to "not act as a God" or badger or bully a client. Unfortunately, in the traditional, pre-pandemic setting, we forced our clients to meet us in our offices or in court — on our turf. Clients would sit across from us, at our desks, looking at our law school diplomas or admission certificates, often having waited for an hour or more to talk to us. Consequently, our advice and counsel seem more valuable and persuasive than it probably should be. Clients feel a deference toward us that we don't necessarily deserve.

Today, and going forward, our default method of communication should be whatever works best for the client. They shouldn't be asked to travel long distances or wait hours to speak with us. They should feel free to communicate with us as they see fit, and when it is convenient for them. In this way, attorneys and clients can be on more equal footing, and attorneys can truly act in their clients' best interests.

In sum, the pandemic broke the traditional attorney-client communication model. Let's call that a win.

Footnotes

aa1 **Sateesh Nori** is the attorney in charge of the Queens neighborhood office of **The Legal Aid Society** in New York City. His Twitter handle is @sateesh_nori. The views expressed here are his own.

31 No. 08 WJPROFL 09

9 Clinical L. Rev. 373

Clinical Law Review
Fall 2002

Papers Presented at the UCLA/IALS Conference on "Problem Solving in Clinical Education"
Paul R. Tremblay [aa1]

INTERVIEWING AND COUNSELING ACROSS CULTURES: HEURISTICS AND BIASES [a1]

WESTLAW LAWPRAC INDEX

LED---- Law School & Continuing Legal Education

Increasingly in recent years, critics and commentators have noted the importance of the role of culture within the lawyering process. Lawyers now understand better than they used to that culture matters in their day to day work with clients, and that not all cultures share the same habits, customs, values, traditions and preferences. This article explores how the reality of cultural diversity might affect some fundamental lawyering practices and models, and specifically the models for interviewing and counseling. In their work, lawyers must take cultural background into consideration expressly, but at the same time they must avoid harmful and unfair generalizations and stereotypes. This article proposes the concept of 'heuristics' to capture the idea that lawyers might assume tentatively, but only tentatively, that a member of a recognized non-dominant cultural group will share the values, habits, and preferences of his or her group. It then employs the concept of 'biases' to remind lawyers of the need to be aware of their own cultural preconceptions when working with different clients, if they hope to be effective counselors. Throughout, the article emphasizes a commitment to 'disciplined naïveté' and 'informed not-knowing'--reminding readers that individuals can only begin to appreciate the richness of cultures different from their own.

If we can make the subject of cross-cultural lawyering one that our students and we can talk about, our collective capacity to practice law in non-discriminatory and culturally-sensitive ways will increase access and substantive justice to our clients. [1]

*374 I. Introduction

A. The Multicultural Critique of Models

This paper sets out to explore how the interviewing and counseling processes taught in United States law schools might begin to accommodate differences in culture between a lawyer and her client. It attempts to learn from the rich literature on cross-cultural counseling in non-legal disciplines to suggest discrete changes to the prevailing models currently available to students.

Let's assume, as we begin, that you are a second year law student who has recently enrolled in a law school clinical program. Your clinical placement happens to be a civil program, where you will represent low income clients in family, housing, welfare

and Social Security disputes. This is your first opportunity to practice law, and you are at once excited and very scared about your performance in this setting.

One of the primary missions of your clinical program, you notice, is to teach you basic skills in interviewing and counseling. That makes sense, of course. You've never done that stuff before, and you worry that if you interview poorly you may miss critical facts and end up less prepared for the advocacy you will be performing. Similarly, if you counsel ineptly, your client may make a decision she will later regret, or end up accepting a course of action that causes her serious harm. So you are quite open to the idea of learning these skills. You have purchased a textbook that your teachers use to help you understand the underlying theories and practice of these skills. [2]

These interviewing and counseling texts are interesting creatures, when you think about them. You notice when you study books on those topics that they tend to offer ‘models‘ for you to use, at least provisionally and tentatively, while you are learning a new professional skill. This makes sense to you. If books are to be of any help, they should suggest reasonably explicit and concrete ways to perform the skills that they purport to teach you. That seems pretty obvious. For instance, the most prominent interviewing and counseling book offers a very elegant model for conducting an initial interview with a ***375** client. [3] That authority suggests four stages of an interview. You begin with a ‘preliminary problem identification,‘ and transition through a ‘preparatory explanation‘ to the second ‘chronology‘ stage where you learn the time-generated narrative of your client. You then follow with an important ‘theory verification‘ segment where you return to topics to flesh out facts that are critical to your legal theory. Finally, you end with a ‘closing‘ stage where you try to conclude your session in a way that makes future agendas clear, offer provisional advice if possible, but resist premature diagnosis or judgment about the client's case even if the client asks strongly for your opinion. [4] The model endorsed by these authors not only helps you out with a very explicit agenda for your meeting, but it also suggests for each stage the kinds of questions that you ought to use (open ended during stages one and two, more narrow and focused during the theory verification stage, etc.), [5] and teaches you about the importance of empathy, active listening, and rapport development--critical components of an interview. [6]

A model like that from Lawyers as Counselors develops from the learned experience of its authors, combined with some established theories of psychology and human interaction. It includes critical assumptions about your goals in the professional activity and about the ways that people tend to react to, and within, various interpersonal events. So, for instance, an interviewing model assumes that your goals in an initial interview are to learn all the relevant facts about the problem that a client comes to a lawyer for assistance with, to establish a rapport and a working relationship between you and your client, and to test for credibility in both directions (to gauge your client's and to bolster yours with him). The model further assumes important things about the ways in which people interact. Some of those assumptions are pretty obvious (being kind and warm is more likely to establish good rapport than being unkind and brusque), while others are things which you learn from the book that you might not otherwise have known intuitively (for instance, open questions allow the client to speak more freely and tell his story more satisfactorily than closed questions; sustained eye contact is effective in showing concern and interest; open body language is more inviting and encouraging than folded-limbs, closed body language; a chronological narrative is a particularly effective vehicle for understanding a story most completely ***376** and in a less distorted way; etc. [7]).

Now here's the puzzle for those of you who wish to learn a new skill from a course or a book or a model (as well as for those who create the books, courses, and models). The puzzle arises from the role of culture, background, and learning styles in our understanding of the effects of interpersonal behavior. Put simply, many of our assumptions about how people interact, and about the meaning of their expressions, are culturally influenced. If all the persons in the world, or, more modestly, all the persons in your lawyering community world, shared with you the same basic, overall way of communicating, interacting and understanding the world, then models for professional skills would be, or could be, pretty damned reliable. They wouldn't be perfect, because an occasional individual might have some idiosyncratic quirk that throws off your structured plan, but they'd be pretty effective just about all the time. If, though, the community in which you work is filled with a variety of interpersonal patterns, and a multiplicity of ways of understanding the world, then any ‘model‘ faces a distinctly more onerous challenge.

Of course, we now know that the latter is far more accurate a description of our experience than the former. Much of what we understand about interpersonal effectiveness is connected to cultural understandings, learned practices, and traditional customs. Your family background, race, gender, ethnicity, and sexual orientation, and those characteristics of your clients, matter a great deal in the interviewing and counseling process. In other fields, most notably social work and mental health counseling, researchers have been arguing and writing about the interplay of culture and technique for decades. [8] In the field ***377** of lawyering practice, this topic has begun to receive serious attention only in recent years. [9]

This paper intends to explore, begin to understand, and offer some practice suggestions about this critical aspect of learning interviewing and counseling skills. [10] One plausible, and logical, inference available from the dissonance between culturally learned behaviors and the usefulness of models for professional skill development is that the dissonance and potential for misunderstanding caused by cultural differences [11] means that no model or skill set can ever work, since any such model or skill set would be bound to be based on some faulty, culture-bound assumptions. That inference, I argue, is too pessimistic, and overlooks the many ways in which persons from varying backgrounds share communicative and interactive traits, and the many ***378** ways in which the client-centered models taught in law schools engender tolerance for difference. At the same time, a model that assumes too many shared communicative and interactive traits will surely fail in many ways. The first challenge, then, is to identify where models can serve reliably and where they are at risk of fostering misunderstanding.

The second challenge is to articulate for newer lawyers (and for experienced lawyers, who are always needing to learn more about how best to work with their clients) how they ought to proceed when some parts of the traditional models might not apply. The task here is to appreciate and respect the differences among your clients, but without resorting to stereotypes or stubborn myths about race, sex, ethnicity and culture. To ignore likely differences in culture is an invitation to malpractice in counseling; to presume you know what those differences will be once you know your client's race or sex or cultural background is an invitation to dehumanize or reify your client, and to assume generalizations that may not apply to him. [12] A primary ambition of this paper is to confront that not insignificant quandary, and to propose some lawyering process conceptions that might allow you to resolve the dilemma. [13] My suggestions focus on the two constructs of heuristics and biases, as I describe immediately below. All of my suggestions proceed from an effort to be, as one writer has put it, ‘'cross-eyed,' with one eye always clearly focused on the differences, and the other eye clearly focused on the similarities‘ [14] between dominant culture and minority culture clients.

This task seems especially critical to your training as a professional. ***379** Consider why your understanding of cultural influences makes a difference to your success as a lawyer. It matters in the obvious ways that we shall explore in this paper--as you interview and counsel clients, the communication patterns between you and your client need to be as accurate, as reliable, and as meaningful as possible. But it matters in other important ways as well. Your work for a client requires that you understand that individual client's story, and what values and goals he brings to your relationship. You should understand why he has approached a lawyer in the first place, and how he hopes to work with a professional, like you, who holds some status in American society. In your work for him you will need to translate his story into the instrumental language of your profession, to attain the results for which your client has retained you. You should also appreciate the web of relationships within which your client lives, works, sleeps, and plays, to know who he is and how you can assist him best. All of these factors connect, in large or small ways, to your client's culture. And your assumptions about each of these items cannot be separated from your culture, and who you are as a person and a lawyer.

B. Setting the Stage for the Inquiry

Before I introduce the heuristics and biases themes, I need to set the stage for the remainder of the discussion in several ways. Initially, I need to offer a working definition of the term ‘culture,‘ which appears repeatedly not only in this paper but in all of the literature on which these ideas are based. While commentators describe or use the term in slightly different ways, the following definition seems appropriate for our purposes:

> [C]ulture [is] all the customs, values, and traditions that are learned from one's environment. [I]n a culture there is a ‘set of people who have common and shared values, customs, habits, and rituals; systems of labeling, explanations, and evaluations; social rules of behavior; perceptions regarding human nature, natural phenomena, interpersonal relationships, time, and activity; symbols, art, and artifacts; and historical developments.‘ [15]

We are all part of some culture, and likely many cultures, understanding culture in this way. At the same time, though, ‘[c]ulture is performed, . . . fluid/emergent . . . [and] improvisational.‘ [16] It is critically ***380** important to the lawyering process, but elusive in any particular interaction.

This Article focuses on the contrasts between what many see as the dominant United States culture, usually understood to mean White, American, and Eurocentric practices and patterns, and non-dominant cultures, representing the practices and patterns of ethnic and religious minority communities as well as members of the disabled, poor, and GLBT [17] communities. One writer on cross-cultural social work skills has employed the term 'minority' to refer to 'a racial, religious, ethnic, or political group with less power than the controlling group in society.' [18] Each such group might be considered a separate culture for our purposes here.

The theme of this Article is that discrete minority (as just defined) communities tend to share certain preferences, styles, patterns, and values, and that a better lawyer will understand that the cultural background of a lawyer or a client matters--it can affect how that person will respond to behaviors suggested by skill models or by your theories of good lawyering. So, given that theme, one might predict that a woman raised in, or living in, a Mexican-American family will possess certain characteristics which the lawyer ought to understand and anticipate. Her ethnic background, reflecting the culture in which she lives or was raised, is thus relevant to the task of good lawyering. The lesson for professionals is apparent: 'It is not appropriate or helpful to insist that ethnic minority clients who come from a value system differing from the Eurocentric worldview be subjected to interventions that are often incompatible with their norms. . . . [I]t is mandatory that we know what [the cultural values] are for every client system of color with which we interact.' [19]

These background definitions and understandings invite a few thoughts about how the concept of race--as opposed, say, to ethnicity--ought to apply to this discussion. Some writers insist that culturally ***381** competent lawyers account for race in their use of the lawyering skill models, and in their representation of clients generally. [20] At the same time, if a goal of this discussion is to identify certain preferences, styles, patterns, and values common to a shared cultural community, it seems a stretch to imagine racial groups as demonstrating such patterns. [21] It seems, if I read the literature right, that race should matter in many ways but, at the same time, it will not serve as shorthand for an ethnic minority culture. Allow me to explain the distinction that I observe.

As Michelle Jacobs has shown so powerfully, lawyers cannot ignore the importance of race in working with clients of color. [22] Her pioneering work notes the ill-fit of conventional models with minority clients and lawyers. She demonstrates the critical and identifiable ways that the attorney-client relationship is affected by racism's impact on the lives of people of color. Jacobs explains how clients of color own a worldview influenced by powerlessness and oppression, and argues that lawyers, especially lawyers from the dominant culture, must find ways to appreciate and respect that worldview. [23] What Jacobs does not suggest, however, is any way in which race is equivalent to culture in its connection to patterns, practices, habits and values. It is true that Jacobs, like other writers, [24] refers to certain norms of the African-American community about which lawyers should be aware, [25] but I see that description as one of an ethnic culture, rather than a characteristic of a racial group. [26]

Other definitional challenges arise from this discussion of ethnicity and culture. Simply put, neither concept is static nor easily knowable, and even if each were so, the risks of misapplying cultural ***382** generalizations to any individual client are obviously a source of some worry. So, not only does one learn that culture is 'socially constructed, evolving, emergent, and occurring in language,' [27] but intersectionality [28] renders many cultural designations suspect. And the role of assimilation is similarly critical to any understanding of the influences of a traditional culture on a member of an ethnic minority community. [29]

The suggestions developed below, especially those regarding heuristics, intend to recognize these objections and worries. As Ruth Dean and others have written, the realization that most dominant culture professionals will never become culturally competent does not mean that those professionals ought not continue to explore, with curiosity and humility, the ways in which cultures tend to express their traditions, values, and beliefs. [30] In this process, the client is the expert, and the lawyer tries to understand, as best she can, the life and worldview of her client. [31] As one writer vividly describes it, the professional proceeds with 'informed not-knowing.' [32]

There is one final orienting topic to cover before we move on. In this Article, I will assume that the existing skill models will apply, at least presumptively, with dominant culture (usually understood as white American) clients, and that the pressing question for students and lawyers is how, if at all, the dominant culture models ought to be ***383** adapted for clients who are not from that dominant culture. [33] This assumption or premise narrows the focus of this inquiry, of course. As many have

written, and as the above definition of culture suggests, all counseling is cross-cultural [34] --even an interaction between a male, WASP lawyer from Newton Centre, Massachusetts and his male, WASP client from the same city. But the traditionally taught lawyering skills models have been developed with an eye to suggesting behaviors most apt to work generally, and if there is a cultural skew in the models it would be in favor of the dominant, Western, Eurocentric conception of a personality. In working with client who may not share the expected personality conceptions, you want to consider how to adjust your skill sets.

Note, though, that this premise or assumption has left out your cultural background. Let us consider that question for a moment. There are two ways in which the lawyer's cultural background affects the work about which I write here. First, to the extent that the skills taught in law school seek to maximize your client's comfort and trust, you may rely on the traditional models when working with dominant culture clients, for those models are apt to be pretty reliable for that purpose. If you happen to share that client's dominant culture background, then, presumably, your use of the models will be uncomplicated (except to the extent that using the models themselves is a challenge, which we ought not underestimate, [35] and except to the extent, as just noted, that all counseling is cross-cultural). If you do not share your client's dominant culture background, then you will be working with models crafted with your client in mind, but not necessarily with your culture in mind. As we see below, a critical responsibility of cross-cultural practice is to understand, respect, and work with your client's preferences and values. The models help you do so in the ***384** setting where you are working with a dominant culture client, because they assume the dominant culture perspective (for both lawyers and clients). [36] In this respect the skills privilege your client's cultural preferences and values, but not yours. [37]

The second point about your cultural background and preferences will be addressed at greater length below, [38] but warrants a quick mention here. In the section of this article discussing ‘bias,‘ I note the importance for any lawyer of understanding his or her cultural identity, including biases, stereotypes, values, and comfort patterns. The sophisticated writers about cross-culture counseling help us understand that no lawyer enters into an attorney-client relationship without a complex package of learned behaviors, assumptions, and biases. Understanding your complex package and identifying its components explicitly is a critical step in becoming a better cross-cultural lawyer.

C. Heuristics and Biases

In searching for advice to good faith lawyers on the topic of cross-cultural counseling we might find the familiar concepts of heuristics and biases to be useful. These paired notions are of course famous from the setting of behavioral psychology, [39] but I use the terms in slightly different ways here. [40] Heuristics represent a method of inquiry which employs generalizations and maxims [41] to guide education ***385** or a learning process. It has achieved particular significance in the past decade as a central component of the new behavioral psychology perspective, which attempts to explain human behavior not through classical economic rationality but instead through the operation of sometimes less-than-rational thinking patterns on which most of us rely to organize our worlds. [42] In contrast to the behavioral psychologists' understanding of heuristics as reflexive operations guiding decisionmaking without much conscious deliberation, I employ the concept as a more explicitly deliberative operation. The key point about heuristics is that they rely on generalizations which are not absolute, but are more tentative and preliminary.

The central premise of the heuristics idea is this: A lawyer working with an ethnic minority client can neither assume that the client's cultural preferences do not matter (as some of the dominant culture models imply), nor be certain that the specific differences of which the lawyer is aware will call for predictable variations in their interaction. The former danger we label as cultural imperialism; the latter, stereotyping. What the good-faith lawyer needs is an orientation to cross-cultural practice which respects differences but does not guess incorrectly how the differences will matter.

If every aspect of the interviewing and counseling process were open for reconsideration in cross-cultural contexts, a lawyer would feel powerless about how to proceed. The models suggested for dominant culture interactions would have no guiding relevance. A review of the extensive literature on the topic of cross-cultural practice, though, shows that in those settings everything is not open to reconsideration. In fact, there are several identifiable, reasonably predictable ways in which cultures will differ, and will influence their members. A culturally competent lawyer can anticipate the areas ***386** where difference is most likely to arise, and, equally importantly, the direction in which the differences are most likely to proceed. Knowing that, the lawyer can anticipate provisionally the places where her model's world view might not be the same as that of her culturally different client, remaining open to possible misunderstanding and the possibility of conversation about the differences, if appropriate.

It is in this fashion that I suggest you consider the idea of heuristics. By identifying the places where cultures are most apt to differ, and by knowing a bit about how each culture differs on these scores, you can plan for a session with a culturally different client by the use of tentative generalizations accompanied by a disciplined naïveté [43] about interpersonal dynamics about which you previously may have felt some real, but possibly misplaced, confidence. Part II describes several areas in which you might expect predictable differences among cultures, and proposes heuristics to employ when working with clients from those non-mainstream cultures.

The second construct borrowed from the work of the behavioral psychologists is that of bias. [44] If the heuristics idea informs and organizes your consideration of the ways that other cultures may differ from the dominant culture, the bias idea turns the focus back on you, on your cultural presuppositions, and on the distortions and prejudices you bring to the client interaction. Not only do you need to know something about how different cultures might respect different values, customs and practices, but you also must 'move[ ] from being culturally unaware to being aware and sensitive to [your] own cultural issues and to the ways that [your] own values and biases affect culturally diverse clients.' [45] As one authority has written concerning teaching ***387** cross-cultural counseling to members of the dominant culture, 'Attempts to teach effective cross-cultural counseling will be doomed unless trainees address their own White racism.' [46] Part III explores the importance in seeking to attain 'cultural competence' by your own self-examination for biases and prejudices, and offers some suggestions and exercises mined from the literature to aid you in that goal.

II. Heuristics

The heuristics concept is an effort to resolve, in a pragmatic kind of way, two apparent hurdles that arise upon the discovery that the typical law school models are constructed upon dominant culture assumptions, which may not apply necessarily in minority-culture contexts. The two hurdles are (1) confronting your uncertainty whether any of the suggestions from a previously acceptable model ought to apply in cross-cultural practice (or, put another way, your not knowing which of the assumptions underlying the models ought to be rethought in any given encounter); and (2) your worry that in responding to culturally different clients you will rely on stereotypes which might not work with the particular individual with whom you happen to be working. These hurdles are no small challenge. If you use dominant culture models faithfully regardless of the cultural background of your client, you will no doubt fail in some respects as a lawyer. So you opt to adapt the models, but you wish to know which parts of the model are likely to be inappropriate for culturally different clients. And, even if you can figure out that puzzle, you encounter the further worry that you will presume in some kind of slavish way that your client must share some characteristics of her culture, and that feels like unfair stereotyping.

The idea of heuristics might help you on both of these counts. First, as we see, a limited range of heuristics will apply. That responds to your first concern. Not everything is subject to revision in cross-cultural practice, but certain predictable items ought to command your attention. Each one of those areas (including kinesics, proxemics, paralanguage, relational qualities, scientific orientation, perhaps a few others) qualifies for a set of heuristics. Otherwise, the wisdom of the models seems to have continued effect. In addition, because you work with heuristics and not rules or models, you minimize the stereotyping risk. The idea of a heuristic is that you assume tentatively--with your 'disciplined naïveté' and 'informed not-knowing ***388** ' [47] --a certain presumption about the behavior you're about to encounter, and better to assume some culturally predominant qualities than some culturally unlikely ones. Because you're applying heuristics, many of your presumptions prove to have been mistaken, but with some training you'll be flexible enough to adjust when your expectations seem unfounded.

The vast literature on cross-cultural counseling in the fields of social work and psychotherapy has identified several important areas in which cultures are most apt to differ. [48] A lawyer who fails to understand these differences, or to anticipate that some such differences might exist, risks misunderstanding, insulting, or offending her client. The following sections summarize some of the most critical areas, with a brief explanation of how certain cultures tend to differ from the dominant American culture. A culturally competent lawyer ought to have available in her library resource materials which would explain the cultural traits, customs, and values that she can expect to encounter in her work with diverse clients. [49] That kind of book-research might be supplemented with other means of understanding ethnic culture, including attending cultural events in the community where your clients live, and speaking with your clients about these topics. [50] As one writer has cautioned, 'Be tactful and discreet and quietly compare any book learning against the actual situation. Use book learning as an aid to understanding, not as a template into which the world will actually be fitted. ' [51]

In reviewing these places where cultures tend to differ in some predictable ways, I attempt to suggest a level of practical application for concepts which sometimes remain a bit theoretical in their discussions. It is quite common, in textbooks written for social work or mental health professions as well as in the few resources emerging for lawyers, to observe authors insisting that professionals anticipate and understand cultural differences in their work with clients, but without ***389** offering adequate guidance to the professionals about how to accomplish those tasks. [52] The areas I am about to describe hardly achieve the goal of adequate guidance, but they do represent a beginning effort to turn the discussion to a more concrete level.

A. Proxemics

The concept of proxemics refers to 'perception and use of personal and interpersonal space.' [53] Cultures tend to develop relatively unambiguous norms concerning appropriate physical distance in social interactions. Most lawyering counseling texts attend to proxemics, and do so with the expected dominant culture norms in mind. For instance, one respected interviewing and counseling text reports on the research available on the effect of distance, including the respect for some 'critical space,' on effectiveness of communication, and reporting that 'experiments indicate that . . . five and one-half feet is the preferred distance between people. . . .' [54] Another central text refers its readers to the '[s]ubstantial literature . . . devoted to how offices should be decorated and arranged to put clients at ease,' [55] after suggesting that lawyers '[h]ave an area of your office which is conducive to personal conversation rather than attempting to communicate across a large and often messy desk. ' [56] A very common suggestion in interviewing and counseling texts is to reduce the psychological barriers between lawyer and client by meeting face-to-face rather than across a desk. [57]

***390** All of these suggestions make important sense, and are necessary for beginning lawyers to understand. [58] But, as Derald Sue and David Sue remind us, 'different cultures dictate different distances in personal space. ' [59] Many cultures, including Latin American, African, Black American, Indonesian, Arab, South American, and French, prefer discourse at a much closer distance than White American culture finds comfortable or appropriate. [60] Other cultures, such as the British, maintain a greater distance than traditional American custom. [61]

You now may see for the first time in this discussion how a set of heuristics about proxemics might assist you when you are working with a minority culture client. The academy's dominant culture training will have established for you certain relatively reflexive feelings about social distance, and you would in a dominant culture meeting rely on those understandings in deciding how close to your client you will sit, how you might arrange your furniture, and so forth. When you meet with a client from a different culture, however, you might want to assume a bit more naïveté about these issues. You can rely on some generalizations (the heuristic) about how your client will react to social distance. If you have read that '[m]any Latina/o people often prefer half [the dominant culture] distance, and those from the Middle East may talk practically eyeball to eyeball,' [62] you might assume--with some tentativeness--that your usual social distances might inaccurately imply aloofness or disinterest in meetings with Latina/o or Middle Eastern clients, and therefore attempt a bit closer contact. Of course, your own social background and cultural influences cannot be ignored either, so you will search for a setting that accommodates the (possibly) different preferences of your client with your own comfort levels. [63]

This first example of the use of heuristics invites consideration of the risk of error. The perhaps most respected work on cross-cultural ***391** counseling in the psychotherapy literature offers the following caveat to its readers:

> It is extremely difficult to speak specifically about the application of multicultural strategies and techniques in minority families because of the great variations not only among Asian Americans, African Americans, Latino/Hispanic Americans, Native Americans, and Euro-Americans, but because large variations exist within the groups themselves. . . . Worse yet, we might foster overgeneralizations that would border on being stereotypes. Likewise, to attempt an extremely specific discussion would mean dealing with literally thousands of racial, ethnic, and cultural combinations, a task that is not humanly possible. [64]

These sophisticated observers of cultural patterns concede that cultural competence is anything but a precise science, and that making assumptions about an individual because of her race or cultural background may lead to mistakes. How do you work with this uncertainty?

The concept of heuristics is intended to respond to precisely this problem of uncertainty. [65] The argument I offer to you is this: If you were to apply automatically the dominant culture model and ignore the cultural differences which might be in play (because of your legitimate worry about being wrong), you would face a risk of error in that direction. It seems far more prudent, given the risks of error in both directions, to assume tentatively that the known generalizations apply, rather than that they do not apply. The heuristics are just that--preliminary orientations from which you will deviate based upon your own pragmatic judgments arising from your interaction with the culturally different client. It is better, in short, to err by assuming provisionally that the cultural generalizations will apply, than to err by assuming provisionally that they do not. [66]

This first heuristic example also invites another consideration which will arise in each heuristics area that we explore in this paper--whether you might simply talk to your client about the matters that you suspect will be different from the model's suggestions. The concern is this: Might you, amidst conditions of uncertainty, ask the client about his cultural preferences and any differences that you might be expecting? [67] The answer to this question will often be ‘yes,‘ but not ***392** necessarily always. Later parts of this paper will address some ways cultures differ in their reactions to and respect for an attorney's status, comfort level with engaging in dialogue, and valuing autonomy. The culturally different client's preferences on those items may affect significantly the prospect for the attorney and client to engage in a mutual exploration of the differences. [68]

In the case of proxemics, some decisions will simply not be subject to collaborative decisionmaking. It would be hard, I imagine, for you to have a productive conversation with a new client about how close to him you ought to stand. You might, by contrast, set up your office in a way that permits you to offer him a choice that includes your provisional assessment of how his culture would arrange such a meeting room, but that interaction might be distorted by his need to defer to your authority, if that cultural value is central to him. [69]

This discussion of heuristics about proxemics invites one final thought about the enterprise of working as a lawyer with culturally different clients. Without an appreciation of cultural preferences about proxemics, many lawyers might interpret ‘inappropriate‘ (from a dominant culture perspective) use of physical space as odd, deviant, or ‘difficult.‘ [70] Similar culturally-specific behaviors might even lead a professional inappropriately to suspect mental illness. [71] The benefits of provisional heuristics and reinforced naïveté include a more sustained appreciation and tolerance for ‘difficult‘ behaviors, [72] especially when combined with an examination of the lawyer's own personal cultural assumptions, values, and biases. [73]

B. Kinesics

The term kinesics refers to the way in which bodily movements are used and interpreted. It includes such things as facial expressions, eye contact, hand shakes, posture, gestures, and similar physical ***393** movements. ‘[K]inesics appears to be culturally conditioned, with the meaning for body movements strongly linked to culture.‘ [74]

The role of kinesics in legal interviewing and counseling is sometimes quite explicit and central, and in other ways it is more subtle. It seems clear, though, that your attempts to achieve effective and meaningful communication and rapport with your clients will be influenced (and evaluated) by your reading of kinesics. A culturally inept lawyer will misread cues, to the detriment of the relationship; and a culturally competent lawyer will understand her clients' cues more accurately, to the benefit of the relationship.

As with proxemics, kinesics may be approached by the employment of heuristics. You can learn about patterns of physical behavior common to various cultures, and approach a meeting with a culturally different client with the tentative expectation that your client will act consistently with her culture. Some of the most common sources of misunderstanding, or of offending another, include the following:

Eye contact: We rely on eye contact, or its absence, to communicate a great deal about feelings, truthfulness, confidence, and comfort level. In the dominant culture, eye contact has some very reliable meaning. Those in the dominant culture understand

a strong, unwavering gaze to indicate honesty, self-assurance, and comfort. By contrast, shifting eye contact or very little eye contact tends to communicate, in the dominant culture, just the opposite-- lack of self-esteem, discomfort, and possibly untruthfulness. [75] The textbooks that teach effective lawyer/client relations rely on these generalizations in recommending that lawyers master eye contact as an appropriate rapport-building tool. [76]

Both the dominant culture and less mainstream cultures recognize that messages are sent by eye contact, but not all cultures agree on the positive/negative valences of this cue. For instance, studies of ***394** kinesics within Black communities have shown that Blacks make less frequent eye contact than Whites, especially when listening. White Americans tend to engage in more sustained eye contact when listening and less when speaking; Black Americans tend to exhibit the reverse pattern--more eye contact when speaking and less when listening. [77] This latter phenomenon can, within dominant culture circles, lead to an inference that the listener is inattentive, uncomfortable, or bored. Eye contact patterns are also different in some Asian cultures, notably Japanese and Chinese, where avoiding eye contact is considered a sign of respect, [78] and in traditional Navajo society where eye contact is also deemed inappropriate. [79]

Facial Expressiveness: Within the dominant culture individuals intuit a great deal from the facial expressions of those with whom they interact. They take pleasure in the smile, and attribute positive qualities, including intelligence and personality, to those who smile often. [80] If their clients demonstrate ‘inappropriate‘ facial expressions (not smiling when politeness or the pleasurable context would call for a smile, or not frowning at painful moments), they might assume that the clients are somehow ‘off.‘ Again, as with proxemics or with eye contact, those cues and inferences are valuable and frequently reliable, but they are almost entirely culturally determined (and, even within the dominant culture, may be gender-based as well [81]). Certain Asian cultures in particular teach that restraint of strong feelings is a virtue, and a sign of maturity and wisdom. [82] Thus, smiling may indicate discomfort. [83] That cultural trait has led dominant culture observers to misconstrue Asians as inscrutable, unfeeling, deceptive, and ***395** sneaky. [84] In the American Black culture the customs may also be different about expressing emotions, facially and otherwise, including less smiling and more expressions of unhappiness than the dominant culture custom finds appropriate. [85]

Hand Shaking: It is a universally expected ritual in the dominant American culture for two persons when meeting in a professional or work context to shake hands, and guide books on successful professional behavior will offer suggestions about how to communicate the best messages when shaking hands. [86] Obviously hand shaking is a cultural artifact, and as such it may develop variations in differing cultures. Latinos, for instance, tend to shake hands more vigorously, frequently, and for a longer period of time than in the dominant American culture, according to the literature. [87] In some Moslem and Asian countries, touching with the left hand is considered taboo, [88] while in some Asian cultures assertive hand shaking, especially by women, is not considered proper. [89]

C. Time and Priority Considerations

Most clinical teachers can relate stories of their students' (and of their) frustration with clients who miss appointments, or show up late, and seem not at all apologetic about the inconsiderateness of their behavior. ‘I really wonder whether [name the client here] really cares about this case as much as I do. And s/he's getting these valuable legal services free!,‘ is a comment heard in most of our clinics at some time. Such reactions are entirely sensible given the dominant culture world view shared by most of our students, and by most of their teachers. Prevailing American culture, especially as it is known in the law office, respects time as a commodity and an appointment as an organizing construct for allocating that scarce commodity.

Clients who ‘abuse‘ our allocation of this resource may well be ***396** inconsiderate and uninterested in their legal problem. But the cross-cultural perspective suggests other explanations, which your disciplined naïveté might encourage you to consider. In some cultures, time considerations simply have a different meaning than in our dominant culture. [90] Hispanic culture, the researchers tell us, does not consider time in the same literal and specific fashion that most law offices tend to do. [91] Sue and Sue distinguish between the ‘future‘ time orientation of middle-class White Americans, the ‘past-present‘ time orientation of Asian Americans and Latino Americans, and the ‘present‘ orientation of American Indians and African Americans. [92] It is

very easy, but culturally hegemonic, to assume that the rest of the world views time and appointments in the same way that the dominant culture does.

Another explanation for the difference in respecting appointments rests with our clients' lived experience in poverty. Not only do our clients have frequent bureaucratic experiences in which a 9:00 a.m. appointment means being called at 10:30 a.m., but their lives will often be filled with more stresses and crises than we can imagine in our organized law firm world. Sue Bryant's and Jean Koh Peters' suggested habit of imagining ‘parallel universes‘ is especially appropriate in settings like missed appointments, where we may tend to attribute the worst motives to understandable behaviors, if we only knew our clients' lives better. [93]

D. Narrative Preferences

The dominant culture models for interviewing and counseling encourage you to provide the maximum space for an undistorted client narrative. The goal of most legal interviewing and counseling books is to suggest the best techniques for learning the client's story from the client's point of view. [94] It is hard to disagree with that goal, one which ***397** seems to hold across differing cultures, since a lawyer cannot begin to do a lawyer's job without knowing the facts of the client's case and the solutions that the client has in mind. [95] This shared goal serves as an apt example of the point made earlier in this paper--that cross-cultural interactions will not call into question everything that one might learn about the lawyering process from within the dominant culture. [96]

This unambiguous goal of the counseling process does encounter some complications in the context of culturally different clients, however, even if it is not a culturally-driven goal. The complications arise from two assumptions of the dominant culture models. First, the models wisely advise the use of open-ended, undirected questions as primary vehicles by which to learn a client's story, [97] but individuals from some cultures will resist that narrative technique. Second, the models implicitly (and at times explicitly [98]) assume a commitment to autonomy as a critical premise of the lawyer/client interaction. The dedication to autonomy may in fact be a culturally-manifested construct in the dominant American culture. To the extent that models assume autonomy as a ‘good,‘ they may fail to achieve their aims with some culturally different clients.

To the extent that we are looking for workable heuristics, it is fair to conclude that the narrative-based focus of the dominant culture models will work in most settings, and hence can serve as a reliable technique most of the time. [99] But some cultures, and some persons within some cultures, may resist the fundamental techniques of silence ***398** and open questions used to encourage the client to talk most of the time. A culturally competent counselor might alter her heuristics in settings where this risk appears to be a possibility. For instance, Michelle Jacobs reminds us that Black clients may feel considerable distrust of a White professional. [100] With such clients techniques that call for open, free-flowing narrative by the client might not be effective until a trusting relationship has been affirmed. Other observers tell us that some cultures might respond less well to unstructured, non-directive techniques, especially those cultures which favor verbal restraint over verbal expressiveness. [101]

The commitment to autonomy affects the counseling process in significant, if perhaps subtle, ways. That value, so deeply-entrenched in American culture, [102] causes lawyers to strive for strict neutrality in their counseling processes (a paradigmatic quality of ‘client-centered counseling‘ [103]) and to search hard for evidence of the client's personal values. [104] These important elements of the dominant culture counseling models will be appropriate most of the time, but not always. Research has shown that some non-Western cultures find non-directiveness in counseling to be much less effective than the American models assume. Parallels to psychotherapy may be apt here. Critics of the dominant psychotherapy schools observe that ‘therapists tend to prefer clients who exhibit the YAVIS syndrome: young, attractive, verbal, intelligent, and successful.‘ [105] Therapy works best when the clients are verbally, emotionally, and behaviorally expressive, and, conversely, less well when the clients are not so expressive. In cultures which discourage self-disclosure, such as Japanese or some Latino cultures, an interviewer expecting the client to provide a narrative tale may be disappointed. [106] Once again, there is the accompanying risk that the lawyer will perceive a client who does not participate in ***399** the narrative, revealing process as difficult, dishonest, or uncooperative. [107]

In similar fashion, the client-centered model of counseling assumes a ‘Rogerian‘ non-directive stance on the part of the lawyer. [108] This fundamental premise of dominant culture counseling models flows from the value of autonomy, with its insistence that a client's choices be determined by the client and not by the lawyer. That goal of the counseling process [109] may

seem to many law students quite self-evident, but it, too, is influenced by cultural assumptions and Western value structures. Many culturally different clients find a non-directive process frustrating and unhelpful. Cultures which value action and results more highly than process, insight, and deliberation look for more active direction from professionals. [110] Relying on the dominant models with clients whose world orientation is different from that underpinning the dominant culture models can cause difficulty in the process and unhappiness on the part of the clients. [111]

***400 E. Relational Perspectives: Individualism versus Collectivism**

The concern about presuming a commitment to autonomy and therefore to non-directiveness in counseling connects to another very common issue in multicultural counseling settings. The dominant culture models are largely individualistic, reflecting quite understandably the individualistic themes of the legal profession's ethics generally. Most interviewing and counseling models assume a single client describing his or her legal issue, making decisions for himself or herself, and grounding those decisions on the client's personal values. On occasion that world is expanded to include spouses, but even that scenario is exceptional. [112] The profession's ethics rules regarding confidentiality [113] and conflicts of interests [114] discourage lawyers from 'pluralizing' the lawyer-client relationship, [115] and the lawyering models tend to follow that lead.

The literature on cross-cultural interactions is rich with examples where the dominant cultural assumption of individual deliberation about personal values is quite inconsistent with minority cultural understandings and customs. [116] In her brilliant and evocative account of the American medical profession's interaction with a very dissimilar culture, the anthropologist Anne Fadiman documents how deep differences in world view can cause enormous misunderstanding in a ***401** professional relationship, even where both sides act in good faith toward a common goal. [117] Fadiman recounts the experiences of the Lees, a Hmong family living in Merced, California, after their daughter Lia suffers a mysterious and life-threatening illness. The well-meaning doctors at the Merced community hospital diagnose Lia's symptoms as a serious form of epilepsy; to the Hmong family, Lia is experiencing 'when the spirit catches you and you fall down,' an event caused by the evil dab spirit and most likely related to some important earlier ritual having been missed in Lia's life. [118] Amidst the scores of agonizing stories Fadiman reports of intolerable frustrations felt by the Lee family toward the medical staff, and the medical staff toward the family, we learn of the implicit and deep connections among the extended Hmong family and community as they collectively care for Lia and search for her cure. [119] The story one encounters is far from that of a nuclear family deciding in 'substituted judgment' fashion what Lia would want. [120] The Hmong traditions and world views do not distinguish between immediate family, extended family, the larger Hmong community, and the historical Hmong ancestry--all are vividly present as implicit context for the ways that the Lees live their lives and raise their daughter. [121]

Lia's story arises in the context of medicine, and shows dramatically the dangers of misunderstanding across cultural gulfs. A recent research study of Latino families in litigation arrived at similar conclusions, in a more empirical fashion than the Fadiman account. The study [122] investigated the experiences of recently-arrived Latino families, primarily from Mexico and Central America, in court-annexed mediation services in family law disputes. The authors found, in concluding that '[t]he justice system needs to better understand the culture of Latino family life and the ways in which Latinos interact with government authority,' [123] that the traditional mediation service offerings ***402** failed to account for the 'collectivist orientation' of Latino families. [124] The well-intended diversion methods offered by the court system misunderstood the significant influence of extended family and community leaders in Latino culture, and the 'holistic' problem-solving orientation of that culture. [125]

These two examples show us the need for a heuristic for the collectivist world view when working with culturally different clients. The Hmong and Latino cultures are hardly alone in their implicit acceptance of a connectedness to a larger family or community. Cross-cultural therapy researchers point out similar orientations among Haitians, [126] African Americans, [127] Asian Americans, [128] and Native Americans. [129] The individualism so cherished in the dominant culture may, in fact, be a less prevailing orientation overall. Your counseling practices could be affected significantly by this shift in world view, as you explore consequences to and values not only of your client, but also of his extended community. Less apparent, but equally important, are the changes that this heuristic might suggest for your interviewing practices. Not only might you invite more 'strangers' into your interview meetings, [130] but you may alter your strategy of 'learning the client's story' in order to learn the story as it might look to others in the client's immediate circle. [131]

***403** Tolerance about difference is not necessarily without its anxieties, especially when the difference clashes with important values of our own. The Western preference for individuality and autonomy tends to include a strong commitment to egalitarianism in relationships. We may consider it our goal in 'client-centered' counseling to achieve a measure of independence for our clients in their decisionmaking capacity. In working with cultures different from the dominant one, some lawyers may encounter a tension between the feminist, egalitarian norms and the well-established sex roles of a minority culture. David Sue and Derald Wing Sue tell a story of an ineffective therapist who failed to appreciate the importance of a woman's expected role in a Hispanic family, and the power of Machismo within that culture. The counselor worked from his established world view that resisted patriarchy, and in doing so he failed to understand the needs of both members of the couple with whom he worked. [132] 'Therapists,' Sue and Sue caution us, 'should not judge the health of a family on the basis of the romantic egalitarian model characteristic of White culture.' [133] Another pair of commentators offer the same advice in the context of Southeast Asian American clients. They write that we may need to accept 'chauvinism to tolerate Confucius's teaching and centuries-old traditions.' [134]

F. The Limits of Scientific Rationality

Our final heuristic is one that has frequent significance in the medical/psychotherapeutic field, and may have similar importance to your work with clients on legal matters. The dominant culture is, not surprisingly, deeply committed to scientific rationality, and its counseling ***404** models reflect that orientation. One primary aim in legal counseling is to predict for clients the likelihood of differing outcomes, allowing a careful comparison of the available alternatives so that the client may choose the one which best serves his purposes. [135] This structure allows for the most careful, reasoned client decisionmaking, even if recent work in the behavioral psychology field demonstrates that individuals rely on distorted reasoning in making many important decisions. [136]

While conventional counseling models vow to respect the idiosyncratic wishes and values of the clients (and insist upon an anti-paternalistic stance on the part of lawyers [137]), it is fair to say that the models do not easily accommodate mysticism, voodoo, and other 'bizarre' [138] or irrational decisionmaking vehicles. [139] Cross-cultural theorists tell us, though, that many non-Western cultures rely importantly on native rituals, beliefs and practices which are not likely to be seen by United States-educated lawyers as 'scientifically rational.'

Anne Fadiman's story of the Hmong family and community in Merced, California is an apt example of how impatient dominant culture professionals can be when faced with unconventional rituals. [140] To her American doctors, Lia suffered from a complex seizure disorder treatable with sophisticated medical intervention, including significant medication regimens. To her Hmong family, Lia's spirit had been invaded by an evil dab spirit, and the only way to banish the dab was through indigenous healing arts, rituals, dermal treatments, and ***405** shamanism. [141] The Hmong shaman was known as a txiv neeb,

> who was believed to have the ability to enter a trance, summon a posse of helpful familiars, ride a winged horse over the twelve mountains between the earth and the sky, cross an ocean inhabited by dragons, and (starting with bribes of food and money and, if necessary, working up to a necromantic sword) negotiate for his patients' health with the spirits who lived in the realm of the unseen. [142]

The txiv neeb, his rituals and his advice were enormously important to the Lees and their Hmong community, but his suggestions were of no use whatsoever to the medical staff at Lia's hospital. Indeed, at one deeply painful juncture in Fadiman's story of Lia's illness the local Department of Child Protective Services obtained a court order and removed Lia from the Lee home, because the Lees were relying on indigenous Hmong remedies and refusing (or failing) to comply with the medical directives from the hospital. [143]

The Fadiman account does not, and cannot, conclude that the doctors were wrong in their medical treatment of Lia or that they were negligent in fulfilling their professional medical obligations to her. [144] Nor does her narrative imply necessarily that the Lees were wrong in their noncompliance with the medical treatment plans ordered by the hospital staff. It does convey acutely,

though, the depth of misunderstanding, distrust, and frustration engendered on both sides of the cultural gulf by the narrow and limited focus of the medical personnel on their well-established traditional medical assumptions.

Fadiman's history is perhaps the most elaborate account of the centrality of non-scientific rituals and beliefs in a different culture, but it is hardly the only one. The literature on cross-cultural counseling shows us that many other cultures hold strong attachments to deep-seated traditions which conventional thinking might find less than scientific. ***406** A form of witchcraft, or 'Obeah,' is common and important in Jamaican society. [145] Voodoo practice is deeply respected and common in Haitian culture. [146] American Indians have long practiced traditional healing rituals. [147] Puerto Rican children have been shown to respond best to native folk-tale therapy when compared to more traditional Western therapy. [148] Many other cultures no doubt respect similar traditional practices and rituals.

Your heuristic on this topic will encourage a nurturing of your 'isomorphic attributions' [149] and your disciplined naïveté when working with culturally different clients. Your open-mindedness and tolerant acceptance of very different ways of thinking about problem-solving will reduce the likelihood of serious misunderstanding between you and your culturally different clients, and will forestall your concluding that the 'bizarre' ways in which your clients respond to your carefully reasoned legal analyses of their problems means that something is seriously amiss with your clients.

III. Biases

Part II of this exploration of cross-cultural counseling has identified several heuristics which you might employ to reduce the risk of misunderstanding when you work with culturally different clients. The 'heuristic' idea is intended to guide your work generally and provisionally, suggesting topics and areas where differences between cultures are most apt to exist.

The latter part of this paper intends to complicate your life a bit more, but necessarily and importantly so. We turn here to the idea of 'bias,' and how it affects and interferes with your likely success even with the best heuristics and the most forthright discipline about naïveté. Unlike its use in the work of the decisional theorists, [150] the term bias in this context refers to its more common meaning -- ***407** prejudice, intolerance, distrust, belief in the inferiority of others. I explore briefly the role of your (and my, and our colleagues') bias in the cross-cultural counseling endeavor. The biases that we need to consider are not as much the conscious, deliberate ones--most, if not all, readers of a paper such as this are likely deeply opposed to institutional prejudice and discrimination--as the implicit, unconscious ways in which our own cultural heritages, whatever they may be, influence our world view and our deep-seated assumptions about how the world works.

The heuristics project described above might readily be seen as a relatively nonjudgmental, largely analytical process. The dominant culture lawyering models employ a collection of culturally-influenced assumptions and develop from a collection of culturally-driven values. Other less mainstream groups celebrate customs and practices, and embrace values and beliefs, that might not be the same as those in the dominant culture. The heuristics project aims to train lawyers in the discipline of naïveté and in accepting the tentativeness of our assumptions, with 'informed not-knowing.' [151]

The problem with that analytical view of the heuristics project is that it does not account adequately for racism, sexism, homophobia, and ethnic and cultural imperialism. You do not need to read a footnote listing research references to remind you of the magnitude of that reality. [152] All of your lawyering work takes place within this world of institutional unfairness, with its long history of oppression of ethnic minorities, women, gays and lesbians, and the poor. If you belong to the dominant culture, your membership in that group will have influenced you in important ways. If you hail from outside the mainstream American culture, your status as an outsider undoubtedly affects your identity as a person and a lawyer.

There are at least three ways in which the 'bias' reality might ***408** affect your work with clients, and the rich literature from disciplines outside of law might help us understand each of these. First, as a professional you need to explore and confront your own cultural influences and the extent of your unconscious (or conscious) biases, including your own racism, sexism, and homophobia. Second, your learned preferences might interfere with your appreciation of your clients' stories, to the detriment of your client's legal case. And third, it is important to your effectiveness as a lawyer to understand how societal and historical racism affects, and has affected, your clients' lives and the stories they bring to you as a helping professional. To develop as a culturally competent counselor you might wish to learn about racial and ethnic identity theories. Those theories can begin

to aid professionals to understand how ethnic minority individuals accommodate their cultural identity within a largely White male American social system.

Let us explore each of these ideas separately. For each of these topics, the discussion here is tentative and preliminary. Talking about race, class, gender, and power is complicated and often threatening to professionals, especially within law schools. [153] The suggestions here, observed from other professional worlds, might begin to expand their discussion in the legal academy.

A. Self-Awareness

In their portrayal of the ‘five habits of cross-cultural lawyering,‘ Sue Bryant and Jean Koh Peters suggest a three-step process ‘for good cross-cultural lawyering‘:

1. Identify assumptions in our daily practice.

2. Challenge assumptions with fact.

3. Lawyer based on fact. [154]

That first step--where you identify explicitly the assumptions which form the basis of your work--is essential to good lawyering generally, and especially so in cross-cultural practice. There are two components of this idea, both rather challenging, but one more easily confronted than the other.

The first, and more accessible, component touches on the relationship ***409** between your cultural identity and your lawyering performance. You possess some cultural identity (or identities) and have learned from your community (or communities) certain beliefs, habits, customs, ways of thinking, and values. These elements help define who you are, and your lawyering activities cannot but reflect them. You may not think very explicitly about those beliefs, habits, values, and so forth--they are just part of who you are and how you see the world. Now, your clients (and your colleagues, and any one else who is not you) will possess different identities, instilled from different communities, with different beliefs, customs, values, and so forth. Some will be very dissimilar from you; others, less so. But nobody will share all of your preferences with you.

So the first part of the Peters and Bryant challenge is to understand where your assumptions come from, what they are, and how they influence your professional work. Having done so, you can better anticipate where your clients' preferences might depart from yours. You probably won't easily or necessarily change who you are, but you might appreciate better why your clients (and your colleagues) seem to see the world in ways that you do not.

The researchers and theorists of multicultural counseling regularly include this important advice, which is at the heart of the ‘cultural competence‘ movement. [155] Some of these sources offer exercises to unpack cultural assumptions and refine cultural identity. Certain exercises are intended for groups or for pairs, allowing a person to appreciate his or her cultural influences comparatively. Others may be performed alone. The exercises often require the participants to identify ‘who [they] are,‘ as well as what values and practices are most important to them. [156] Other experts recommend developing a ***410** ‘family genogram,‘ a map of your immediate and extended family which includes ‘your own perceptions of the relationships with and between family members.‘ [157] The genogram will help you understand your intergenerational context and situate you within a wider culture. Jean Koh Peters and Sue Bryant use a similar device of Venn diagrams to chart ‘degrees of separation/connection‘ between a lawyer and her client. [158]

The story of Lia Lee, the Hmong child whose medical crises were documented in Ann Fadiman's book, [159] offered powerful insights about a medical culture far short on reflection about its own unexamined assumptions. At the end of her book, Fadiman reports a conversation with the anthropologist and psychiatrist Arthur Kleinman, of Harvard Medical School, about the Lee saga. Kleinman's observations about the Merced doctors' interactions with the Hmong family apply with equal force to the legal community:

> [Y]ou need to understand that as powerful an influence as the culture of the Hmong patient and her family in this case, the culture of biomedicine is equally powerful. If you can't see that your own culture has its own set of interests, emotions, and biases, how can you expect to deal successfully with someone else's culture? [160]

The Kleinman quote provides an apt segue to the second component of the Peters and Bryant 'identify your assumptions' (or, perhaps, 'know thyself' [161]) suggestion. [162] This second component is the more challenging one, but no less important to effective lawyering practice. Here, the task is not simply to understand your identity and its preferences and values; it is also to understand how your cultural background has influenced your own views about race, sex, class, and sexual orientation. It asks you to confront your own biases, your own stereotypes, and your own participation in oppressive societal practices.

Many writers on cross-cultural counseling emphasize the importance ***411** of this self-reflection, especially, but not only, for members of the dominant culture. [163] Our cultural assumptions are important to understand not just because they explain what we prefer and what we value; some of them show deep prejudices that we may or may not understand well enough. Those biases will have a substantial effect on our work if we do not confront them.

But confronting them will never be easy; as Marjorie Silver writes, 'Few of us want to admit to being racists.' [164] The same researchers who developed exercises to help people explore their cultural identities [165] have also developed similar modules to try to uncover biases and prejudices. [166] Perhaps such assessments will work in law schools or other settings where lawyers explore these issues. In the cross-cultural lawyering setting, this task is of some importance. As Patricia D'Ardenne and Aruna Mahtani demonstrate in the therapeutic counseling context,

> When the counsellor and client are from differing cultural backgrounds, countertransference invades the therapeutic relationship in a particularly insidious way. Counsellors are unlikely to examine their own racism and cultural prejudice. As a consequence of this neglect, unacknowledged prejudice is reflected back unconsciously in the therapeutic relationship. . . . The dissonance in the relationship results in both parties having their beliefs about the other's culture ***412** reinforced. [167]

There is little reason to believe that the risks within the lawyer/client relationship are any less substantial.

B. Understanding and Respecting Clients' Stories

The previous section described how you will bring your own bundle of preferences and values to your work with clients, and how that package will almost always be different, in greater or lesser extent, from the bundle your client comes with. This section reminds us of a particular concern within that larger context. As you work with different clients, you will filter their stories through the lens of your own cultural identity and your bundle of preferences and values. In doing so, you run a risk of misunderstanding your clients. Your misunderstanding may lead to frustration on your part ('My client just isn't making any sense!') and, of greater worry, your failing to achieve what your client really wants. [168]

The remedy for this worry is easy to articulate but perhaps rather difficult to accomplish. First, the disciplined naïveté and informed not-knowing that we stressed in the discussion of heuristics play an equal role here. The client story that seems to make little sense, the strategy direction that you cannot understand, that tactic that you see as self-defeating--each might be perfectly reasonable with another's lens and another's bundle of preferences and values. [169] Second, the better that you understand the ways in which your own bundle of preferences and values skews your thinking about stories, strategies, tactics and the like, the better you are likely to be in remaining less judgmental about your clients' different preferences and values.

All that said, it is important to remember that your judgments are not necessarily wrong just because they are part of your bundle of preferences and values. Correspondingly, your clients' choices indeed may be wrong or ill-advised. Your commitment to disciplined naïveté does not imply an abdication of your responsibility to talk directly and frankly with your clients about the

hard lawyering topics on your agenda. What it does imply, though, is greater humility about the universality or inevitability of your perspective.

*413 C. Understanding the Effects of Oppression on Your Clients' Lives

Multicultural competency experts advise professionals to understand more than the culturally linked preferences and values of their clients. They would urge you to understand at a deeper level how your clients have been formed and affected by the forces of racism, ethnocentrism, sexism, and homophobia. [170] If you are from the dominant culture and your client is not, that gulf between you will affect your relationship in many ways. Your client may distrust you and suspect that you will never understand him adequately. His preferences and values will likely be shaped by his experiences with bigotry and hatred. Your ability to empathize with him and to share his worldview will be limited because of your cultural differences, but you might increase your empathic connection to him by becoming more aware of his history and struggles. [171]

There may not be any simple clinical method to accomplish this goal, but the multicultural theorists offer some suggestions, including a greater appreciation for narrative and stories. [172] Michelle Jacobs explains how a lawyer and a student could have understood a client and the meaning to him of a legal dispute by exploring the role of race in that dispute and in the lawyer-client interactions. [173] Leslie Espinoza Garvey in similar fashion recounts a family law case from her clinic and shows us that her clients' story can never be fully understood without accounting for race and racism. [174] Lucie White's moving story of a welfare hearing is another well-known example of the power of narrative and context to expose the workings of racism, sexism, and poverty. [175]

Other writers stress the importance of honest conversation with your client about the racial and cultural differences between you. [176] For many of us conversations about difference will be difficult, but a lot of professional learning will be challenging. If you share that discomfort, your effectiveness may hinge on your developing comfort ***414** with this skill. In appropriate circumstances, by acknowledging the effect of racism, sexism, or other injustices on the problems your client has come to you with, or by asking about the ways he sees oppression and the exercise of privilege as having influenced his story, you can begin to reduce the mistrust that a culturally different client may feel in the professional relationship. [177]

You may also benefit from learning about cultural identity development theory, whose refinement and influence has grown in recent years. Because culture is necessarily ‘performative[,] improvisational[,] fluid[, and] emergent,‘ [178] a member of a cultural community may participate deeply, or very little, in its rituals and practices. The degree of assimilation of a cultural minority client into mainstream American traditions will be important to understand, and will affect how reliably the heuristics we explored above will fit that person's life experiences. [179]

Therapists and other helping professionals understand that to be effective in cross-cultural contexts they must appreciate not only larger cultural differences but also the degree to which a particular client has identified with his ethnic/racial background. Sophisticated models have been developed to assist in this process. One such vehicle, known as R/CID (Race/Culture Identity Development Model), suggests a conceptual framework with ‘five stages of development that oppressed people experience as they struggle to understand themselves in terms of their own culture, the dominant culture, and the oppressive relationship between the two cultures: conformity, dissonance, resistance and immersion, introspection, and integrative awareness. ‘ [180] A more recent iteration of this model uses these five stages: naïveté, encounter, naming, reflections on self as a cultural being, and multiperspective internalization. [181] The models recognize a progression of consciousness about one's ethnic/racial backgrounds, and anticipate the emotional and psychological implications of each stage of that progression. Separate models have been developed for many discrete ethnic or minority groups. [182] Each member of an oppressed minority ***415** group ‘will constantly cycle through the five levels again and again as new issues are discovered. . . . [T]here is no end to development of consciousness as a cultural being.‘ [183]

As lawyers and law students, we will probably not study identity development, either of ourselves or of our clients, with the dedication and resourcefulness of the therapeutic professionals. It seems valuable, though, for legal counselors to understand at least a little bit about the development of ethnic consciousness in the face of an oppressive larger society. Lawyers who hope

to become culturally competent practitioners ought to have some familiarity with this topic, and take advantage of the rich literature that a related discipline is developing.

Conclusion

In this Article I have sought to address some issues that seem both important but elusive in lawyering practice and clinical teaching. Good lawyers, as we know, need to master sophisticated skills in interviewing and counseling, usually by studying and refining developed models for those skills. At the same time, good lawyers must recognize the cultural underpinnings of those models, and adapt their practice for clients, usually ethnic minorities, whose values, preferences and norms differ from those represented by the standard protocols. Those good lawyers must furthermore understand their own cultural biases and influences, while respecting the individuality of each of their clients, regardless of the client's background. Plainly, this is a formidable challenge.

I contribute to meeting this challenge in some modest ways. I first offer a rather practical, concrete set of ideas for adapting the conventional protocols in those settings where the protocols might not fit well. I borrow the concept of heuristics to suggest a set of tentative maxims or guidelines that lawyers might use in working with members of particular cultural groups. The heuristics both predict likely preferences of minority clients and emphasize for lawyers how little confidence they can have in any of their assumptions. The heuristics idea aims to confront the need for adaptation and flexibility while avoiding the companion risks of gross stereotypes, on the one hand, and lack of structure, on the other.

I then borrow the concept of ‘bias‘ to emphasize the most central message I see in the multicultural counseling scholarship--the need for counselors, including lawyers, to confront their own cultural ***416** identity, including the biases and prejudices that accompany that identity, and to begin to understand the role of racism and oppression on the lives of ethnic minority clients and communities.

What I have not done here is to address with any depth the more daunting challenge about how one teaches lawyers and law students about these topics. That topic has been addressed by others with far greater insight than mine, [184] and I imagine, and hope, that the pedagogy in this area will continue to advance as this topic attracts more and more attention in law school and in the profession.

Footnotes

a1 With apologies to Kahneman, Tversky & Slovic. See note 39 infra.

aa1 Clinical Professor, Boston College Law School. I presented an earlier version of this article at the UCLA/University of London International Clinical Conference in Lake Arrowhead, CA, and at an informal colloquium at Boston College Law School. I learned a great deal from the comments at both of those meetings. Thanks also to Shin Amai and Lynn Barenberg (whose critiques I concede have not adequately addressed here), Dick Huber, Sanford Katz, Carol Liebman and Carwina Weng for comments on these ideas, to Peter Durning, J. Miguel Flores, and Rocky LeAnn Pilgrim for invaluable research assistance (mostly on sophisticated social science topics about which I know so little), and to Hale and Dorr, LLP and Boston College Law School for financial support for this project. Finally, I owe much to Tony Varona for introducing to me many of the ideas that appear here. See note 9 infra for more about that. Any misjudgments or clumsiness are, of course, entirely my responsibility.

1 Susan Bryant, The Five Habits: Building Cross-Cultural Competence in Lawyers, 8 Clin. L. Rev. 33, 99 (2001).

2 For the sake of our discussion here, let us assume that you have been assigned one of the two leading textbooks on these topics, sources which were written about a decade ago and have not yet included in their pages a substantial component dedicated to the specific issues of cultural difference. I refer to David Binder, Paul Bergman & Susan Price, Lawyers as Counselors: A Client-Centered Approach (1990), and Robert M. Bastress & Joseph D. Harbaugh, Interviewing, Counseling and Negotiating: Skills for Effective Representation (1990). More recent textbooks have included at least

some explicit attention to the cultural difference phenomenon. See, e.g., Robert F. Cochran, John M.A. DiPippa & Martha M. Peters, The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling 203-21 (1999).

3 See Binder, et al., supra note 2 passim.

4 Id. at 228-30.

5 Id. at 69-81.

6 Id. at 46-68. The other books available to law students on these topics offer the same types of instruction, with many differences in substance as well as in the explicitness of the structure and model suggested. See sources cited in note 2, supra.

7 As you read this list you may conclude that even these suggestions are not all that revolutionary as insights, an observation which invites two comments. First, if you have had that reaction, please read on, for one important task of this paper is to question our assumptions about the effectiveness of the usual techniques with all clients. Second, and perhaps in some defense of I&C books, even if most of the insights in these introductory skill books represent ideas that most of would recognize if we gave it a little thought, there is, seemingly, some substantial benefit in organizing our stock ideas into a coherent package, and then thinking about how one melds all of the common wisdom about interpersonal effectiveness into a meaningful meeting with a stranger.

8 For a sample of the literature on the topic of ‘multicultural counseling,‘ or ‘counseling across cultures‘ in the mental health field, see, e.g., Allen E. Ivey & Mary Bradford Ivey, Intentional Interviewing and Counseling: Facilitating Development in a Multicultural Society (4th ed. 1999); Counseling and Psychotherapy: A Multicultural Perspective (Allen E. Ivey, Mary Bradford Ivey & Lynn Simek-Morgan, eds., 4th ed. 1997)[hereafter Counseling and Psychotherapy]; Ethnicity and Family Therapy (Monica McGoldrick, Joe Giordano & John K. Pearce eds., 2d ed., 1992); Woodrow M. Parker, Consciousness-Raising: A Primer on Multicultural Counseling (2d ed. 1998); Counseling Across Cultures (Paul B. Pedersen ed. 1996); Handbook of Multicultural Counseling (Joseph G. Ponterotto, J. Manuel Casas, Lisa A. Suzuki & Charlene M. Alexander eds. 1995); David Sue and Derald Wing Sue, Counseling the Culturally Different (3d ed. 1999) [hereafter Sue & Sue 1999]; David Sue and Derald Wing Sue, Counseling the Culturally Different (2d ed. 1990) [hereafter Sue & Sue 1990].

9 An early student article raised these issues, but did not gain much attention. See Earleen Baggett, Cross-Cultural Legal Counseling, 18 Creighton L. Rev. 1475 (1985). A provocative article by Michelle Jacobs in 1997 did garner attention, however. See Michelle Jacobs, People from the Footnotes: The Missing Element in Client-Centered Counseling, 27 Golden Gate U. L. Rev. 345 (1997). Since 1997 a new text on interviewing and counseling included a chapter on lawyer-client differences (see Cochran, et al., supra note 2, at 203-21), a supplement to a text on representing children added a chapter on the topic (see Jean Koh Peters, Representing Children in Child Protection Proceedings (1995)(2000 Cum. Supp. 165-239), and a recent Clinical Law Review article addresses this topic (see Bryant, supra note 1). While the recent literature adds immensely to our understanding of this topic, I write here to explore some questions which I find not yet resolved. In particular, this article explores the insights from non-legal literature to understand some of the concrete ways by which lawyers might change their behaviors when dealing with differences. My hope here is to suggest practical tools for those lawyers and students who respect the fact that a large part of their client community may not share dominant American practices, customs, and thinking.

An important additional law-based source upon which I rely is an unpublished manuscript by Tony Varona, now a professor at Pace Law School. See Anthony E. Varona, Blind Justice and Invisible Walls: Exposing and Surmounting Barriers to Legal Services through Cultural-Sensitive Lawyering (1992)(on file with the author). I supervised an independent study by Tony at Boston College Law School in 1992, and then filed his work away. I stumbled across his paper in 2002, after I had written most of what appears here. I am struck, as I read Tony's work, how many of his ideas I have worked into my article.

10 Culture will affect much more of the lawyering process than the skills of interviewing and counseling. Most importantly, cultural differences may affect how a client's story gets interpreted by a lawyer, or how a lawyer translates that story for advocacy purposes. See Clark D. Cunningham, Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse, 77 Cornell L. Rev. 1298 (1992); Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G, 38 Buff. L. Rev. 1 (1990). This article more modestly addresses only the interviewing and counseling skills, without intending to underestimate the significance of the topics I elide. I am particularly interested in how the effort to teach some basic, reliable models of lawyering practice is limited or adjusted when the significance of cultural difference is recognized.

11 See text accompanying notes 30-31 infra for an account, and defense, of the dominant culture perspective that I adopt in this paper.

12 In the movie Annie Hall, the comedian Alvy Singer, played by Woody Allen, meets at an Adlai Stevenson presidential rally Alison Porchnik, a campaign staffer for Stevenson, played by Carol Kane. After Alvy learns that that Alison's graduate thesis is entitled ‘Political Commitment in Twentieth Century Literature,‘ he says,

Alvy: So you're, like, New York, Jewish, left-wing, liberal intellectual, Central Park West, Brandeis University, socialist summer camp, father with the Ben Shahn drawing on the wall, ah, strike-oriented, kind of--stop me before I make a complete imbecile of myself ...

Alison: No, that was wonderful. I love being reduced to a cultural stereotype.

Alvy: I'm a bigot, I know--but for the left ...

Annie Hall (United Artists Films 1977).

13 This effort develops themes arising from a process outlined by Kimberly O'Leary. See Kimberly E. O'Leary, Using ‘Difference Analysis‘ to Teach Problem-Solving, 4 Clin. L. Rev. 65, 82 (1997). Professor O'Leary proposed a four-step process of introducing cultural differences into lawyering courses, the third step of which she describes as ‘research and understand diverse perspectives.‘ Id. Her article does not pursue in depth how a student might accomplish this step, or how a student should change his lawyering behavior once having researched and understood a diverse culture. I try to answer those questions here.

14 Paul B. Pedersen, Culture-Centered Counseling Interventions: Striving for Accuracy 28 (1997).

15 Gargi Roysircar Sodowsky, Kwong-Liem Karl Kwan & Raji Pannu, Ethnic Identity in the United States, in Handbook of Multicultural Counseling, supra note 8, at 123, 132, quoting Gargi Roysircar Sodowsky, E.W.M. Lai & B. S. Plake, Moderating Effects of Sociocultural Variables on Acculturation Variables of Hispanics and Asian Americans, 70 J. Couns. & Dev. 194 (1991).

16 Joan Laird, Theorizing Culture: Narrative Ideas and Practice Principles, in Re-Visioning Family Therapy: Race, Culture, and Gender in Clinical Practice 24 (Monica McGoldrick, ed. 1998)(hereafter Re-Visioning Family Therapy). Compare Pedersen, supra note 14, at 29 (‘Culture is complex, but not chaotic. There are patterns that make it possible to manage complexity.‘).

17 ‘GLBT‘ is the preferred term for individuals who are not conventionally heterosexual in their orientation, covering gays, lesbians, bisexuals, and transgenders.

18 Doman Lum, Social Work Practice and People of Color: A Process-Stage Approach 7 (2d ed. 1991). Lum has reconsidered the term ‘minority‘ in his next edition of this work, in light of evidence that ‘the Caucasian race ... is in a

numerical minority globally.‘ He now prefers the term ‘culturally diverse groups‘ to the term ‘ethnic minorities.‘ Doman Lum, Social Work Practice and People of Color: A Process-Stage Approach 3 (3d ed. 2000).

19 Rowena Fong, Culturally Competent Social Work Practice: Past and Present, in Culturally Competent Practice: Skills, Interventions, and Evaluations 4, 6 (Rowena Fong & Sharlene Furuto eds. 2001)[hereafter Culturally Competent Practice].

20 See, e.g., Jacobs, supra note 9; Marjorie A. Silver, Emotional Competence, Multicultural Lawyering and Race, 3 Fla. Coastal L. Rev. 219 (forthcoming 2002)(manuscript on file with the author).

21 See John A. Axelson, Counseling and Development in a Multicultural Society 153 (1999)(objecting to the tendency to treat the ideas of race and ethnicity as if they were interchangeable).

22 See Jacobs, supra note 9 at 378-91.

23 See also Silver, supra note 20, at 18-19.

24 See, e.g., Aminifu R. Harvey, Individual and Family Intervention Skills with African Americans: An Africentric Approach, in Culturally Competent Practice, supra note 18, at 227, 227.

25 See, e.g., Jacobs, supra note 9, at 358-59 (referring to eye contact norms).

26 See Alfrieda Daly, A Heuristic Perspective of Strengths in the African American Community, in Culturally Competent Practice: Skills, supra note 18, at 241, 242 (‘[c]ultural differences suggest that African American is an ethnic designation, not racial‘). But see Wynetta Devore, ‘Whence came these people?‘: An Exploration of the Values and Ethics of African American Individuals, Families, and Communities, in Culturally Competent Practice: Skills, supra note 18, at 33, 34 (minimizing the homogeneity of the African American community and family). Devore, like Jacobs, does stress the common theme of the ‘experience [of] persistent racism.‘ Id.

27 Ruth G. Dean, The Myth of Cross-Cultural Competence, 82 Families in Society: The Journal of Contemporary Human Services 623, 625 (2001). See also Laird, supra note 16.

28 See, e.g., Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241 (1991); Leslie Espinoza & Angela P. Harris, Afterword: Embracing the Tar-Baby--LatCrit Theory and the Sticky Mess of Race, 10 La Raza L. J. 499 (1998), 85 Cal. L. Rev. 1585 (1997); Trina Grillo, Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House, 10 Berkeley Women's L.J. 16, 22 (1995); Kenneth L. Karst, Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation, 43 UCLA L. Rev. 263 (1995).

29 See T.K. Oommen, Citizenship, Nationality and Ethnicity 63 (1997); Varona, supra note 9, at 46-47.

30 See Dean, supra note 27, at 624. As Professor Dean writes:

I ... propose a model in which maintaining an awareness of one's lack of competence is the goal rather than the establishment of competence. With ‘lack of competence‘ as the focus, a different view of practicing across cultures emerges. The client is the ‘expert‘ and the clinician is in a position of seeking knowledge and trying to understand what

life is like for the client. There is no thought of competence--instead one thinks of gaining understanding (always partial) of a phenomenon that is evolving and changing.

31 See id. See also Harlene Anderson & Harold Goolishian, The Client Is the Expert: A Not-Knowing Approach to Therapy, in Sheila McNamee & Kenneth J. Gergen, Therapy as Social Construction 25 (1992).

32 Laird, supra note 16, at 21 (quoting V. Shapiro, Subjugated Knowledge and the Working Alliance: The Narratives of Russian Jewish Immigrants, 1 In Session: Psychotherapy in Practice 9 (1995)).

33 Recall that there remains an important consideration which I do not address here in any depth. Many writers have noted the significance, in instrumental terms, of translating Outsider stories into Insider narratives in order to be persuasive as an advocate in courts or in similar dominant culture fora. See, e.g., Brook K. Baker, In‘doctrine‘ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom, 34 J. Marshall L. Rev. 131, 142-45 (2000). That endeavor is at once necessary to explore but subject to much concern if it undercuts the integrity of the original stories. See id.; Jacobs, supra note 9, at 365-69 (warning of the distortion and privileging of voice that can occur when lawyers assume that a client's goals must be accommodated within existing power structures).

34 See, e.g., Sue & Sue 1999, supra note 8, at xii; Peters, supra note 9, at 177; Pedersen, supra note 14, at 273.

35 This article suggests amendments to the ‘usual‘ interviewing and counseling skill sets, and in doing so it adds some complexity, richness and ambiguity to the process of learning those skills. But even without that added texture, the skill sets are themselves enormously challenging and difficult to master, if my clinical teaching experience is at all reliable.

36 See Varona, supra note 9, at 8; cf. Gary Peller, Race Consciousness, 1990 Duke L. J. 758, 772-79 (1990).

37 On occasion in this paper I refer to those clients for whom the models were not written as ‘culturally different clients,‘ even though those clients may not be ‘culturally different‘ from you, the lawyer. I use the ‘different‘ phrase as a short-hand term to capture ethnic minorities, disabled persons, GLBT individuals, and others whose diversity creates uncertainty whether the ‘usual‘ models ought to apply. At other times I use the phrase ‘ethnic minority‘ to refer, perhaps awkwardly, to non-dominant culture individuals. See Varona, supra note 9, at 3, n.2 (preferring the term ‘intercultural‘ to ‘minority‘).

38 See infra notes 154-67 and accompanying text.

39 See Judgment Under Uncertainty: Heuristics and Biases (Daniel Kahneman, Paul Slovic & Amos Tversky eds. 1982) [hereafter Judgment Under Uncertainty].

40 The dictionary definition of ‘heuristic‘ as a noun is ‘a heuristic method or procedure.‘ As an adjective, the term means, ‘involving or serving as an aid to learning, discovery, or problem-solving by experimental and especially trial-and-error methods <heuristic techniques> <a heuristic assumption>; also: of or relating to exploratory problem-solving techniques that utilize self-educating techniques (as the evaluation of feedback) to improve performance.‘ Miriam-Webster Dictionary On Line < http://www.m-w.com/cgi-bin/dictionary> (visited September 30, 2001). Amos Tversky and Daniel Kahneman use the term as a noun representing patterns of thought which human employ to organize ambiguous data and perceptions. See, e.g., Amos Tversky & Daniel Kahneman, Judgments Under Uncertainty: Heuristics and Biases, in Judgment Under Uncertainty, supra note 39, at 3; Amos Tversky & Daniel Kahneman, A Heuristic for Judging Frequency and Probability, in Judgment Under Uncertainty, supra note 39, at 163.

41 The use of pragmatic, tentative generalizations and maxims resembles a process within ethical decisionmaking known as casuistry. See Paul R. Tremblay, The New Casuistry, 12 Geo. J. Legal Ethics 489 (1999)(exploring that process).

One might refer to ‘rules of thumb‘ as a phrase that captures the pragmatic tentativeness intended here. The use of the phrase ‘rules of thumb‘ may be exemplary of the concerns addressed in this paper, since that saying, common in the dominant culture, has been considered by many as offensive to women because of its purported origin as a measure of the size of stick permitted by English law to be used by husbands to beat wives in some earlier society. Some argue, though, is that this professed origin is in fact an urban legend, and a myth. See, e.g., http://www.shu.ac.uk/phrases/list/307000.html (visited September 30, 2001). But see Jennifer Freyd & J. Q. Johnson, Commentary: Domestic Violence, Folk Etymologies, and ‘Rule of Thumb,‘ http://dynamic.uoregon.edu/~ jjf/essays/ruleofthumb.html (visited September 30, 2001) (reviewing historical documents to show that evidence exists for the domestic violence etymology).

42 See, e.g., Behavioral Law and Economics (Cass R. Sunstein ed., 2000); Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471 (1998); Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 97 Mich. L. Rev. 107 (1994).

43 The idea of disciplined naïveté as a critical virtue of cross-cultural counseling has been suggested by David Sue and Derald Wing Sue, see Sue & Sue 1999, supra note 8, at 115, and by Jean Koh Peters and Sue Bryant, see Bryant, supra note 1, at 62; Peters, supra note 9, at 225-29. See also Dean, supra note 27, at 623 (proposing ‘a model based on acceptance of one's lack of competence in cross-cultural matters‘); Laird, supra note 16, at 23 (describing ‘informed not-knowing‘).

44 See Judgment Under Uncertainty, supra note 39. Tversky and Kahneman use the concept of bias to explain distorted psychological workings that lead to economically irrational decisions. See Tversky & Kahneman, supra note 40, at 18-19. See also Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Calif. L. Rev. 1051, 1075 (describing ‘hindsight bias,‘ the term that describes the tendency of actors to overestimate the ex ante prediction that they had concerning the likelihood of an event's occurrence after learning that it actually did occur). The Tversky and Kahneman interpretation is more descriptive than normative (except on the maximizing economic value scale). I use the phrase here in its more common, and normatively loaded, understanding.

45 Donald B. Pope-Davis & Jonathan G. Dings, The Assessment of Multicultural Counseling Competencies, in Handbook of Multicultural Counseling, supra note 8, at 287, 287-88.

46 Sue & Sue 1990, supra note 8, at 73.

47 See supra note 43.

48 Many of the texts developed for counseling psychology students and practitioners include chapters dedicated to specific cultural groups, and what to expect within those cultures. See, e.g., Counseling American Minorities: A Cross-Cultural Perspective (Donald R. Atkinson, George Morten & Derald Wing Sue eds., 4th ed. 1993); Handbook of Multicultural Counseling, supra note 8; Wanda M. L. Lee, An Introduction to Multicultural Counseling 104-13 (1999); Ethnicity and Family Therapy (Monica McGoldrick, Joe Giordano & John K. Pearce eds., 2d ed., 1992); Pedersen, supra note 14; Sue & Sue 1999, supra note 8.

49 See supra note 48 for a list of some such resources.

50 ‘What matters is that you seek information and experience of other cultures in all possible ways that are around you.‘ Patricia D'Ardenne & Aruna Mahtani, Transcultural Counseling in Action 41 (2d ed. 1999).

51 Fran Crawford, Jalinardi Ways: Whitefellas Working in Aboriginal Communities 56 (1989), quoted in Dean, supra note 27, at 629.

52 The impressive article by Susan Bryant is an apt example. Throughout her extremely thoughtful and comprehensive article, Bryant makes repeated references to the need for students to know more about the cultures that differ from dominant culture. See, e.g., Bryant, supra note 1, at 43 ('[s]tudents need to recognize these [cultural] differences and plan for a representation strategy that takes them into account'); at 50 ("the teacher should identify culture-general and culture-specific information that is important to the students' clinical work and future learning"); at 55 ("[s]tudents may also want to focus on skills that are valued in the client's culture"). The present project is an effort to make concrete the places where those differences and culture-sensitive topics are apt to appear, and in what fashion.

53 Sue & Sue 1990, supra note 8, at 53.

54 Thomas L. Shaffer & James R. Elkins, Legal Interviewing and Counseling in a Nutshell 225 (3d ed. 1997). While this book seems to assume some universality of the effect of distance and other proxemics on communication and rapport, it is in fact quite vivid in its recognition of the importance of the particular client's needs, including a partly-in-jest suggestion that lawyers use furniture on wheels and permit clients to choose which office furniture arrangement works best for them. See id. at 224.

55 Binder, et al., supra note 2, at 86 n.6 (citing Paul Marcotte, Was It Something I Said? Office Decor Can Help Determine Whether You Keep Clients, 73 ABA J. 34 (August, 1987); Steven G. Fey & Steven Goldberg, Legal Interviewing from a Psychological Perspective: An Attorney's Handbook, 14 Willamette L.J. 217, 221-24 (1978)).

56 Id. at 85-86.

57 See, e.g., Fred E. Jandt, Effective Interviewing 31-32 (1990); Bastress & Harbaugh, supra note 2, at 135-36.

58 Or, for experienced lawyers to hear. I find it striking how often I observe professionals who meet clients and other guests from behind a formal desk, despite the many suggestions about the effect of that barrier on comfort, rapport, and power relationships.

59 Sue & Sue 1990, supra note 8, at 53 (citing Nan M. Sussman & Howard M. Rosenfeld, Influence of Culture, Language and Sex on Conversation Distance, 42 J. Personality & Soc. Psychology 66 (1982); Aaron Wolfgang, The Function and Importance of Nonverbal Behavior in Intercultural Counseling, in Handbook of Cross-Cultural Counseling and Therapy (Paul B. Pedersen ed. 1985)).

60 Id. See also Ivey & Ivey, supra note 8, at 35.

61 Ivey & Ivey, supra note 8, at 35.

62 Id.

63 Sue and Sue report that 'U.S. Americans ... like to keep a desk between them and the other person,' see Sue & Sue 1990, supra note 8, at 54, so my observation above about professionals I encounter (see supra note 58) is quite consistent with research into the dominant culture.

64 Sue & Sue 1999, supra note 8, at 115.

65 Indeed, the heuristics commonly studied apply to general patterns of decisionmaking ‘under uncertainty.‘ See Judgment Under Uncertainty, supra note 39.

66 But recall, as Ruth Dean has emphasized, that the goal of this endeavor is to maintain an awareness of just how much we do not know--the idea of ‘informed not-knowing.‘ See Dean, supra note 27, at 628; see also supra note 31.

67 See supra note 54, describing the Shaffer and Elkins suggestion that a lawyer furnish an office with furniture on wheels, so the client may choose the arrangement that is most comfortable for him.

68 For a more elaborate consideration of explicit discussion between client and lawyer of cultural differences, see Peters, supra note 9, at 177-78, 190-93; Bryant, supra note 1, at 55.

69 See, e.g., Lee, supra note 48, at 104-13 (describing Asian American culture's commitment to respect for authority). See also text accompanying notes 108-10 infra.

70 See, e.g., Jacobs, supra note 9, at 356 (criticizing some traditional skills books for interpreting difference as deviance and labeling clients ‘difficult‘).

71 See, e.g., Sue & Sue 1999, supra note 8, at 21, 224-30 (describing ways in which therapists work to aid their culturally different clients to change qualities which are culturally-established, and noting that some therapists label culturally-deviant behavior as the basis for a psychological diagnosis).

72 See Bryant, supra note 1, at 12-13 (recommending development of a nonjudgmental perspective about different customs and practices).

73 See Part III, infra.

74 Sue & Sue 1990, supra note 8, at 54.

75 An inability to sustain eye contact for more than a second or two at a time can be informative. Client persistence in glancing away from you immediately after making eye contact evidences nervousness or, possibly, deceit (hence the term ‘shifty-eyed‘). A client who never, or almost never, looks at you indicates a severe state--perhaps a total breakdown in trust, an intense dislike, extreme nervousness, psychiatric or physical illness, or some combination of these.

Bastress & Harbaugh, supra note 2, at 139.

76 See, e.g., Cochran, et al., supra note 2, at 63 (‘[G]eneral factors that contribute to an effective interview include ... making and keeping eye contact throughout the interview‘); Binder, et al., supra note 2, at 50 (in using silence as a facilitator, you should ‘keep your attention on the client and give other non-verbal cues (such as leaning forward, maintaining eye contact, or nodding your head) to indicate your expectation that the client will continue speaking‘); id. at 254 (suggesting the use of ‘[d]irect eye contact,‘ a serious expression, and a few shakes of the head to communicate to a suspected lying client that you are not fooled by his lie).

77 Sue & Sue 1990, supra note 8, at 56; Jacobs, supra note 9, at 358-59.

78 See Lee, supra note 48, at 104-13.

79 Ivey & Ivey, supra note 8, at 87.

80 Sue & Sue 1990, supra note 8, at 54 (citing Sing Lau, The Effect of Smiling on Person Perception, 117 J. Soc. Psychol. 63 (1982)).

81 Substantial literature reflects the differing experiences of female law students and female law professors in law schools, reflecting in some respects the differing preferences described in the text. See, e.g., Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow & Deborah Lee Stachel, Becoming Gentlemen: Women's Experiences at One Ivy League Law School, 143 U. Pa. L. Rev. 1 (1994); Pamela J. Smith, Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority, 6 Wm. & Mary J. Women & L. 53 (1999); Morrison Torrey, Jennifer Ries & Elaine Spiliopoulos, What Every First-Year Female Law Student Should Know, 7 Colum. J. Gender & Law 267 (1998). For a discussion of social science evidence for gender differences in expressiveness, see Bryna Bogoch, Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction, 31 Law & Soc'y Rev. 677, 681 (1997).

82 Sue & Sue 1990, supra note 8, at 54 (citing Joe Yamamoto & Mitsuru Kubota, The Japanese American Family, in The Psychosocial Development of Minority Group Children (Joe Yamamoto, Annelisa Ramero & Armando Morales, eds. 1983)).

83 Ivey & Ivey, supra note 8, at 87.

84 Sue & Sue 1990, supra note 8, at 54. In watching and listening to Boston Red Sox baseball games a year ago (a perverse, culturally determined ritual in itself, one might say), I frequently heard the television or radio commentators refer to the on-field demeanor of the Red Sox' star Asian pitcher, Hideo Nomo, as ‘stoic,‘ unemotional, and the like. These observers are viewing the kinesics of culturally different players through the accepted lens of their dominant culture, drawing inferences which might have some reliability within the dominant culture but which are less reliable across cultures.

85 See Lee, supra note 48, at 76-87.

86 See, e.g., Terence Brake, Danielle Medina Walker & Thomas (Tim) Walker, Doing Business Internationally: The Guide to Cross-Cultural Success 118 (1995).

87 Sue & Sue 1990, supra note at 8, at 55.

88 Id.

89 See, e.g., Ann Caddell Crawford, Customs and Culture of Vietnam 108 (1966).

90 See, e.g., Sue & Sue 1990, supra note 8, at 44.

91 See Freddy A. Paniagua, Assessing and Treating Culturally Diverse Clients: A Practice Guide 37 (1994); Baggett, supra note 9, at 1490; Harold Cheatham, Allan E. Ivey, Mary Bradford Ivey, Paul Pedersen, Sandra Rigazio-DiGilio, Lynn Simek-Morgan & Derald Wing Sue, Multicultural Counseling and Therapy II: Integrative Practice, in Counseling and Psychotherapy, supra note 8, at 170, 177.

92 Sue & Sue 1990, supra note 8, at 125-29.

93 See Peters, supra note 9, at 224-29. The ‘parallel universe‘ habit asks lawyers to ‘brainstorm ... different explanations for the client's behavior,‘ and ‘to identify alternatives to assumptions [the lawyer] may make about her client's behavior.‘ Id. at 225. See also Bryant, supra note 1, at 70-72.

94 See, e.g., Bastress & Harbaugh, supra note 2, at 94-96; Binder, et al., supra note 2, at 73-74, 118-21; Cochran, et al., supra note 2, at 83-85; Stefan H. Krieger, Richard K. Newmann, Jr., Kathleen H. McManus & Steven D. Jamar, Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis 69-72 (1999).

95 It is noteworthy that those texts which teach multicultural approaches to interviewing and counseling stress models which will apply, with some exceptions, across cultures. See, e.g., Cochran, et al., supra note 2; Ivey & Ivey, supra note 8.

96 A good reinforcing example of this might be found in Ivey & Ivey, supra note 8. This text, whose subtitle is ‘Facilitating Client Development in a Multicultural Society,‘ is authored by two pioneers in the field of cross-cultural counseling. It is an ‘interviewing and counseling‘ text primarily, but includes a number of insights about the cross-cultural implications of the counselor-client relationship. This book, sensitive as it is to the nuances of cultural difference, still offers highly sophisticated advice to students about how to obtain honest, full client narratives, how to develop effective rapport, and how to respect the values of the client. See also Charles R. Ridley & Danielle W. Lingle, Cultural Empathy in Multicultural Counseling: A Multidimensional Process Model, in Counseling Across Cultures, supra note 8, at 21; Cheatham et al., supra note 91.

As Paul Pedersen points out, our expectations (for success, fairness, safety, accuracy) are apt to be shared across cultures even if our behaviors are not. Pedersen, supra note 14, at 9. Pedersen distinguishes between ‘emic‘ considerations, which are culture-specific, and ‘etic‘ factors, which are culture general. Id. at 6. See also Parker, supra note 8, at 26 (also developing the emic and etic themes); Juris G. Draguns, Human Universal and Culturally Distinctive: Charting the Course of Cultural Counseling, in Counseling Across Cultures, supra note 8, at 1, 6 (same).

97 See, e.g., Cochran, et al., supra note 2, at 76.

98 See, e.g., Binder, et al., supra note at 261.

99 See Ivey & Ivey, supra note 8, at 27.

100 Jacobs, supra note 9, at 384-91.

101 See Sue & Sue 1990, supra note 8, at 71 (noting the resistance of Asian cultures to ‘attending‘ (non-directive) techniques versus ‘influencing‘ (directive) techniques).

102 See William H. Simon, Lawyer Advice and Client Autonomy: Mrs. Jones's Case, 50 Md. L. Rev. 213, 225 (1991).

103 See Robert D. Dinerstein, Clinical Texts and Contexts, 39 UCLA L. Rev. 697 (1992); Robert D. Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 Ariz. L. Rev. 501 (1990)[hereafter Dinerstein, Reappraisal].

104 See Binder, et al., supra note 2, at 21.

105 Sue & Sue 1990, supra note 8, at 33 (citing W. Schofield, Psychotherapy: The Purchase of Friendship (1964)). Sue and Sue report a later commentator's label for the obvious reciprocal less-preferred clients: ‘QUOID,‘ for quiet, ugly, old,

indigent, and culturally dissimilar. Id., citing N.D. Sundberg, Cross-Cultural Counseling and Psychotherapy: A Research Overview, in Cross-Cultural Counseling and Psychotherapy (A. J. Mansella & Paul B. Pedersen eds. 1981). For further discussion of the YAVIS preference, see D'Ardenne & Mahtani, supra note 50, at 87.

106 See Sue & Sue 1990, supra note 8, at 31-32, 39-40.

107 See Jacobs, supra note 9, at 355-60 (fearing that Blacks who experience well-grounded mistrust of professionals, and therefore may participate less enthusiastically in the lawyer's agenda, will be deemed deviant or ‘difficult‘).

108 See, e.g., Bastress & Harbaugh, supra note 2, at 26-27 (citing Carl Rogers, Client-Centered Therapy (1951)).

109 See Simon, supra note 102, at 223 (pointing out that in the established counseling structures autonomy is both a goal of the interaction as well as a premise of it).

110 See, e.g., Sue & Sue 1990, supra note 8, at 69; James Alfini, John Barkai, Robert Baruch Bush, Michele Hermann, Jonathan Hyman, Kimberlee Kovach, Carol Liebman, Sharon Press & Leonard Riskin, What Happens When Mediation Is Institutionalized?: To the Parties, Practitioners, and Host Institutions, 9 Ohio St. J. on Disp. Resol. 307, 320 (1994)(Asians typically prefer more directive counseling).

111 Some readers at this point might perceive a seeming contradiction in the arguments surrounding the relative value of autonomy. Recall that the autonomy principle in traditional counseling discussions earns its importance from the empirical likelihood that a lawyer's values will be sufficiently different from her client's values that the lawyer cannot presume to decide matters for the client. The ‘client-centeredness‘ doctrine is one of the strictest neutrality among competing visions of the world. See Dinerstein, Reappraisal, supra note 101, at 405-05. Seen that way, this doctrine is entirely consistent with the arguments offered by cross-cultural counseling writers, who critique dominant culture models for their hegemonic assumptions that their world views are the only world views. The cross-cultural counseling reformers seem, then, to value autonomy, and self-determination, as something of a universal good.

In the above paragraphs, though, we see the critics of dominant models including in their critique the assumption that autonomy is a shared value, and we find arguments that in many cultures the commitment to autonomy is far less significant than it is in Western circles. See, e.g., Lee, supra note 48, at . This seeming contradiction may not be so difficult to resolve conceptually, however. The critics' argument might proceed as follows: ‘Some non-Western cultures do not include as strong a commitment to individual self-determination as the traditional American culture seems to foster. That difference in philosophy of living and choosing ought to be respected by lawyers, who will, in appropriate circumstances, act in a more directive and interventionist way.‘ In some respects this argument resembles an early criticism of the first Binder and Price counseling model, where Stephen Ellmann argued that the client-centeredness philosophy deprived clients of the choice not to engage in client-centered counseling. See Stephen Ellmann, Lawyers and Clients, 34 UCLA L. Rev. 717 (1987)(discussing David Binder & Susan Price, Legal Interviewing and Counseling (1977)).

112 See, e.g., Teresa Stanton Collett, The Ethics of Intergenerational Representation, 62 Fordham L. Rev. 1453 (1994); Russell G. Pearce, Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses, 62 Fordham L. Rev. 1523 (1994).

113 According to most doctrine, the attorney-client privilege is waived if a friend, relative, or other non-essential person joins a meeting between the lawyer and the client. See Fed. R. Evidence 503(a)(4); United States v. Evans, 113 F.2d 1457, 1464 (7th Cir. 1997)(privilege inapplicable absent showing that third party's presence was necessary to accomplish the object of the consultation).

114 See Model Rules of Prof'l Conduct R. 1.7(b)(forbidding allegiances to several persons whose interests are not congruent); Thomas Shaffer, The Legal Ethics of Radical Individualism, 65 Tex. L. Rev. 963 (1985) (discussing the ‘The Case of

the Unwanted Will,‘ where a lawyer represents both husband and wife, treating each as individuals and finding himself in an irreconcilable conflict of interests).

115 See John Leubsdorf, Pluralizing the Client-Lawyer Relationship, 77 Cornell L. Rev. 825 (1982); William B. Rubenstein, Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns, 106 Yale L.J. 1623 (1997).

116 For a vivid account of this tension, see Charles Waldegrave, The Challenge of Culture to Psychology and Postmodern Theory, in Re-Visioning Family Therapy, supra note 16, at 404, 407. Waldegrave quotes a Samoan individual who has been asked ‘what do you think?‘:

‘It is so hard for me to answer that question. I have to think. ‘What does my mother think? What does my grandmother think? What does my father think? What does my uncle think? What does my sister think? What is the consensus of those thoughts? Ah, that must be what I think.‘

117 Anne Fadiman, The Spirit Catches You and You Fall Down: A Hmong Child, Her American Doctors, and the Collision of Two Cultures (1997).

118 Id. at 20.

119 E.g., id. at 70-71. Fadiman describes elaborate ceremonies performed by Hmong friends and neighbors in elaborate rituals thousands of years old, including chanting, dancing, sacrificing animals (including pigs and cows), applying ointments and medicinal blends to Lia's skin, and other measures well established in Hmong culture but ‘bizarre‘ to many dominant culture Americans.

120 Compare Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728 (1977)(requiring a form of substituted judgment for medical decisionmaking on behalf of an incompetent psychiatric patient).

121 Fadiman, supra note117, at passim.

122 See Steven Weller, John A. Martin & John Paul Lederach, Fostering Culturally Responsive Courts: The Case of Family Dispute Resolution for Latinos, 39 Fam. Ct. Rev. 185 (2001).

123 Id. at 185.

124 Id. at 191.

125 Id. at 194. The study suggested that mediation services will be more effective with Latino families if they recognize the role of extended family and community leaders in solving problems, understand that Latino families will tend not to seek help from strangers who are not part of that network, bring mediation into the community (rather than leaving it at the institutional courthouse setting), and look for collective, holistic interests in addition to individual interests. Id. at 94-95.

126 See Amy Bibb & Georges J. Casimir, Haitian Families, in Ethnicity and Family Therapy 97, 105 (Monica McGoldrick, Joe Giordano & John K. Pearce eds., 2d ed. 1992).

127 'In contrast to the European premise, 'I think, therefore, I am,' the prevailing African philosophy is 'We are, therefore, I am.'' Paulette Moore Hines & Nancy Boyd-Franklin, African American Families, in Ethnicity and Family Therapy, supra note 124, at 66, 70.

128 See Sue & Sue 1990, supra note 8, at 36.

129 See Michael Yellow Bird, Critical Values and First Nations Peoples, in Culturally Competent Practice, supra note 19, at 61, 64-67.

130 See Ivey & Ivey, supra note 8, at 68-69 (recounting a story in which a therapist asked a godfather to remain outside of a meeting with a Hispanic family, wishing to meet only with the 'immediate family,' and the difficulties engendered by that move); Sue & Sue 1999, supra note 8, at 97-102 (recounting a similar story, also involving a Hispanic family and a godfather). Note that your decision to include a larger circle of individuals in the interview process has implications for the application of the attorney-client privilege, unless you can succeed in an argument that, for culturally-significant reasons, the presence of the others in the meeting is 'necessary to accomplish the object of the consultation.' See supra note 113.

131 See, e.g., Counseling and Psychotherapy, supra note 8, at 68, 70 (recommending finding 'multiple perspectives on the story').

132 Sue & Sue 1999, supra note 8, at 97-102. The importance of machismo as a deeply-seated value in Latino culture has been noted by many commentators. See, e.g., Lirio K. Negroni-Rodriguez & Julio Morales, Individual and Family Assessment Skills with Latino/Hispanic Americans, in Culturally Competent Practice, supra note 19, at 132, 135.

133 Sue & Sue 1999, supra note 8, at 116.

134 Kazumi Nishio & Murray Bilmes, Psychotherapy with Southeast Asian American Clients, in Counseling American Minorities, supra note 48. It is important to note, however, that the tolerance defended in the text is not a universally accepted moral or political position, at least with respect to some controversial cultural practices. As Joan Laird writes, 'Others, more concerned about subjugation and injustice, take a very different stance. [One author], for example, argues that every therapeutic act is a political one, and that clients need to be helped to deconstruct not only their self-narratives but also the dominant culture narratives and discursive practices that constitute their lives.' Laird, supra note 16, at 33. One particularly troubling cultural practice that offends most moral sensibilities is female genital mutilation. For a discussion of the multicultural feminist reaction to that practice, see Isabelle R. Gunning, Global Feminism at the Local Level: Criminal and Asylum Laws regarding Female Genital Surgeries, 3 J. Gender Race & Just. 45 (1999); Isabelle R. Gunning, Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 Colum. Hum. Rts. L. Rev. 189, 194-97 (1992).

135 All of the dominant models include this aim in a more or less explicit fashion. See, e.g., Binder, et al., supra note 2, at 272-75; Bastress & Harbaugh, supra note 2, at 237-40; Roger S. Haydock, Peter B. Knapp, Ann Juergens, David F. Herr & Jeffrey W. Stemple, Lawyering: Practice & Planning 79-94 (1996); Krieger, et al., supra note 92, at 211-12; American Bar Association Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development--An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992)(the 'MacCrate Report').

136 See supra note 44.

137 See Mark Spiegel, The Story of Mr. G: Reflections Upon the Questionably Competent Client, 69 Fordham L. Rev. 1179 (2000). The only exception to the anti-paternalist stance in traditional ethics doctrine is when working with a client

who is not competent to make his own reasoned decisions. Id. at 1190. See also David Luban, Paternalism and the Legal Profession, 1981 Wis. L. Rev. 454, 479 (arguing that paternalism is only justified when the client cannot offer ‘inference[s] from real facts‘).

138 See Bryant, supra note 1, at 2 (describing, as a trait of a culturally competent professional, ‘the capacity to make ‘isomorphic attributions' ... the capacity to enter the cultural imagination of another, as ‘perceiving as normal things that at first seem bizarre or strange’ ‘ (quoting Raymonde Carroll, Cultural Misunderstandings: The French/American Experience 2 (1988)).

139 See Luban, supra note 137, at 479 (paternalism, and overriding client decisionmaking, justified when there are no ‘inference[s] from real facts‘ supporting a client's choice).

140 Fadiman, supra note 117.

141 Id. at 34-35, 100.

142 Id. at 4.

143 Id. at 78-92; 250-61.

144 One of the most powerful achievements of the Fadiman book is its author's diplomatic but honest unwillingness to assign blame for the tragedy that befell Lia. Lia's medical condition ebbs and flows throughout the story, with some ebbs seemingly (but not assuredly) connected to her parents' disinterest in the rigors of the medicinal treatment plans, and some flows seemingly (but not assuredly) associated with the family's non-traditional efforts and practices. After a series of improvements and declines, however, Lia suffered a catastrophic seizure which caused her to become, essentially, brain dead. The doctors understood that Lia would die within a day or two, and permitted her to return home to die. For reasons unexplained by the prevailing United States medical wisdoms, Lia has survived for years once she was left to her family's traditional care. Fadiman, supra note 117, at 250-61. Indeed, as of late September, 2002, Lia was still alive. (Presentation by Anne Fadiman at Boston College, September 23, 2002.)

145 See Janet Brice Baker, Jamaican Families, in Ethnicity and Family Therapy, supra note 126, at 85, 92-93.

146 Bibb & Casimir, supra note 126, at 101.

147 Sandra K. Choney, Elise Berryhill-Paapke & Rockey R. Robbins, The Acculturation of American Indians: Developing Frameworks for Research and Practice, in Handbook of Multicultural Counseling, supra note 8, at 73, 87.

148 Donald R. Atkinson & Susana M. Lowe, The Role of Ethnicity, Cultural Knowledge, and Conventional Techniques in Counseling and Psychotherapy, in Handbook of Multicultural Counseling, supra note 8, at 387, 404.

149 See Bryant, supra note 1, at 56. ‘Isomorphic attribution‘ means ‘to attribute the same meaning to behavior and words that the person intended to convey.‘ Id.

150 Recall that I have borrowed the phrase ‘heuristics and biases‘ from the pioneering text of Kahneman, Slovic and Tversky. See Judgment Under Uncertainty, supra note 39. In that work the authors employ the term bias to capture a psychological distortion in perception and understanding. See Tversky & Kahneman, supra note 40, at 3-4. I use the term in its more familiar understanding.

151 See Dean, supra note 27, at 625.

152 But you will get one. The ‘Race-Crit‘ movement in legal scholarship has documented the many ways that race pervades our lives, both in the law and otherwise. See, e.g., Peggy Davis, Law as Microaggression, 98 Yale L.J. 1559 (1989); Leslie G. Espinoza, Legal Narratives, Therapeutic Norms: The Invisibility and Omnipresence of Race and Gender, 95 Mich. L. Rev. 901 (1996); Ian F. Haney Lopez, Social Construction of Race: Some Observation on Illusion, Fabrication, and Choice, 29 Harv. C.R-C.L. L. Rev. 1 (1994); Bill Ong Hing, Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses, 45 Stan. L. Rev. 1807, 1809 (1993); Charles Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987). The multicultural counseling literature within psychotherapy explores the invidious effects of racism on therapy and therapeutic models. See, e.g., Allen E. Ivey, Psychotherapy as Liberation: Toward Specific Skills and Strategies in Multicultural Counseling and Therapy, in Handbook of Multicultural Counseling, supra note 8, at 53 (suggesting methods of developing critical consciousness as well as understanding cultural identity theory); Parker, supra note 8, at 15-34.

153 In the therapeutic counseling field, where these issues are studied much more forthrightly and deeply, and where students obviously expect to explore their own cognitive and emotional makeup, issues of race and power still remain threatening and uncomfortable to confront. See, e.g., Julie R. Ancis & Janis V. Sanchez-Hucles, A Preliminary Analysis of Counseling Students' Attitudes Toward Counseling Women and Women of Color: Implications for Competency Training, 28 J. Multicultural Coun. & Dev. 16, 27 (2000). It is not unexpected, then, that the more analytically-inclined law students will find these topics even more uncomfortable.

154 Peters, supra note 9, at 170; Bryant, supra note 1, at 64-99.

155 See, e.g., D'Ardenne & Mahtani, supra note 50, at 44; Cochran, et al., supra note at 205; Sue & Sue 1999, supra note 8, at 225-27; Jacobs, supra note 9, at 377-84.

156 For instance, one popular college course text offers a ‘Describing Cultural Identity‘ exercise which works as follows in a classroom setting:

Objective

To identify the complex culturally learned roles and perspectives that contribute to an individual's identity[.]

Instructions

In the blanks below, please write answers in a word or phrase to the simple question ‘Who are you?‘ Give as many answers as you can think of but try to identify at least 20 descriptors. Write the answers in the order that they occur to you. You will have 7 minutes to complete the list.

I AM _____

I AM _____

[Repeated 18 more times]

Debriefing

Ask volunteers to read their list out loud and count the numbers of others in the class who also used approximately the same label. Keep count of all the labels on a flipchart, blackboard, overhead, or whiteboard[, identifying which responses were] given by all, by many, by some, by few, or by only one to demonstrate the extent of similarity or difference in the group. If students would prefer to keep their identity labels confidential, their lists can be turned in anonymously

and coded by the instructor for feedback to the class later. The instructor may use these data to discuss the importance of between-group and within-group differences.

Pedersen, supra note 14, at 271.

157 Counseling and Psychotherapy, supra note 8, at 43. See also Ivey & Ivey, supra note 8, at 236-37.

158 Peters, supra note at 9, 165; Bryant, supra note 1, at 64.

159 Fadiman, supra note 117. See discussion of Lia's story supra at notes 117-21 and 140-44.

160 Id. at 261.

161 See Sue & Sue 1999, supra note 8, at (‘Counselor, know thyself‘).

162 See supra note 153 and accompanying text.

163 See, e.g., D'Ardenne & Mahtani, supra note 50, at 92-93; Sue & Sue 1999, supra note 8, at; Lisa M. Brown, Subjectivity and Practice: Stereotyping and Other Results of Imposed Perspective, in Parker, supra note 8, at 123; Laird, supra note 16, at 29-32.

164 Silver, supra note 20, at 15.

165 See supra note 156.

166 A college-level text offers the following exercise which focuses more explicitly on cultural prejudices:

Exercise 2: Questions About Culture

Answer the following questions about yourself:

• What are some of the prejudices of your ethnic group, your religion, your gender group, or other subcultures to which you belong?

• In what ways are those prejudices expressed?

• What are your personal prejudices?

• How does your socioeconomic level affect your attitude toward people of other economic groups?

• How might your cultural prejudice give you difficulty in connecting to others in your professional role?

• How would you describe your own state of mental health, culturally speaking?

• Have you ever gone through a period of confusion and uncertainty about any of the values and practices with which you were raised?

• Have you borrowed any other culture's ways to help you live a better life? List all of them. What have they done for you?

Lee, supra note 48, at 18 (adapting the exercise from D.S. Murphy, From Multicultural Infusion Theory to Multicultural Infusion Practice in a Weekend!, 2 MEI Center Connection #2, 3-5 (Spring 1994) and M. K. Ho, Family Therapy with Ethnic Minorities (1987)).

167 D'Ardenne & Mahtani, supra note 50, at 92-93.

168 A vivid example of this point, and one commented upon with some frequency, is Clark Cunningham's story of his work on behalf of a Black man accused of disorderly conduct after an interaction with a white police officer. See Cunningham, supra note 10. For commentary, see Jacobs, supra note 9; Silver, supra note 20.

169 This is the idea of ‘parallel universes,‘ one of Sue Bryant's and Jean Koh Peters' ‘five habits.‘ See Peters, supra note 9, at 225-29; Bryant, supra note 1, at 90.

170 See, e.g., Sue & Sue 1999, supra note 8, at 31-39.

171 See id.; Ridley & Lingle, supra note 96, at 33-40.

172 See, e.g., Marc Fajer, Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Education, 82 Geo. L. J. 1845 (1994).

173 Jacobs, supra note 9, at 362-74, 386-88 (commenting on a narrative offered by Clark Cunningham; see Cunningham, supra note 10).

174 Espinoza, supra note 152, at 930-36.

175 White, supra note 10.

176 See Paniagua, supra note 91, at 24 (recommending a discussion about race with African American clients early in the relationship); Sue & Sue 1999, supra note 8, at 231 (same); Ivey & Ivey, supra note 8, at 166 (‘[a]uthorities are in increasing agreement that cultural and ethnic differences need to be addressed straightforwardly relatively early in counseling, often in the first interview‘ (citing H. Cheatham & J. Stewart, Black Families: Interdisciplinary Perspectives (1990))).

177 See Sue & Sue 1990, supra note 8, at 75-92.

178 Laird, supra note 16, at 24.

179 See Varona, supra note 9, at 46-47.

180 Sue & Sue 1990, supra note 8, at 96 (italics in original).

181 Harold Cheatham, Allan E. Ivey, Mary Bradford Ivey, Paul Pedersen, Sandra Rigazio-DiGilio, Lynn Simek-Morgan & Derald Wing Sue, Multicultural Counseling and Therapy II: Integrative Practice, in Counseling and Psychotherapy, supra note 8, at 133, 163. Another similar model for African Americans is known as the ‘Nigrescence model.‘ See William E.

Cross, Jr., The Psychology of Nigrescence: Revising the Cross Model, in Handbook of Multicultural Counseling, supra note 8, at 93; Parker, supra note 8, at 35-70.

182 See Cheatham et al., supra note 181, at 162 (listing African-Americans, Asian-Americans, Latinas/os, biracial groups, women, and Whites).

183 Id.

184 See, e.g., Peters, supra note 9; Bryant, supra note 9; Silver, supra note 20, at 20-26.

9 CLINICLR 373

End of Document

Restatement (Third) of the Law Governing Lawyers § 134 (2000)

Restatement of the Law - The Law Governing Lawyers | October 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 8. Conflicts of Interest

Topic 5. Conflicts of Interest Due to a Lawyer's Obligation to a Third Person

§ 134 Compensation or Direction of a Lawyer by a Third Person

Comment:
Reporter's Note
Case Citations - by Jurisdiction

(1) A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 122 and knows of the circumstances and conditions of the payment.
(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if:
(a) the direction does not interfere with the lawyer's independence of professional judgment;
(b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
(c) the client consents to the direction under the limitations and conditions provided in § 122.

Comment:

a. *Scope and cross-references.* This Section applies the general conflicts prohibition of § 121 to the various situations in which a third person pays a lawyer's fee for representing a client or directs a lawyer's work for a client. The third person might be interested as a relative or friend or have obligations to the client because of indemnification or similar arrangements, or be interested directly in the matter because of a co-client, such as a corporation sued along with one or more of its employees (see § 131, Comment *e*). The risk of adverse effect on representation of the client is inherent in any such payment or direction. Accordingly, this Section, following the standard rule of the lawyer codes, requires informed consent of the client and imposes limitations on the control that a third person may exercise over the lawyer's work.

While discussion in the following Comments (see Comment *f*) will consider issues of the law governing a lawyer representing an insured person, the relationship between the insured person and the insurer or indemnitor will be controlled by other law, such as the law of insurance or of contract. Similarly, other law may govern other relationships between a client and a third person who pays or directs the lawyer, such as when the government pays a lawyer to represent a client in a criminal or civil matter (see Comment *g*). Issues relating to all such other relationships are beyond the scope of the Restatement.

The prohibition imposed by this Section applies to all affiliated lawyers (see § 123). Sanctions and remedies listed in § 6, are available for violation of this Section. Where a violation of this Section has caused actionable harm to a client, the remedy of legal malpractice (see Chapter 4) is available.

Issues relating to payment of legal fees generally are considered in Chapter 3. Chapter 5 examines a lawyer's duty to protect confidential information of a client.

b. *Initial client consent.* As stated in the Section, under § 122 a client must consent to a lawyer's accepting either a third person's payment of the fee for a client or a third person's direction in a matter. In particular, the client must have knowledge of the circumstances and conditions under which the fee payment or direction is to be provided and any substantial risks to the client thereby created (see § 122, Comment *c*). On consent in insurance-defense representations, see Comment *f* hereto. In an emergency situation in which the lawyer must take action to protect the interests of the client, as in filing an answer to avoid default, the lawyer may take such action even if a conflict appears to exist, but must also promptly take action to address the conflict.

c. *Third-person fee payment.* This Section accommodates two values implicated by third-person payment of legal fees. First, it requires that a lawyer's loyalty to the client not be compromised by the third-person source of payment. The lawyer's duty of loyalty is to the client alone, although it may also extend to any co-client when that relationship is either consistent with the duty owing to each co-client or is consented to in accordance with § 122. Second, however, the Section acknowledges that it is often in the client's interest to have legal representation paid for by another. Most liability-insurance contracts, for example, provide that the insurer will provide legal representation for an insured who is charged with responsibility for harm to another (see also Comment *f* hereto). Lawyers paid by civil-rights organizations have helped citizens pursue their individual rights and establish legal principles of general importance. Similarly, lawyers in private practice or in a legal-services organization may be appointed or otherwise come to represent indigent persons pursuant to arrangements under which their fees will be paid by a governmental body (see Comment *g*).

d. *Third-person direction of a representation.* The principle that a lawyer must exercise independent professional judgment on behalf of the client (Subsection (2)(a)) is reflected in the requirement of the lawyer codes that no third person control or direct a lawyer's professional judgment on behalf of a client. Consistent with that requirement, a third person may, with the client's consent and otherwise in the circumstances and to the extent stated in Subsection (2), direct the lawyer's representation of the client. When the conditions of the Subsection are satisfied, the client has, in effect, transferred to the designated third person the client's prerogatives of directing the lawyer's activities (see § 21(2)). The third person's directions must allow for effective representation of the client, and the client must give informed consent to the exercise of the power of direction by the third person. The direction must be reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer. Such directions are reasonable in scope and character if, for example, the third party will pay any judgment rendered against the client and makes a decision that defense costs beyond those designated by the third party would not significantly change the likely outcome. Informed client consent may be effective with respect to many forms of direction, ranging from informed consent to particular instances of direction, such as in a representation in which the client otherwise directs the lawyer, to informed consent to general direction of the lawyer by another, such as an insurer or indemnitor on whom the client has contractually conferred the power of direction (see Comment *f*).

Illustration:

1. Resettle, a nonprofit organization, works to secure better living conditions for refugees. Resettle's board of directors believes that a case should be filed to test whether a federal policy of detaining certain refugees is legally justified. Client is a refugee who has recently been detained under the federal policy, and Resettle has offered to pay Lawyer to seek Client's release from detention. With the informed consent of Client, Lawyer may accept payment by Resettle and may agree to make contentions that Resettle wishes to have tested by the litigation.

Just as there are limits to client consent in § 122, there are limits to the restrictions on scope of the representation permitted under this Section. See § 122, Comment *g* (nonconsentable conflicts).

Illustrations:

2. Client is charged with the crime of illegally selling securities. Client's employer, Brokerage, has offered to pay Lawyer to defend Client on the condition that Client agree not to implicate Brokerage or any of its other employees in the crimes charged against Client. Lawyer may not accept the representation on those terms. Whether to accept a plea bargain, for example, and whether to implicate others in the wrongdoing are matters about which the client, not the person paying for the defense, must have the authority to make decisions (see § 22).

3. Same facts as stated in Illustration 2, except that there is no substantial factual or legal basis for implicating Brokerage or any of its other employees and Client consents to accept Lawyer's representation on the condition stated by Brokerage under the limitations and conditions provided in § 122, including knowledge that Brokerage has stated the condition. Under such circumstances, Client's consent authorizes Lawyer to accept payment from Brokerage and adhere to the described conditions.

e. *Preserving confidential client information.* Although a legal fee may be paid or direction given by a third person, a lawyer must protect the confidential information of the client. Informed client consent to the third-person payment or direction does not by itself constitute informed consent to the lawyer's revealing such information to that person. Consent to reveal confidential client information must meet the separate requirements of § 62.

Illustration:

4. Employer has agreed to pay for representation of Employee in defending a claim involving facts arguably arising out of pursuit of Employer's business. Employer asks Lawyer what Employee intends to testify about the circumstances of Employee's actions. Without consent of Employee as provided in § 62, Lawyer may not give Employer that information.

On a lawyer's discretion to disclose confidential information of a client to a co-client in the representation, see § 60, Comment *l*.

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

It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 14. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. Similarly, communications between counsel retained by an insurer to coordinate the efforts of multiple counsel for insureds in multiple suits and such coordinating counsel are subject to the privilege. Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer. Compare § 51, Comment *g*.

The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment *d* hereto. With respect to client consent (see Comment *b* hereto) in insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent in the form of the acquiescence of the client-insured to an informative letter to the client-insured at the outset of the representation should be all that is required. The lawyer should either withdraw or consult with the client-insured (see § 122) when a substantial risk that the client-insured will not be fully covered becomes apparent (see § 121, Comment *c(iii)*).

Illustration:

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

Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured. If the lawyer knows or should be aware of such an excess claim, the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage. Such occasions for conflict may exist at the outset of the representation or may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent (see § 122(2)(c)), the lawyer may proceed after obtaining client consent under the limitations and conditions stated in § 122.

When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (see

§ 60) without explicit informed consent of the insured (see § 62). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured (compare § 60, Comment *l* (confidentiality in representation of co-clients in general)).

With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud (see § 94) and, if applicable, consistent with the lawyer's duties to the insurer as co-client (see § 60, Comment *l*). If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided in § 32 (see also § 60, Comment *l*). The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement (see Comment *a* hereto).

g. Legal service and similarly funded representations. Lawyers who provide representation to indigent persons may do so pursuant to various arrangements under which their fees or other compensation will be paid by a governmental agency or similar funding organization. For example, a lawyer may represent clients as a staff attorney of a legal aid, military legal assistance, or similar organization, with compensation in the form of a salary paid by the organization. Lawyers in private practice may be appointed by a court, defender or legal-service organization, or bar association to represent a person accused of crime or a person involved in a civil matter (see § 14, Comment *g*), with the lawyer's fee to be paid by the government or organization, often pursuant to a schedule of fees. Certain for-profit legal-service arrangements have also been approved, under which individual private practitioners provide assistance to participants who pay a flat charge to the legal-service organization for limited legal services. Regardless of the method of appointment, the form of compensation, or the nature of the paying organization (for example, whether governmental or private or whether nonprofit or for-profit), the lawyer's representation of and relationship with the individual client must proceed as provided for in this Section.

Reporter's Note

*Comment a. Scope and cross-references.*The traditional rule on third-person fee payments is expressed in Rule 1.8(f) of the ABA Model Rules of Professional Conduct (1983):

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents after consultation;
>
> (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 [the duty of confidentiality].

See also ABA Model Code of Professional Responsibility, DR 5-107(A) and (B) (1969) (similar).

*Comment b. Initial client consent.*See, e.g., Arrington v. Nat'l Broadcasting Co., 531 F.Supp. 498 (D.D.C.1982) (union may pay costs of lawsuit on behalf of its members seeking overtime compensation where full disclosure and consent shown). On consent in policyholder-insured relationships, see Comment *f* and Reporter's Note thereto.

*Comment d. Third-person direction of a representation.*On cases involving insurer control of litigation, see Comment *f* and Reporter's Note thereto. Cases involving lawyers for public-interest causes have proceeded on a different rationale, typically founded on the basic right of a public-interest organization to provide legal services. In upholding that right, courts have implicitly sustained the right of the organizations to specify the legal issues to be tested. See, e.g., American Civil Liberties Union v. State of Tennessee, 496 F.Supp. 218 (M.D.Tenn.1980) (state barratry statute, which forbade groups paying legal fees

in public-interest cases, ruled unconstitutional); In re Education Law Center, 429 A.2d 1051 (N.J.1981) (general state rule against corporate practice of law held not to apply to not-for-profit corporation representing persons without charge on issues relating to equal educational opportunity). But cf. In re Primus, 436 U.S. 412, 442-44, 98 S.Ct. 1893, 1910-11, 56 L.Ed.2d 417 (1978) (Rehnquist, J., dissenting) (overreaching of private client can occur even if organization has best of motives).

The risk of outside control by third-person payers in criminal cases has led to results consistent with Illustration 2. See, e.g., United States v. Bernstein, 533 F.2d 775 (2d Cir.), cert. denied, 429 U.S. 998, 97 S.Ct. 523, 50 L.Ed.2d 608 (1976) (appropriate to require separate counsel where individual defendants might have tried to place blame for crime on corporation alone while corporation might have tried to blame crime on them); In re Abrams, 266 A.2d 275 (N.J.1970) (lawyer reprimanded for accepting payment from illegal lottery organization to defend employees who might be charged with lottery violations). See also Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) (when employer set up test case putting employees at risk and employees expected employers to pay fines as well, but they did not do so, case remanded for investigation of conflicts because of counsel's possible divided loyalties).

In some of the reported criminal cases, the government has succeeded in disqualifying a lawyer whose fee was being paid by someone else, asserting that the common-payment scheme interfered with its investigation or with the rights of the defendants to turn state's evidence. See, e.g., Pirillo v. Takiff, 341 A.2d 896, opinion reinstated on rehearing, 352 A.2d 11 (Pa.1975), appeal dism'd, 423 U.S. 1083, 96 S.Ct. 873, 47 L.Ed.2d 94 (1976) (proper to disqualify single lawyer being paid by police fraternal order and representing all 12 policemen called before grand jury investigating police-department corruption). But see, e.g., In re Special Grand Jury, 480 F.Supp. 174 (E.D.Wis.1979) (when target company was paying for lawyer for its past and present employees, government could show no reason why employer should be denied counsel of choice). Cf. Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (although state that prosecutes also pays public defender, defender represents only defendant and thus no improper conflict of interest).

A similar issue can arise in civil cases. E.g., Purdy v. Pacific Auto. Ins. Co., 203 Cal.Rptr. 524 (Cal.Ct.App.1984) (when conflict arises over settlement strategy, insurer must provide new counsel for insured at insurer's expense); American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 131 N.Y.S.2d 393 (N.Y.Sup.Ct.1954) (insurer seeking in settlement negotiations to shift greater portion of risk to parties other than insurer improperly put insured at higher risk of liability); see also Comment *f* and Reporter's Note thereto.

Comment e. Preserving confidential client information. See Comment *f* and Reporter's Note thereto.

Comment f. Representing an insured. See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:700 (2d ed.1990); R. Keeton & A. Widiss, Insurance Law 824-41, 846-47, 853-57 (1988) (consideration of multiple issues from perspectives of both insurance law and law governing lawyers); C. Wolfram, Modern Legal Ethics §§ 8.4, 8.8 (1986); Hazard, Triangular Lawyer Relationship: An Exploratory Analysis, 1 Geo. J. Leg. Ethics 15 (1987); Leubsdorf, Pluralizing the Client-Lawyer Relationship, 77 Cornell L. Rev. 825 (1992); Richmond, Lost in the Eternal Triangle of Insurance Defense Ethics, 9 Geo. J. Leg. Ethics 475 (1996); Neumier, Serving Two Masters: Problems Facing Insurance Defense Counsel, 77 Mass. L. Rev. 66 (1992); Hall, Confusion Over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?, 41 Drake L. Rev. 731 (1992).

Statements in the Comment are limited to aspects of the "triangular relationship" set of problems that directly concern the legal constraints under which the designated defense counsel must operate. Nothing stated there about the substantive law of insurance necessarily reflects the policy of the Institute.

On whether a defense lawyer designated for an insured by an insurer represents only the insured or both insured and insurer as co-clients, compare, e.g., Pepper, Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice, 4 Conn. Ins. L.J. 27 (1998); O'Malley, Ethics Principles for the Insurer, the Insured and Defense Counsel: the Eternal Triangle Reformed, 66 Tulane L. Rev. 511 (1991) (arguing for insured-as-sole-client position), with, e.g., Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 Tex. L. Rev 1583 (1994) (arguing for dual-client view). The Comment takes the position that whether only the insured or both insured and insurer (as co-clients) enter into a client-lawyer relationship with the designated lawyer is a question to be determined on the facts of the particular case, employing the approach indicated in

§ 14. For acceptance of such a view, see, e.g., ABA Formal Opin. 96-403, at 2, 3 (1996) ("… Provided there is appropriate disclosure, consultation, and consent, any of these arrangements would be permissible…. For purposes of this opinion, nothing fundamental turns on whether the lawyer represents the insured alone or both the insurer and the insured…."); cf. Silver & Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 Duke L. J. 255 (1995). The requirements of third-party payor rules such as ABA Model Rules of Professional Conduct, Rule 1.8(f) (1983), quoted in Reporter's Note to Comment *b*, supra, apply whether or not the insurer is also regarded as a client. Cf., e.g., Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) (conflict when lawyer, paid by co-client employer, represented employee); but see 3 R. Mallen & J. Smith, supra § 28.18, at 566 (asserting, without citation of authority, that ABA Model Rule 1.9(f) is inapplicable when the third-party payor is a co-client).

In a "captive firm," employees of an insurer are sometimes held out as a freestanding law firm. See, e.g., Keeton & Widiss, supra at 827-28; see also Mallen, A New Definition of Insurance Defense Counsel, 1986 Def. Counsel J. 108. On judicial attitudes toward such arrangements, compare, e.g., Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151 (Ind.1999) (permissible, but use of firm name misleading); In re Youngblood, 895 S.W.2d 322 (Tenn.1995) (approving such arrangements when properly structured and operated); In re Allstate Ins. Co., 722 S.W.2d 947 (Mo.1987); In re Rules Governing Conduct of Attorneys in Florida, 220 So.2d 6 (Fla.1969) (same), with Gardner v. North Carolina St. Bar, 341 S.E.2d 517 (N.C.1986) (lawyers may not enter such arrangements); American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky.1996) (same).

On application of the attorney-client privilege to communications between an insured and an agent of the insurer, see § 70, Comment *f,* and Reporter's Note thereto. On the ability of the insurer to maintain against insurance-defense counsel an action for legal malpractice in the absence of a conflict with the insured, see, e.g., Paradigm Ins. Co. v. Langerman Law Offices, _ P.2d _, 1999 WL 672662 (Ariz.Ct.App.1999); Unigard Ins. Group v. O'Flaherty & Belgum, 45 Cal.Rptr.2d 565 (Cal.Ct.App.1995); see generally § 51, Comment *g,* and Reporter's Note thereto.

On consent by the insured to the lawyer's role, see, e.g., ABA Formal Opin. 96-403, at 3 (1996) ("If the lawyer is to proceed with the representation of the insured at the direction of the insurer, the lawyer must make appropriate disclosure sufficient to apprise the insured of the limited nature of [the lawyer's] representation as well as the insurer's right to control the defense in accordance with the terms of the insurance contract…."); see also id. at 3-5 (appropriate disclosure and consent can be accomplished in short letter; client-insured's acceptance is sufficiently manifested by accepting defense after being advised of its limitations). As a matter of insurance law, courts have found policyholder consent to the role of the insurer in designating counsel and controlling the defense through execution of an insurance contract containing a duty-of-cooperation clause. E.g., Crum v. Anchor Cas. Co., 119 N.W.2d 703 (Minn.1963) (insurer obliged to defend where pleadings showed incident within terms of policy). Closer questions about the adequacy of consent arise when the complaint alleges one or more claims not covered by the policy, or when (for whatever reason) the insurer defends under a reservation of rights. As a matter of insurance law, the majority of jurisdictions hold that, if the insurer timely asserts noncoverage, either the insurer must pay for separate counsel for the insured or the insured must specifically give informed consent to defense by a lawyer selected by the insurer. E.g., N.Y. State Urban Dev. Corp. v. VSL Corp., 738 F.2d 61 (2d Cir.1984) (insurer may participate in selection of the insured's independent counsel); San Diego Federal Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal.Rptr. 494 (Cal.Ct.App.1984) (consent to insurer's choice of counsel deemed withdrawn when insured retained independent counsel); Nandorf, Inc. v. CNA Ins. Cos., 479 N.E.2d 988 (Ill.App.Ct.1985) (insurer obliged to pay for separate counsel for insured).

Most of the case law on control-of-litigation strategy by the insurer turns on questions of who controls the decision to settle, particularly when the insured need not expect to bear the financial risk of loss. As a matter of insurance law, the ability of the insurer to control the defense is ceded by the insured under a policy so providing. E.g., Buchanan v. Buchanan, 160 Cal.Rptr. 577 (Cal.Ct.App.1979) (insurer may assert claim of nonliability in face of insured's wish to concede liability to victim-relative); Feliberty v. Damon, 527 N.E.2d 261 (N.Y.1988) (malpractice insurer not liable to doctor for settlement within policy limits despite adverse publicity). When a dispute between insured and insurer exists over settlement, the duties of a defense lawyer representing the insured are controlled, not by the policy, but by the lawyer's professional duties. See, e.g., ABA Formal Opin. 96-403, at 5-6 (1996) (dispute may require lawyer's withdrawal; thereafter, former-client conflict rule precludes lawyer from

assisting insurer in reaching settlement objected to by insured); Rogers v. Robson, Masters, Ryan, Brumund & Belom, 407 N.E.2d 47 (Ill.1980) (lawyers designated by medical-malpractice insurer to defend doctor had duty to tell insured doctor of insurer's intent to settle claim within policy limits contrary to doctor's insistence against settlement).

Decisions based on the law of insurance have resolved the settlement problem consistent with the rule in this Section in the case of an insurer's bad-faith refusal to settle within policy limits. The insurance company is typically held liable for any damages awarded in excess of the policy limits. See, e.g., Parsons v. Continental Nat'l American Group, 550 P.2d 94 (Ariz.1976); Crisci v. Security Ins. Co., 426 P.2d 173 (Cal.1967); Gibson v. Western Fire Ins. Co., 682 P.2d 725 (Mont.1984). Where the lawyer behaves improperly in such cases, there is potential malpractice exposure to the insurer or the insured for any resulting loss. E.g., Lysick v. Walcom, 65 Cal.Rptr. 406 (Cal.Ct.App.1968) (lawyer who failed to tell insurer of settlement offer within policy limits required to pay insurer amount by which eventual judgment exceeded settlement offer); Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J.1980) (in medical-malpractice case settled after doctor had withdrawn consent, lawyer's duty was to insured, and malpractice claim lies against lawyer for so settling). See also Betts v. Allstate Ins. Co., 201 Cal.Rptr. 528 (Cal.Ct.App.1984) (in case involving bad-faith refusal to settle, judgment against lawyer upheld for negligent infliction of emotional distress on insured).

Most of the decisions involving the question whether a lawyer designated by the insurer may use information obtained in the client-lawyer relationship against the interests of the client-insured (typically to enable the company to deny coverage) have arisen under the substantive law of insurance. They typically find such use impermissible. See, e.g., Parsons v. Continental Nat'l American Group, 550 P.2d 94 (Ariz.1976) (when lawyer learned confidential medical information that child's assault had been intentional and thus not covered by the policy, lawyer was required to keep information confidential but should withdraw from representation; where lawyer used information to benefit insurance company, company was estopped to deny coverage); Employers Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex.1973) (because insurer did not tell insured that it might deny coverage and even interviewed insured's employees without revealing that it was building case against liability, prejudice to insured shown, so insurer estopped to deny coverage).

*Comment g. Legal service and similarly funded representations.*E.g., 42 U.S.C. § 2996e(b)(B)(3) (provision of Legal Services Corporation act prohibiting corporation from "interfer[ing] with any attorney in carrying out" professional responsibilities to client); cf., e.g., Ferri v. Ackerman, 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979) (defense counsel court-appointed in federal criminal trial not entitled to absolute immunity under federal law in subsequent state malpractice action by former client because, among other things, lawyer's primary allegiance is to client); Jackson v. Salon, 614 F.2d 15 (1st Cir.1980), and authority cited (defense counsel court-appointed in state criminal case not acting under color of state law for purposes of 28 U.S.C. § 1983 action; lawyer works primarily for benefit for and at the instruction of client and not that of state). On limited imputation of conflicts within a nonprofit legal-services agency, see § 123, Comment *d(v)*. On the validity of periodic Congressional limitations on the range of services that may be provided by lawyers in programs receiving Legal Services Corporation funds, compare, Velazquez v. Legal Services Corp., 164 F.3d 757 (2d Cir.1999), cert. granted, _ U.S. _, 120 S.Ct. 1553, 146 L.Ed.2d 459 (2000) (congressional limitation on challenging existing law in representing individual welfare claimants unconstitutional), with Legal Aid Soc'y v. Legal Services Corp., 145 F.3d 1017 (9th Cir.1998) (limitation constitutional); see generally ABA Formal Opin. 96-399 (1996) (obligations of lawyer in organization receiving Legal Services Corporation funding when funding reduced or subject to new limitations).

On for-profit legal-service organizations, see, e.g., ABA Formal Opin. 87-355 (1987) (lawyer may practice in for-profit legal-service plan under ABA Model Rules, provided plan complies with guidelines in opinion relating to allowing participating lawyer to exercise independent professional judgment on behalf of individual client, to maintain client confidences, to avoid conflicts of interest, and to practice competently); Miss. Formal Opin. 199 (1992) (following ABA opinion).

Case Citations - by Jurisdiction

—

C.A.10,
E.D.N.Y.
D.Vt.
N.D.W.Va.
Cal.App.
Conn.App.
Mont.
Tex.
Wis.

C.A.10,

C.A.10, 2020. Quot. in sup. Widower of motorist killed in a crash entered into a pretrial agreement with driver, parents of driver, and employer of driver, under which driver, parents, and employer assigned widower the policy limits of their insurance policies and their right to pursue claims against their insurer arising from their assigned attorney's failure to disclose the existence of their excess coverage insurance. Insurer brought a declaratory-judgment action against widower, alleging that widower was not entitled to damages beyond the policy limit, because the conduct of the attorney it assigned to defend the defendants in the preceding litigation did not show that it breached its duty to hire competent counsel. The district court granted insurer's motion for summary judgment. This court affirmed, holding that insurer did not breach its duty to hire competent counsel and was not vicariously liable for any negligence by the attorney. The court explained that insurer was not liable for the professional malpractice of the attorney under Restatement Third of the Law Governing Lawyers § 134, because insurer did not interfere with the attorney's independent professional judgment. Progressive Northwestern Insurance Company v. Gant, 957 F.3d 1144, 1155.

E.D.N.Y.

E.D.N.Y.2006. Subsec. (1) quot. in disc. In an action against criminal defendant accused of participating in a racketeering conspiracy with an organized crime family, government moved to disqualify defendant's attorney, in part on grounds that attorney's loyalties to his uncle and father, alleged high-ranking members of crime family, created a conflict of interest. Denying the motion, this court found, inter alia, that while the facts showed a disturbing pattern of a continuing relationship between attorney and crime family, there was no indication that attorney was being paid by parties other than defendant's family, nor was there any reason to believe that crime family was attempting to limit a good-faith and aggressive defense. U.S. v. Pizzonia, 415 F.Supp.2d 168, 185.

D.Vt.

D.Vt.2018. Com. (f) cit. in disc. In an age-discrimination action, employee obtained a default judgment against employer —which had agreed to cancel its liability policy with insurer based on a dispute over insurer's choice of defense counsel, before experiencing financial difficulties and going out of business—and then filed suit against insurer, seeking payment of the judgment with interest under Vermont's direct-action statute. This court granted summary judgment for employee, holding that it would follow the majority rule in recognizing the public policy against cancellation of a liability-insurance policy in cases in which litigation had already commenced following an insured injury. The court noted that employer's interest in selecting its own defense counsel did not outweigh or offset to any meaningful extent the complete forfeiture of employee's ability to recover compensation for the harm a jury determined she experienced, noting that, under Restatement Third of the Law Governing Lawyers § 134, insured parties could be represented by their own attorneys who appeared at trial and participated at all stages of the case in conjunction with counsel selected by their insurer; thus, it was unnecessary for employer to have waived coverage altogether in order to achieve any legitimate objectives served by the involvement of its chosen counsel. West v. Carolina Casualty Insurance Company, 325 F.Supp.3d 501, 506.

N.D.W.Va.

N.D.W.Va.2007. Com. (f) quot. in case quot. in sup. (Erron. cit. as § 14, com. (f).) Insurer brought action for legal malpractice against attorney whom it hired to defend its insureds in connection with an automobile accident, alleging that attorney's sub-

par representation of insureds forced it to settle the underlying claims against insureds for amounts in excess of the claims' true value. Denying attorney's motion for judgment on the pleadings, this court held, inter alia, that, even absent the employer-employee relationship between insurer and attorney that gave rise to a duty, insurer had standing to bring an action against attorney for negligence, because attorney owed a duty to insurer as a nonclient beneficiary of attorney's services. The court discussed at length the policy behind recognizing an insurer's standing in such a case. State and County Mut. Fire Ins. Co. v. Young, 490 F.Supp.2d 741, 747.

Cal.App.

Cal.App.2007. Com. (f) quot. in sup. During discovery in insurance-coverage dispute, insurer objected to insured's requested production of certain of insurer's documents, invoking the attorney-client privilege and work-product doctrine. The trial court overruled insurer's objections. Granting insurer's petition for writ of mandate or prohibition, this court held, inter alia, that the communications between insurer's employees were presumptively privileged to the extent that they discussed or contained legal advice or strategy of counsel for insurer. Zurich American Ins. Co. v. Superior Court, 155 Cal.App.4th 1485, 1500, 66 Cal.Rptr.3d 833, 843.

Conn.App.

Conn.App.2009. Subsec. (1) cit. in disc. Alleged former client sued attorney, claiming that, although defendant knew that plaintiff and his brothers had agreed to share both the attorney's fees and the proceeds of a lawsuit brought by medical practice, defendant failed to ensure plaintiff's receipt of one third of the value of the ensuing settlement. The trial court denied attorney's motion for summary judgment asserting collateral estoppel arising from another action brought by practice in which it was found that there was no attorney-client relationship between defendant and plaintiff. Affirming, this court agreed that, because the prior action did not result in a definitive determination of the nature of the relationship between the parties, the doctrine of collateral estoppel was inapplicable. The court rejected defendant's argument that the absence of an attorney-client relationship precluded plaintiff's claim of a contractual relationship of any kind; while it was true that lawyers were permitted to accept from third parties compensation for representing a client, it was also the case that lawyers could owe personal loyalties and some legal duties to persons who were not their clients. Clukey v. Sweeney, 112 Conn.App. 534, 545, 963 A.2d 711, 717.

Mont.

Mont.2000. Quot. in disc., com. (f)(5) quot. in disc. (citing § 215, Prop. Final Draft No. 2, 1998, which is now § 134). Defense counsel appointed by insurer to represent insured sought declaration that restrictions and conditions imposed by insurer, which could limit or direct the scope and extent of representation of the insured, violated the Rules of Professional Conduct (RPC). Entering judgment for counsel, the court held, in part, that because of the potential conflicts of interest inherent in dual representation of insurer and insured, insured was to be considered the sole client to whom defense counsel owed its professional duties, and that restrictions that might interfere with those duties were in violation of the RPC. In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 299 Mont. 321, 2 P.3d 806, 813, 814.

Tex.

Tex.2008. Quot. in ftn. Insurer brought action against state's unauthorized practice of law committee, seeking a declaration that its employment and use of staff counsel to defend claims against its insureds did not constitute the unauthorized practice of law. The trial court granted summary judgment for committee. The court of appeals reversed and rendered judgment for insurer. Affirming as modified, this court held that an insurer could use staff attorneys to defend a claim against an insured when the insurer and the insured were aligned in defeating the claim and there was no conflict of interest between the insurer and the insured, but not otherwise; disclosure to the client, however, was required. The court noted the Restatement's position that a lawyer's representation of a client could be directed and paid for by someone other than the client where disclosure, consent, and certain other conditions were met. Unauthorized Practice of Law Committee v. American Home Assur. Co., Inc., 261 S.W.3d 24, 42.

Wis.

Wis.2013. Com. (f) quot. in ftn. Newspaper brought an action to enforce Wisconsin's Public Records Law against county, seeking unredacted copies of invoices submitted to county's insurer by law firm that insurer had hired to defend county in underlying action. The trial court granted summary judgment for county. The court of appeals reversed and remanded. Affirming, this court held that unredacted copies of the invoices were subject to disclosure, because they were public "contractors' records" that were produced or collected during the course of law firm's representation of county pursuant to the insurance policy between county and insurer. The court explained that county's argument that the invoices were private records produced and collected pursuant to the private contractual relationship between insurer and law firm ignored the unique, direct attorney-client agency relationship that was created between county and law firm by insurer's retention of law firm to represent county, as its insured, and county's acceptance of the representation pursuant to the insurance policy. Juneau County Star-Times v. Juneau County, 345 Wis.2d 122, 2013 WI 4, 824 N.W.2d 457, 466.

3 Law and Prac. of Ins. Coverage Litig. § 33:24

Law and Practice of Insurance Coverage Litigation | July 2023 Update

Chapter 33. Ethical Issues and Conflicts of Interest
By:

Leslie S. Ahari

Sean M. Hanifin

§ 33:24. Ethical issues for duty to defend counsel—Liability for defense counsel malpractice

References

West's Key Number Digest

- West's Key Number Digest, Insurance 2929

Westlaw Databases

- Couch on Insurance 3d (COUCH)

A.L.R. Library

- A.L.R. Index, Insurance
- Liability Insurer's Rights and Duties As to Defense and Settlement As Affected by Its Having Issued Policies Covering Parties Who Have Conflicting Interests, 18 A.L.R. 3d 482

Treatises and Practice Aids

- Business and Commercial Litigation in Federal Courts § 58.14 (Robert L. Haig ed.) (West Group & ABA 1998 & Supp. 1999)Business and Commercial Litigation in Federal Courts § 58.14 (Robert L. Haig ed.) (West Group & ABA 1998 & Supp. 1999)

- Couch on Insurance 3d §§ 202:23 to 202:33
- Wright, Miller & Graham, Federal Practice and Procedure: Civil 2d § 5505

Trial Strategy

- Legal Malpractice—Attorney's Unreasonable Settlement or Failure to Settle Client's Case, 26 Am. Jur. Proof of Facts 2d 703
- Actions Against Insurer for Bad Faith Failure to Settle Claim, 21 Am. Jur. Trials 229

Defense counsel appointed by the insurer to represent the insured potentially faces liability both to the insured and to the insurer for breach of his or her ethical obligations and for malpractice. Moreover, although there is contrary authority, the insurer generally should not be held liable to the insured for the malpractice of defense counsel.

First, consistent with the uniform view that an attorney-client relationship exists between the insured and counsel appointed by the insurer to represent the insured, there is little question that counsel is subject to liability to the insured both for ethical violations and for mishandling the insured's defense. In *Lieberman v. Employers Ins. of Wausau*, [1] the insured filed suit against defense counsel retained by the insurer based on counsel's settling the case at the insurer's direction but over the insured's objection. The court found that, although the insurer assigned counsel to defend the case and paid counsel's fee, it nevertheless was clear that an attorney-client relationship existed between counsel and the insured. By ignoring the insured's wishes to litigate the case rather than settle, counsel was found to have breached the duty owed to his client. This breach constituted actionable malpractice, thereby rendering counsel liable for damages resulting therefrom. [2] Thus, even though the insurance policy may give the insurer control over the settlement, the policy provisions will not override defense counsel's ethical obligations to the client-insured.

Decisions such as Lieberman are illustrative of courts' failures to reconcile general attorney-client principles with the insurance contract entered into by insurer and insured. The insurer retains defense counsel to defend the insured because the insurer has contractually bound itself to provide a defense for the insured. The same insurance contract that compels the insurer to provide defense counsel typically also spells out the parties' rights with respect to settlement. If the insured has entered into a contract that expressly permits the insurer to settle claims without the insured's consent, insureds should not be permitted to abrogate this provision by asserting that, in effectuating a settlement, defense counsel has a conflict. If the insured wishes not to settle the case, the insured may discharge the insurer and defense counsel and proceed to handle the claim thereafter at its own expense and risk.

Second, the insured's defense counsel also can be liable to the insurer. In *Atlanta International Ins. Co. v. Bell*, [3] the Michigan Supreme Court found that although there was no attorney-client relationship between the insured's defense counsel and the insurer, the "special circumstances" presented in the insurance context excepted the case from the general rule against the imposition of liability to a third party for attorney malpractice. The court thus held that the doctrine of equitable subrogation should be applied to allow recovery by the insurer, who stands in the shoes of the insured. [4] In this situation, the interests of the insured and the insurer are consistent since both have an interest in not losing the case against the insured because of attorney malpractice. "Allowing recovery for the insurer on the basis of the failure of defense counsel to adhere to basic norms of duty of care thus would not substantially impair an attorney's ability to make decisions that require a choice between the best interests of the insurer and the best interests of the insured." [5]

There is, however, contrary authority. In *National Union Fire Ins. Co. v. Salter*, [6] the court held that an insurer cannot sue an insured's attorneys for malpractice because the insurer neither was in privity with the attorneys nor an intended third party beneficiary of the insured's attorney-client relationship. The court rejected the insurer's argument that it should be subrogated to the insured's cause of action, holding that the same public policy reasons (i.e., the personal and confidential nature of the

attorney-client relationship) precluding the assignment of a personal tort such as legal malpractice prohibited the subrogation of such a claim.

There is conflicting authority on whether an excess insurer can maintain a cause of action for legal malpractice against attorneys retained either by the primary insurer or the insured. In *National Union Ins. Co. v. Dowd & Dowd, P.C.*,[7] although the court rejected the insurer's argument that it was a third party beneficiary of the attorney's contract to provide legal services to the insured, it permitted the excess carrier to sue counsel under the doctrine of equitable subrogation.[8] Other courts have rejected this approach, finding that allowing excess carriers to sue defense counsel for malpractice would undermine the personal nature of the attorney-client relationship.[9]

Third, most courts find that the insurer is not vicariously liable to the insured for damages as a result of the negligence of an attorney retained by it to defend the insured. In *Ingersoll-Rand Equipment Corp. v. Transportation Ins. Co.*,[10] the court rejected an attempt to hold the insurer liable for defense counsel's malpractice, finding that because the attorney's client is the insured, and not the insurer, "the attorney's ethical obligations to his or her client, the insured, prevent the insurer from exercising the degree of control necessary to justify the imposition of vicarious liability."[11] Other courts have reached the same conclusion on the reasoning that counsel acts as an independent contractor, "responsible for the results of their conduct and not subject to the control and direction of their employer over the details and manner of their performance."[12]

By contrast, those courts that favor imposing liability on the insurer for the malpractice of defense counsel do so on the theory that defense counsel is acting as the agent of the insurer, thus warranting application of the familiar rule that the principal is liable for the acts of his or her agent.[13] Insurers also face potential loss of coverage defenses in the event it is determined that appointed defense counsel wrongfully favored the interests of the insurer over those of the insured.[14] Finally, some courts have held an insurer directly liable for its own negligence in connection with the selection of defense counsel for the insured.[15]

CUMULATIVE SUPPLEMENT

Cases:

Insurer may bring a direct malpractice action against counsel hired to represent its insured, so long as there is no conflict between attorney's client's interests and interests of insurer, determination which district court should make independently, based on all facts and circumstances of case; thus, insurer may recover only for attorney's breach of his duty to his client when insurer proves, by clear and convincing evidence, that breach is proximate cause of damages to insurer. If interests of client are slightest bit inconsistent with insurer's interests, there can be no liability of attorney to insurer, for attorney's duty to client must not be affected by interests of insurance company; whether there is any inconsistency between client's and insurer's interests in circumstances of individual case is question of law to be answered by trial court. Sentry Select Insurance Company, 826 S.E.2d 270.

Under Kansas law, the general rule is that insurer's mere hiring of attorney to represent an insured will not make the liability insurer vicariously liable for the attorney's negligence; a liability insurer has no vicarious liability for the negligence of the attorney selected by insurer to defend the insured in an underlying lawsuit, but instead vicarious liability is limited to those actions of the attorney in which the insurer was directly involved; thus, automobile insurer was not vicariously liable for any negligence by counsel it hired to represent insureds in wrongful death suit arising out of motor vehicle accident, absent evidence that insurer was involved in or interfered with counsel's independent legal judgment in representing insureds. Progressive Northwestern Insurance Company v. Gant, 957 F.3d 1144 (10th Cir. 2020).

Under Kansas law, as predicted by the Court of Appeals, automobile insurer did not breach its duty to hire competent counsel to represent insureds and defend them in wrongful death suit arising from motor vehicle accident; although counsel represented all three insureds, and rejected a proposed settlement that would have avoided excess judgment against insureds over the policy limits, there was no showing that counsel had history of impeding settlements in other cases, and counsel obtained a conflict waiver signed by all insureds. Progressive Northwestern Insurance Company v. Gant, 957 F.3d 1144 (10th Cir. 2020).

An insurer may bring a direct malpractice action against counsel hired to represent its insured; however, the insurer may recover only for the attorney's breach of his duty to his client, when the insurer proves the breach is the proximate cause of damages to the insurer. Sentry Select Insurance Company v. Maybank Law Firm, LLC, 2018 WL 2423694 (S.C. 2018), reh'g granted, (Aug. 9, 2018) and opinion superseded on reh'g, 2019 WL 1119977 (S.C. 2019).

Although an insurer may bring a direct malpractice action against the attorney hired to represent its insured, if the interests of the insured client are the slightest bit inconsistent with the insurer's interests, there can be no liability of the attorney to the insurer; whether there is any inconsistency between the insured client's and the insurer's interests in the circumstances of an individual case is a question of law to be answered by the trial court. Sentry Select Insurance Company v. Maybank Law Firm, LLC, 2018 WL 2423694 (S.C. 2018), reh'g granted, (Aug. 9, 2018) and opinion superseded on reh'g, 2019 WL 1119977 (S.C. 2019).

Where insured sought to hold insurer liable because attorney it provided for her failed to secure and timely designate experts to testify in her favor on issues of causation and amount of damages, her claim for breach of contract against insurer arising out of attorney's allegedly deficient representation had no basis in law; insured had identified no pleaded facts that would take her claim outside rule that liability insurer is not ordinarily vicariously responsible for conduct of independent attorney it selects to defend insured. In re Farmers Texas County Mutual Insurance Company, 621 S.W.3d 261 (Tex. 2021).

[END OF SUPPLEMENT]

Footnotes

1 Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 419 A.2d 417 (1980).

2 Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 419 A.2d 417, 424 (1980). *See also* Dynamic Concepts, Inc. v. Truck Ins. Exchange, 61 Cal. App. 4th 999, 71 Cal. Rptr. 2d 882 (4th Dist.), as modified, (Mar. 27, 1998) and review denied, (June 10, 1998) (defense counsel appointed by insurer would be subject to malpractice liability to insured if counsel favors interests of insurer over the insured); Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406, 415, 28 A.L.R.3d 368 (1st Dist. 1968) (attorney who attempts a dual relationship without making the required full disclosure is civilly liable to the client who suffers loss caused by the lack of disclosure).

See also Kroll & Tract v. Paris & Paris, 72 Cal. App. 4th 1537, 86 Cal. Rptr. 2d 78 (4th Dist. 1999) (public policy precludes filing of cross claim for indemnity against the insured's personal counsel by defense counsel appointed by insurer and who was sued by the insured for malpractice); Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker, 82 Cal. App. 4th 768, 98 Cal. Rptr. 2d 419 (2d Dist. 2000), review denied, (Nov. 1, 2000) (defense counsel paid by insurer may not seek indemnity from insurer's monitoring counsel relating to insurer's malpractice claim against defense counsel because monitoring counsel was not representing the insured).

3 Atlanta International Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 294 (1991).

4 Atlanta International Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 294, 297 (1991).

5 Atlanta International Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 294, 298 (1991) (citation omitted). *See also* Government Employees Ins. Co. v. Forbes, 1999 WL 371625 (E.D. Pa. 1999) (duty to defend

counsel owes duty of care to the insurer with respect to matters as to which the interests of the insurer and the insured are not in conflict).

See also Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 79 Cal. App. 4th 114, 128–29, 93 Cal. Rptr. 2d 534, 544 (2d Dist. 2000), as modified, (Mar. 17, 2000) and review denied, (May 17, 2000) (defense counsel appointed by insurer owed duty of care to insurer that will support insurer's direct action against counsel for acts in its representation of insured provided the interests of the insurer and insured are not in conflict).

6 National Union Fire Ins. Co. v. Salter, 717 So. 2d 141 (Fla. Dist. Ct. App. 5th Dist. 1998), review denied, 727 So. 2d 908 (Fla. 1999).

7 National Union Ins. Co. v. Dowd & Dowd, P.C., 2 F. Supp. 2d 1013 (N.D. Ill. 1998).

8 *See also* American Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480 (Tex. 1992), reh'g of cause overruled, (Jan. 27, 1993).

9 *See* Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103 (2d Cir. 1991); Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae, 674 N.Y.S.2d 280 (1st Dep't) appeal dismissed, 92 N.Y.2d 962, 705 N.E.2d 1213, 683 N.Y.S.2d 172 (N.Y. 1998); American Continental Ins. Co. v. Weber & Rose, P.S.C., 997 S.W.2d 12 (Ky. Ct. App. 1998), review denied, (Aug. 18, 1999); American Employers' Ins. Co. v. Medical Protective Co., 165 Mich. App. 657, 419 N.W.2d 447 (1988).

10 Ingersoll-Rand Equipment Corp. v. Transportation Ins. Co., 963 F. Supp. 452 (M.D. Pa. 1997).

11 Ingersoll-Rand Equipment Corp. v. Transportation Ins. Co., 963 F. Supp. 452, 454 (M.D. Pa. 1997). *See also* State Farm Mut. Ins. Co. v. Traver, 980 S.W.2d 625 (Tex. 1998).

12 Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 110 Cal. Rptr. 511, 526–27 (2d Dist. 1973); Aetna Cas. & Sur. Co. v. Protective Nat. Ins. Co. of Omaha, 631 So. 2d 305, 306 (Fla. Dist. Ct. App. 3d Dist. 1993), on reh'g in part, (Feb. 8, 1994); Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367, 371, review allowed in part, 323 N.C. 542, 373 S.E.2d 542 (1988) and decision aff'd, 326 N.C. 387, 390 S.E.2d 150 (1990); Feliberty v. Damon, 72 N.Y.2d 112, 531 N.Y.S.2d 778, 527 N.E.2d 261 (1988).

See also Mentor Chiropractic Center, Inc. v. State Farm Fire And Cas. Co., 2000 WL 1473888 (Ohio Ct. App. 11th Dist. Lake County 2000) (defense counsel is independent contractor, and therefore, insurer generally is not liable for counsel's negligence but noting possibility that counsel would not be considered an independent contractor if the insurer interfered with counsel's strategy).

13 *See* National Farmers Union Property & Cas. Co. v. O'Daniel, 329 F.2d 60, 65 (9th Cir. 1964); Smoot v. State Farm Mut. Auto. Ins. Co., 299 F.2d 525, 530 (5th Cir. 1962); Pacific Employers Ins. Co. v. P.B. Hole Co., Inc., 789 F. Supp. 1117, 1122–23 (D. Kan. 1992); Continental Ins. Co. v. Bayless and Roberts, Inc., 608 P.2d 281, 294 (Alaska 1980); Stumpf v. Continental Cas. Co., 102 Or. App. 302, 794 P.2d 1228, 1231–32 (1990).

14 *See* Dynamic Concepts, Inc. v. Truck Ins. Exchange, 61 Cal. App. 4th 999, 71 Cal. Rptr. 2d 882, 888 (4th Dist.), as modified, (Mar. 27, 1998) and review denied, (June 10, 1998) (citing Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (4th Dist. 1984)).

15 *See, e.g.*, Travelers Ins. Co. v. Lesher, 187 Cal. App. 3d 169, 231 Cal. Rptr. 791 (1st Dist. 1986).

End of Document

33 ABA J. Lab. & Emp. L. 55

ABA Journal of Labor & Employment Law
Fall, 2017

Stephanie D. Gironda [a1] Kimberly W. Geisler [aa1]

EMPLOYMENT PRACTICES LIABILITY INSURANCE: A GUIDE TO POLICY PROVISIONS AND CHALLENGING ISSUES FOR INSUREDS AND PLAINTIFFS

Introduction

Employment practices liability insurance (EPLI), in some form, has existed for decades. Stand-alone EPLI policies emerged in the late 1980s with low coverage limits and coverage of only the costs of defending wrongful termination claims. [1] They arose to fill the gap left by general commercial liability policies that typically excluded employment practices claims. [2] In the early 1990s, insurance companies began offering EPLI policies that included both indemnity and defense costs. [3] This coincided with enactment of federal employment laws such as the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), and insurers' expansion of the types of employment claims EPLI covered to include racial discrimination and sexual harassment claims. [4] Large jury verdicts under the Civil Rights Act of ***56** 1991 and renewed public attention to sexual harassment prompted increased sales of EPLI. [5] Today, EPLI is key to risk management for employers of all sizes, although large corporations are more likely to purchase policies. A 2014 analysis of the EPLI market found that forty-one percent of companies with more than one thousand employees had stand-alone EPLI. [6] Small and mid-size companies have also been attracted to EPLI because a single significant adverse verdict could be devastating. [7]

As EPLI becomes more widespread, attorneys need to understand the structure of a typical EPLI policy and, for employment defense counsel specifically, the special challenges of working with EPLI insurers. This Article provides a guide to typical EPLI policy provisions, as well as issues faced by attorneys representing insureds and plaintiffs. Part I offers an overview of policy provisions that employment lawyers typically encounter. Part II discusses issues facing EPLI defense counsel, including tips for avoiding conflicts of interest arising from the "tripartite relationship." Part III examines strategies for plaintiffs' counsel to maximize coverage under EPLI policies.

I. Typical EPLI Policy Provisions

EPLI covers a business and typically extends to officers, employees, and former employees. [8] The filing of a lawsuit, an administrative complaint, an arbitration claim, or a simple demand letter may trigger coverage. [9] Oral demands are usually insufficient to constitute a claim because of uncertainty about proof and timing. [10] Claims first presented as lawsuits are deemed made upon the insured's receipt of the summons or similar process. [11] Standard EPLI policies usually place on the insurer both the duty to indemnify and the duty to defend. [12] The duty to defend is broader than the duty to indemnify because insurers often must defend claims that do not result in damages. ***57** [13] Insurers accept the duty to defend in exchange for the right to control the litigation. [14]

Most EPLI policies are written on a claims-made basis, meaning coverage is triggered when a claim is first made against an insured during the term of the policy. [15] Policies usually require that claims be reported to the insurer as soon as practicable, but not later than a prescribed period of time after policy expiration. [16] Some older policies may have reporting requirements

that are either completely open-ended or require insureds to report claims before the policy expires.[17] Many EPLI policies also contain an awareness provision that allows insureds to report potential claims during the policy period, thereby securing coverage for any actual claim made later.[18]

For attorneys, another important facet of EPLI to consider is that coverage for defense expenses usually is part of the liability limit.[19] Lawyers defending EPLI claims must adequately represent the insured although every billable hour eats into the funds available for indemnification of any future settlement or judgment.[20] Additionally, defense expenses typically are subject to a self-insured retention or deductible.[21] Retention amounts result from negotiations between insurers and policyholders and represent the extent of risk that insureds retain.[22] Many insurers set minimum retentions to avoid exposure to "routine, non-severe claims."[23] There often is an inverse correlation between retention amounts and premiums-- policies with high premiums have lower retentions and vice versa.

EPLI covers damages in excess of the retention arising from covered employment practices.[24] Generally, EPLI covers judgments, settlements, back pay and front pay awards, pre-judgment and postjudgment interest, attorneys' fees and costs, and defense expenses.[25] However, EPLI typically excludes punitive damages (unless coverage ***58** is permitted by applicable state law);[26] fines, penalties, and taxes; amounts due under an employment contract; stock options and deferred compensation; and injunctive relief, such as reinstatement or providing ADA accommodations.[27] To be covered, claims must be made by parties defined in the policy. Depending on the policy, this may exclude leased workers, temporary workers, former employees, or applicants for employment.[28] Most EPLI policies define each "employment practice" as one claim.[29] "Thus, if more than one person makes a claim for the same employment practice, the coverage available under the policy to pay those claims will be limited to a single limit of liability."[30]

Although early EPLI policies covered only wrongful termination claims, policies today include a wider range of employment practices. Beyond constructive and retaliatory discharge, almost all policies cover various forms of discrimination and retaliation, including racial and sexual harassment.[31] Some policies contain a catch-all category covering claims of discrimination based on other protected categories, such as sexual orientation and gender identity--claims not expressly protected by federal statutes but which may be covered by state or local law.[32] Most policies also cover FMLA violations[33] and all forms of harassment.[34] Despite the breadth of modern policies, most still exclude claims based on workers' compensation, the Employee Retirement Income Security Act of 1974 (ERISA), unemployment compensation, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), wage and hour laws,[35] the National Labor Relations Act, and breach of contract.[36]

***59** EPLI policies also regularly exclude claims for bodily injury and property damage, which are more likely covered by general liability policies or other forms of insurance.[37] However, EPLI often covers claims for mental anguish or emotional distress associated with covered losses.[38] EPLI also excludes intentional wrongdoing. While discrimination is an intentional act, the intentional wrongdoing exception is generally limited to situations in which final adjudication establishes intentionality.[39] Because so few employment cases are decided on the merits, this exception is rarely of real consequence.[40] Importantly, this exception will not exclude sexual harassment claims based on an employee-harasser's wrongdoing because any liability the business incurs would be vicarious rather than direct.[41]

EPLI policies vary widely with respect to the duty to defend and the related right to select defense counsel. Insurers that assume the duty to defend normally reserve the right to select defense counsel.[42] Insurers tend to use a pre-approved list of firms or individual attorneys with employment litigation experience in a particular market.[43] Insureds with experience with a particular firm may seek to include a policy provision naming that firm as pre-selected counsel.[44] Even if the insured's preferred counsel is not pre-approved before policy issuance, the insurer may consent to the insured's selection after a claim arises. Nevertheless, insurers are more likely to approve such requests if made during policy negotiations.[45]

II. Issues Facing EPLI Defense Counsel

Counsel EPLI insurers retain to defend employment claims face a variety of challenges arising from the "tripartite relationship" among the attorney, the insurer, and the insured.[46] While all three share ***60** the basic goal of defending the claim, the insurer and the insured may disagree on strategy. For example, an employer seeking to protect its reputation may desire vindication at trial, while the insurer may prefer settling within policy limits to avoid additional defense costs.[47] Sometimes, though, an insured may want to settle a claim quickly to avoid damaging relations with another business, even though the insurer would prefer pursuing litigation vigorously to obtain a more favorable settlement offer.[48] The seeds of potential conflicts between insurers and insureds can be sown at the beginning of litigation, such as when an employee brings both covered and non-covered claims or when the insurer only defends a claim under a reservation of rights. Defense counsel is often placed in the middle, trying to balance the interests of the insurer and the insured. This section surveys common issues employment defense counsel face in the tripartite relationship.

A. Who Is the Client?

Navigation of ethical questions starts with attorneys knowing whom they represent.[49] Depending on the jurisdiction, counsel will have one client (the insured employer) or two clients (both the insured and the insurer).[50] The label "client" comes with several rights, including the right to sue a lawyer for malpractice, to confidentiality, and to conflict-free representation.[51] According to the Restatement (Third) of the Law Governing Lawyers, an attorney-client relationship arises when:

> "(1) [A] person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and (2) either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services ...."[52]

This basic statement of law is not particularly helpful to the attorney attempting to resolve the conflicts posed by the tripartite relationship.

Most states follow the "two-client theory," meaning that "both the insured and the insurer are clients of the defense attorney."[53] The two-client theory is based on the expectation that most cases settle quickly ***61** within policy limits and that conflicts of interest are rare.[54] In many two-client states, substantive law identifies the insured as the "primary" client.[55] A growing minority follow the "one-client theory," making the insured employer the attorney's only client, despite the insurer paying the attorney.[56] The one-client theory seeks clarity for attorneys and alleviation of fears that "allowing an insurer to have an attorneyclient relationship weakens the attorney's loyalty to the insured."[57] It will become even more important for employment attorneys to familiarize themselves with these rules as more states adopt the one-client theory.[58] Accurately identifying the client is critical to navigating the ethical and practical challenges likely to arise in the tripartite relationship.

B. Who Controls the Defense?

Once the client is identified, the attorney, insurer, and insured must determine who controls the defense, a question especially important in two-client jurisdictions.[59] Because insurers pay for the defense, EPLI policies usually allow them to steer the defense and control costs with litigation management guidelines. Such guidelines articulate insurers' rules and procedures for defense counsel to follow:

> Litigation management guidelines typically include a statement of the insurer's goals (quality legal services at the lowest possible cost); a delineation of the respective duties of the claims professionals and the attorney; standard procedures for handling lawsuits, including required periodic consultations with or submissions to the

> claims manager to permit insurer direction of the case; an enumeration of tasks which require the insurer's prior approval ... and staffing guidelines and limitations. [60]

Increasingly, EPLI carriers use internal or external auditors to review legal bills to ensure compliance with guidelines. [61] Such detailed billing guidelines can influence an attorney's litigation judgment. [62] ***62** For example, an attorney may be unlikely to pursue a particular course of action if an insurer refuses to pay for it. [63] EPLI carriers frequently require pre-approval for fundamental litigation tools, such as "(1) hiring an expert; (2) hiring an investigator; (3) taking depositions; (4) videotaping depositions; (5) filing motions; (6) undertaking discovery; (7) expenditures for travel; (8) computerized legal research; and (9) determining how many attorneys may attend depositions, hearings, and trials." [64] These limits present potential conflicts of interest between insurers and insureds that may force attorneys to consider their ethical duties to both parties.

The ABA's Model Rules of Professional Conduct articulate general principles governing litigation management guidelines. Model Rule 1.8(f) states:

> (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 .... [65]

Similarly, Rule 5.4(c) provides that: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." [66]

Because of the potential for conflicts in these situations, several states offer ethical guidance to lawyers operating under litigation management guidelines. [67] Other states more strictly hold that insurer-issued litigation guidelines violate rules of professional conduct. [68] Still other jurisdictions allow litigation guidelines if the insured gives informed consent after full disclosure of the "possible risks and implications of the limitations." [69] Finally, a few states determine whether litigation guidelines are acceptable on a case-by-case basis. [70]

The ABA maintains that litigation guidelines do not usually raise ethical concerns because insureds impliedly consent to them when they contract for insurers to pay costs of defense and indemnification. ***63** [71] However, the ABA advises that attorneys who believe that their professional judgment is impaired by litigation guidelines should consult with both insureds and insurers. [72] In consultation, insurers can agree to withdraw or modify an offending guideline or insureds can agree to limited representation. [73] If the three parties cannot agree on litigation strategy, "the resulting conflict between the insurer's directives and the insured's immediate interests requires the lawyer to withdraw from representing the insurer and to protect the immediate interests of the insured in the litigation." [74]

Insurers' detailed billing requirements may also present problems for insureds and counsel, especially if insurers employ third-party auditors. [75] These issues go beyond mere inconvenience. For example, a bill's detailed time entry may reveal confidential information regarding the insured's representation. [76] Although EPLI policies usually grant the insurer access to the insured's

confidential information, attorneys still owe certain duties to the insured-client under the Rules of Professional Conduct. [77] Model Rule 1.6(a) states that: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation ...." [78]

The ABA has cautioned against "disclosure of confidential information to a third party auditor absent the insured's informed consent." [79] Indeed, disclosure of confidential information to a thirdparty auditor may result in waiver of the attorney-client privilege. [80] However, the ABA "recognizes the propriety of submission of detailed bills and other confidential information to the client's insurer unless ***64** disclosure will adversely affect 'a material interest of the insured.'" [81] In sum, an attorney should consult with the insured and, if possible, get written consent before (1) disclosing information to the insurer that could materially affect coverage, and (2) disclosing information to a third-party auditor. [82]

C. Who Controls Settlement?

Perhaps no part of a case presents such fertile ground for conflicts between the insurer and the insured as settlement. Traditionally, insurers maintained the exclusive right to settle covered claims. [83] However, as the prevalence of employment practices claims grew, employers demanded more control over settlement. [84] In response, insurers began including "hammer clauses" in policies to limit their exposure if employers refuse to accept a settlement the insurer favors. [85] A hammer clause, also known as a "consent to settle" provision, provides that:

> [I]f the insurer can obtain an opportunity to settle, that is, an offer that the plaintiff has stated he or she would accept, then, if the insured refuses to consent to the insurer settling the claim, the insurer's liability under the policy will be capped at the amount of the foregone settlement plus defense expenses incurred through that point in time. [86]

A hammer clause "permits the insured to object to a settlement opportunity, but it requires the insured to bear the cost of making a bad decision." [87] Some hammer clauses are less severe, only requiring insureds "to pay a percentage of the defense costs or indemnity beyond the rejected settlement amount." [88]

Regardless of specific policy language regarding settlement control, defense counsel will face a difficult situation if the insured and the insurer disagree about settlement. Settlement offers may reveal differences in the motives and goals driving the insurer and the insured employer. There is often tension between the insurer's desire to settle "quickly and cost-effectively" and "the insured's desire to fight the claim in employment-related cases, which are often emotional ***65** and viewed as precedent-setting by the insured." [89] In other situations, employers may desire a quick resolution to avoid embarrassment or bad publicity, while insurers want to continue litigation in hope of a lower settlement. [90] The EPLI policy's structure may also lead to conflicts when a settlement offer is made. For example, the insured may be especially resistant to settle if the proposed amount is within the self-insured retention. [91] Similarly, an insurer may want to reject an offer at or near policy limits if a larger judgment seems likely because the insurer's indemnification duty is capped by the policy's coverage limit. [92] However, an insurer's refusal to settle within policy limits may create grounds for a bad faith claim by the insured. [93]

Difficult situations also arise if a settlement proposal includes reinstatement of a terminated employee. [94] While many employment laws, including Title VII and the ADA, permit reinstatement as a form of equitable relief, most terminated workers prefer not to accept reinstatement. [95] Counsel should anticipate conflicts between employers (who must deal with the practical problems of re-integrating a terminated employee) and insurers (who may favor reinstatement to reduce a monetary settlement). If an employee desires reinstatement--or a court order requires it--counsel for insureds should determine if the policy addresses reinstatement and communicate with both the employer and insurer to explain potential conflicts and complications with reinstatement.

Counsel must remember that the insured employer always retains the right to reject the insurer's desired settlement. Even if policy language explicitly gives the insurer the right to settle, an employer may choose to pursue litigation even if doing so amounts to a policy breach. [96] The ABA addressed this situation in a Formal Opinion, stating:

> ***66** If a lawyer for an insured knows that the insured objects to a settlement, the lawyer may not settle the claim against the insured at the direction of the insurer, without giving the insured an opportunity to reject the defense offered by the insurer and to assume responsibility for his own defense at his own expense. [97]

Lawyers who participate in settlement against the insured's wishes have been held liable for malpractice. [98] Even if the insurer has a contractual right to settle without the insured's consent, counsel must be aware of ethical obligations to follow client wishes. [99] A lawyer with an irreconcilable conflict between the insured and the insurer over settlement may have no choice but withdrawal. [100]

As a practical matter, insurers use good business judgment in their relationships with employer-clients. Insurers are likely to negotiate with insureds to reach consensus rather than to enforce hammer clauses. Counsel can lay the groundwork for avoiding these conflicts early on by ensuring that both insureds and insurers have realistic expectations about the litigation's costs and potential outcome. An attorney's early candid assessment of a case's strengths and weaknesses and the employer's potential monetary liability, injunctive relief, and negative publicity in the event of an adverse verdict can inform later negotiations between the insured and the insurer at the settlement stage.

III. Issues Facing Plaintiffs' Counsel

Plaintiffs' attorneys want to maximize the possibility that EPLI will cover a settlement or award. Plaintiffs' counsel need to draft complaints to ensure coverage, but EPLI must also be considered throughout representation because coverage influences negotiation and litigation decisions.

EPLI policy coverage varies, making it critical for plaintiffs' counsel to know coverage limits before litigation begins. Because it is difficult to obtain a defendant's policy before litigation, plaintiffs' counsel should know which claims are generally covered by EPLI in the employer's region. In the alternative (or in addition), plaintiffs' counsel can simply ask defense counsel if the employer is covered. Defense counsel are often willing to reveal the existence of an EPLI policy, although generally not its specific terms, before litigation.

Counsel should carefully draft the complaint to include claims covered by EPLI. Drafting is easy if a plaintiff has a strong claim that insurance will invariably cover, but it becomes more complex if the covered claim is weak. Counsel must weigh the benefits of including ***67** a claim covered by EPLI in the complaint against the negatives of pressing a weaker claim, including possible dismissal. This choice becomes more complicated if the covered claim arises under federal law but the plaintiff would prefer to litigate in state court. Including a federal law claim risks removal to federal court, while foregoing the claim may keep the suit in state court. Of course, the client must be fully informed and understand the reasons for counsel's decisions.

It is imperative for a plaintiff's attorney to obtain the defendant's EPLI policy as soon as possible after litigation commences. Federal Rule of Civil Procedure 26 requires initial disclosure of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action." [101] Thus, counsel may obtain a defendant's EPLI policy very early in litigation under federal rules. In state courts, plaintiffs' counsel should examine state civil procedure rules to determine the earliest time to request a defendant's insurance policy. [102] Until the defendant's EPLI policy is reviewed, plaintiffs' counsel may not know which claims are covered by the policy. In addition, policy limits vary substantially, making it critical for plaintiffs' counsel to know the limits before discussing settlement.

There are other issues for plaintiffs and their lawyers to discuss. If a plaintiff's claims are covered by EPLI and not subject to a policy exception or exclusion, the plaintiff must decide the litigation strategy. One strategy is to exceed the defendant's deductible as quickly as possible so that the plaintiff will have access to a larger settlement from the insurer. Another strategy

is to limit expenses (by restricting motion practice, for example) because defense costs are part of the total policy limits and a plaintiff would prefer that money be allocated to settlement rather than litigation expenses.

Conclusion

The increasing prevalence of EPLI is unsurprising. Federal and state employment claims have increased, as have employers' corresponding desires to protect themselves and their businesses from potentially crippling liability. Attorneys for both insureds and plaintiffs must understand standard EPLI policy terms and the impact of those terms ***68** on coverage. Defense counsel must recognize challenges and ethical issues that may arise in the tripartite relationship among employers, insurers, and defense attorneys. Plaintiffs' attorneys need to recognize how these issues impact their clients' claims from complaint filing through litigation and settlement negotiations.

Footnotes

a1 Stephanie D. Gironda is a veteran counselor and litigator at Wilentz, Goldman & Spitzer, P.A. in Woodbridge, New Jersey. She represents employees in all varieties of employment matters, from negotiation to litigation in both state and federal courts. She also counsels employees on disciplinary matters and disability and religious accommodation requests.

aa1 Kimberly W. Geisler is a partner with Scott Dukes & Geisler, P.C. in Birmingham, Alabama, where she represents management in employment claims before administrative agencies and in state and federal courts. She also provides day-to-day employment advice, Equal Employment Opportunity training, and policy review to companies across a wide range of industries. The authors acknowledge William Stevenson, associate at Scott Dukes & Geisler, P.C., for his assistance in preparing this article.

1 Joseph P. Montelone, *Employment Practices Liability Insurance*, *in* PRACTITIONER'S GUIDE TO THE DEFENSE OF EPL CLAIMS 1, 1 (Ellis B. Murov ed., 2005). The exclusions in early employment practices liability insurance (EPLI) policies have been described as "many and severe." Jeffery P. Klenk, *Emerging Coverage Issues in Employment Practices Liability Insurance: The Industry Perspective on Recent Development*, 21 W. NEW ENG. L. REV. 323, 333 (1999).

2 Klenk, *supra* note 1, at 324.

3 Montelone, *supra* note 1, at 1.

4 *Id.*; Nancy H. Van der Veer, *Employment Practices Liability Insurance: Are EPLI Policies a License to Discriminate? Or Are They a Necessary Reality Check for Employers?*, 12 CONN. INS. L.J. 173, 186 (2005) ("The 1990s also saw an explosion of employment discrimination class action lawsuits that have been resolved through record breaking settlements.").

5 Montelone, *supra* note 1, at 2; *see also* L. Kathleen Chaney, *Employment Practices Liability Insurance*, 30 COLO. LAW. 125, 125 (2001) ("The rapid expansion of the EPLI market is attributable to a steady increase in the frequency and severity of employment related claims over the last decade.").

6 Advisen Insurance Intelligence, *Complete the Picture: A Spotlight on the United States Employment Practices Liability Insurance Market*, at 12 (Sept. 2014), http://www.aig.com/content/dam/aig/america-canada/us/documents/business/industry/advisen-whitepaper-final-brochure.pdf [hereinafter *Complete the Picture*].

7 *Id.*

8 *A Guide to Employment Practices Liability Insurance*, THE WORKING PAPER (Phillips Lytle LLP, New York, N.Y.), Mar. 2007, at 2 [hereinafter *The Working Paper*].

9 Montelone, *supra* note 1, at 8.

10 *Id.*

11 *Id.* at 8-9.

12 Francis J. Mootz, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 70-74 (1997).

13 *Id.* at 70.

14 *Id.* at 74.

15 Writing policies on a claims-made basis "provides two important benefits to the carrier: it minimizes the insurer's responsibility for risks that existed prior to the underwriting and implementation of its loss prevention program, and it allows the insurer to quickly adjust in the face of an unexpected negative loss history by eliminating the long tail of coverage that exists under occurrence-based policies." *Id.* at 58.

16 Montelone, *supra* note 1, at 4.

17 *Id.*

18 *Id.* at 5.

19 Chaney, *supra* note 5, at 127 ("A majority of EPLI policies are 'defense within limits' policies.").

20 *The Working Paper*, *supra* note 8, at 2.

21 Chaney, *supra* note 5, at 127. Generally, the retention includes defense costs and applies on a per claim basis. *Id.*

22 Montelone, *supra* note 1, at 4.

23 *Id.*

24 Chaney, *supra* note 5, at 126.

25 Montelone, *supra* note 1, at 9.

26 In some states, it is unlawful to provide coverage for punitive damages because doing so allows insureds to transfer punishment for their harmful conduct to insurers--defeating the purpose of punitive damages. Chaney, *supra* note 5, at 127.

27 Montelone, *supra* note 1, at 9-10.

28 Chaney, *supra* note 5, at 126.

29 *Id.*

30 *Id.*

31 Montelone, *supra* note 1, at 10.

32 *Id.*

33 *Id.*

34 "Harassment coverage has been broadened to include harassment of a nonsexual nature. Broadened definitions of harassment often include coverage for harassment [] which creates a hostile work environment that interferes with performance, or creates an intimidating, hostile, or offensive work environment." Van der Veer, *supra* note 4, at 190.

35 Some insurers now offer coverage for wage and hour claims with low coverage limits. However, coverage is often limited to defense costs. *See, e.g.*, CRC Group, *State of the Market: Wage and Hour* 1, 6 (Oct. 2016), https://www.crcins.com/docs/professional/WageHour.pdf.

36 Chaney, *supra* note 5, at 127; *The Working Paper*, *supra* note 8, at 2. The exclusion for breach of contract usually does not extend to claims by employees attempting to defeat their at-will status by alleging that an employee handbook constitutes a contract of employment. *See* Montelone, *supra* note 1, at 12.

37 Montelone, *supra* note 1, at 11.

38 *Id.*

39 Van der Veer, *supra* note 4, at 192-93 ("Prohibiting insurance coverage for intentional conduct is based on two premises. First, no individual or entity should profit from his own malfeasance. Second, many courts will declare void any coverage for acts or conduct that harms others.").

40 Montelone, *supra* note 1, at 12.

41 James B. Dolan, Jr., *The Growing Significance of Employment Practices Liability Insurance*, GPSOLO MAG. (Sept. 2005), www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_ solo_magazine_index/employmentinsurance.html ("[T]here is widespread agreement that, if the named insured is held vicariously liable for an employee's wrongful acts, coverage exists for the named insured but not for the wrongdoing employee.").

42 *The Working Paper*, *supra* note 8, at 3.

43 *Id.*

44 *Id.* ("If the employer requests specific counsel during policy negotiations and the counsel is qualified to handle labor and employment matters, most carriers will allow an employer to designate its own counsel.").

45 *Id.*

46 David H. Anderson, *Balancing the Tripartite Relationship Between Defendant, Defense Counsel, and Insurer*, 88 ILL. B.J. 384, 384 (July 2000).

47 *Id.*

48 *Id.*

49 Amber Czarnecki, *Ethical Considerations Within the Tripartite Relationship of Insurance Law--Who Is The Real Client?*, 74 DEF. COUNS. J. 172, 173 (2007) ("The very nature of the tripartite relationship, the hiring of an attorney by a non-party to represent another party to a lawsuit, leaves the defense attorney to wonder whether he has one client or two.").

50 Anderson, *supra* note 46, at 385.

51 Czarnecki, *supra* note 49, at 173-74.

52 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

53 Czarnecki, *supra* note 49, at 174; *see also* ABA Comm'n on Ethics & Prof 'l Responsibility, Formal Op. 96-403, n.2 (1996) ("Today, absent a contrary agreement as to the identity of the client, the prevailing view appears to be that the lawyer represents both the insured and the insurer, at least for some purposes.").

54 Czarnecki, *supra* note 49, at 174-75 (citing Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593 (Ariz. 2001)).

55 ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 08-450, n.19 (2008).

56 Czarnecki, *supra* note 49, at 176.

57 *Id.* (citing Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294 (Mich. 1991)).

58 *Id.* at 177.

59 Amy S. Moats, *A Bermuda Triangle in the Tripartite Relationship: Ethical Dilemma Raised By Insurers' Billing and Litigation Management Guidelines*, 105W. VA. L. REV. 525, 526-27 (2003) ("Problems created by the eternal triangle

are even more difficult in dual-client states because the attorney must fulfill ethical obligations to both the insured and the insurer.").

60 Czarnecki, *supra* note 49, at 182 (quoting Danny M. Howell, *Defense Counsel and Coverage Implications of the Tripartite Relationship*, 13 COVERAGE, no. 7, Nov.-Dec. 2003)).

61 Moats, *supra* note 59, at 532.

62 *Id.* at 533.

63 *Id.*

64 Czarnecki, *supra* note 49, at 182.

65 MODEL RULES OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 1983).

66 MODEL RULES OF PROF'L CONDUCT r. 5.4(c) (AM. BAR ASS'N 1983).

67 Moats, *supra* note 59, at 538-39.

68 *Id.* (collecting authority); *see also In re* Rules of Prof 'l Conduct and Insurer Imposed Billing Rules & Procedure, 2 P.3d 806, 814 (Mont. 2000) (billing guidelines conflicted with counsel's duties to client).

69 Moats, *supra* note 59, at 539.

70 *Id.*

71 Ellis B. Murov, *Ethical Issues Arising Out of Defense of Claims Under Employment Practices Liability Policies*, *in* PRACTITIONER'S GUIDE TO THE DEFENSE OF EPL CLAIMS 303, 306 (Ellis B. Murov ed., 2005) (citing ABA Comm'n on Ethics & Prof'l Responsibility, Formal Opinion 01-421 (2001)).

72 *Id.*

73 *Id.*

74 *Id.*

75 Anderson, *supra* note 46, at 391 ("In addition to house counsel, insurers increasingly have been using outside auditing services to review bills submitted to insurers by defense counsel in an effort to reduce costs.").

76 "Time sheets and '[b]illing records may ... reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided to the insured. This information generally is protected by the confidentiality

rule or the attorney-client privilege or both."' Murov, *supra* note 71, at 307 (quoting ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 01-421 (2001)).

77 Czarnecki, *supra* note 49, at 183.

78 MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 1983).

79 Murov, *supra* note 71, at 307 (citing ABA Comm'n on Ethics & Prof 'l Responsibility, Formal Op. 01-421 (2001)).

80 *Id.* at 308 (citing state ethics opinions); *see also* United States v. MIT, 129 F.3d 681 (1st Cir. 1997) (privileged billing information given to government auditors waived attorney-client privilege).

81 Murov, *supra* note 71, at 307 (quoting ABA Comm. on Ethics and Prof 'l Responsibility, Formal Op. 01-421).

82 *Id.* at 309.

83 Klenk, *supra* note 1, at 339. If the insurance policy gives the insurer the right to control settlement, the insurer may be considered the insured's agent for purposes of settlement. *See* Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828 (3d Cir. 1995) (insured could not prevent liability insurer from entering into settlement agreement on insured's behalf).

84 Klenk, *supra* note 1, at 339.

85 *Id.*

86 Montelone, *supra* note 1, at 7.

87 Klenk, *supra* note 1, at 340.

88 Thomas E. Deer, *Settlement Issues and Strategies for EPL Claims*, *in* PRACTITIONER'S GUIDE TO THE DEFENSE OF EPL CLAIMS 265, 267 n.5 (Ellis B. Murov ed., 2005).

89 *Id.* at 265. Employers who refuse to settle risk losing coverage altogether because the refusal may be deemed a violation of the "cooperation clause" found in most policies. *Id.* at 267.

90 *Id.* at 265-66.

91 Mary Beth Nebel & James K. Horstman, *High Stakes and Hard Decisions: Serving the Tripartite Relationship* 12, http://www.crayhuber.com/articles/tripartite.pdf (last visited Oct. 9, 2017).

92 Murov, *supra* note 71, at 323 ("The insurer ... has nothing to lose by rejecting a policy limits settlement offer and trying the case, as, if it loses, its liability is policy limits *in absence of some other basis of liability*.").

93 *Id.* at 324.

94 *Id.* at 320-22.

95 Joseph E. Slater, *The American Rule That Swallows the Exceptions,* 11 EMP. RTS. & EMP. POL'Y J. 53, 81 (2007) ("[T]he reinstatement remedy is problematic in practice. The majority of workers discriminated against decline reinstatement. One can imagine why a reasonable worker would not wish to return to a company that had illegally fired her, but lengthy delays make this attitude even more likely ....").

96 *See* Nebel & Horstman, *supra* note 91, at 14 ("As a party to the suit, it is always the insured's decision whether to settle or proceed to trial. Choosing to proceed to trial when the insurer wishes to settle may jeopardize the insured's insurance coverage, but this is a choice to be made by the insured nonetheless.").

97 ABA Comm'n on Ethics & Prof 'l Responsibility, Formal Op. 96-403 (1996).

98 Murov, *supra* note 71, at 321 (citing cases).

99 *Id.*

100 *Id.*

101 FED. R. CIV. P. 26(a)(1)(A)(iv).

102 Some state courts require initial disclosure of an insurance agreement without a request by the plaintiff. *See, e.g.*, MINN. R. CIV. P. 26.01. Other state courts require plaintiffs to wait until written discovery to request a copy of a defendant's insurance policy. *See, e.g.*, ALA. R. CIV. P. 26. In New Jersey, the rule is: "A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." N.J. R. 4:10-2(b). Although not stated in the rule, it is common practice in New Jersey to include a request for a defendant's insurance policy at the end of a complaint.

33 ABAJLEL 55

End of Document

NEW HAMPSHIRE BAR ASSOCIATION

Relationship Between Insurance Company and the Lawyer Hired to Represent an Insured

Ethics Committee Advisory Opinion #2018-19/02

ABSTRACT

The Ethics Committee previously issued two opinions addressing the relationship between an insurance company and the lawyer hired by the company to represent its insured. These opinions, which turned on a preliminary question of insurance law that remains unsettled in New Hampshire, are inconsistent with one another. Because it is not within the Committee's purview to decide this question of insurance law, after review, the Committee withdraws one of the opinions and modifies the reasoning of the other. Lawyers are further advised that until this question is resolved by the New Hampshire Supreme Court, they should be clear whom they represent in their engagement letters and in communications with the insurance company.

ANNOTATIONS

There are three schools of thought on the relationship between an insurance company and the lawyer hired by the company to represent its insured: 1. The lawyer always represents the insured alone, while the company is only a third party payor (the "single-client" model); 2. The lawyer always represents both the insured and the company (the "dual-client" model); or 3. The lawyer always represents the insured and may represent the insurance company as well, in appropriate situation, based on agreement of the parties (the Restatement approach).

Ethics Committee Formal Opinion #1993/94-15 (Communication with Insurance Representative Without Consent of Defense Counsel) (N.H. 1993), which concluded that plaintiff's counsel may contact an insurance adjustor without the approval of defense counsel, is incorrect and is withdrawn.

N.H. Bar Ethics Committee Advisory Opinion #2001-01/05 (Release of Billing Statements to Third Party Auditors), (N.H. 2000), which concluded that it was unethical for a lawyer hired to defend an insured to release billing information to third-party auditors hired by the insurance company, is correct, but its reasoning must be modified.

The general rule is that, in the tripartite relationship between an insurance company, its insured, and the lawyer the company hires to defend the insured, the insured is always the lawyer's client.

New Hampshire law is unsettled as to whether, in the tripartite relationship between an insurance company, its insured, and the lawyer that the company hires to defend the insured, the insurance company is also the lawyer's client.

It is not within the purview of the Ethics Committee to determine the nature of the tripartite relationship between an insurance company, its insured, and the lawyer that the company hires to defend the insured.

Until the nature of the tripartite relationship between an insurance company, its insured, and the lawyer that the company hires to defend the insured is resolved by our Supreme Court, lawyers should be clear whom they represent in their engagement letters and in communication with the insurance company.

If an insurance company insists that it must have an attorney-client relationship with the lawyer it hires to defend its insured, then potential conflicts under NH RPC Rule 1.7 may require the lawyer to withdraw in some situations.

Role of Insurance Defense Lawyer

The Committee has been asked to clarify two inconsistent ethics opinions addressing the role of insurance defense counsel. The opinions, described below, although addressing different factual questions, turn on the relationship between the insurance company and the lawyer hired by the company to represent its insured. Courts and Ethics Committees across the country have grappled with this issue, and it continues to generate much controversy and commentary. *See e.g., Restatement (Third) of the Law Governing Lawyers, § 134, cmt. f.*

Three schools of thought have emerged on the question: 1. The lawyer always represents the insured alone, while the company is only a third party payor ("single-client" model); 2. The lawyer always represents both the insured and the company ("dual-client" model); or 3. The lawyer always represents the insured and may represent the insurance company as well, in appropriate situation, based on agreement of the parties (the Restatement approach). *Id.*

1993 Opinion

In a 1993 opinion, *Ethics Committee Formal Opinion #1993/94-15 (Communication with Insurance Representative Without Consent of Defense Counsel)* (N.H. 1993), we concluded that plaintiff's counsel may contact an insurance adjustor without the approval of defense counsel. We believe this opinion is incorrect and withdraw the opinion, for the reasons discussed below.

In the 1993 opinion, the Committee stated that a lawyer for a plaintiff is permitted to contact an insurance adjustor directly without violating the no-contact rule for represented clients (NHRPC 4.2). This conclusion was based on a decision of the Federal District Court for the District of New Hampshire finding that the lawyer retained by an insurance company to provide a defense under a liability policy represents only the insured, and not the insurer. *See Gibbs v. Lappies,* 828 F.Supp. 6, 7 (D.NH 1993). Based on this case, the Committee concluded that New Hampshire was a single-client state.

2000 Opinion

In the second opinion, *N.H. Bar Ethics Committee Advisory Opinion #2001-01/05 (Release of Billing Statements to Third Party Auditors),* (N.H. 2000) we found it unethical for a lawyer hired

to defend an insured to release billing information to third-party auditors hired by the insurance company. After reviewing that opinion, we believe that conclusion still to be correct. We find it necessary, however, to modify our reasoning as discussed below.

In the 2000 opinion, the Committee stated that a lawyer retained by an insurance company to defend its insured generally could not disclose detailed billing statements to third-party auditors hired by the insurer without the insured's informed consent. This conclusion was based on *Dumas v. State Farm Automobile Insurance*, 111 N.H. 43, 49 (1971). In the ethics opinion, we stated that the *Dumas* holding was "consistent with the traditional view that the tripartite relationship between insurer, insurance defense counsel and insured involves dual representation of 'co-clients.'" In other words, the Committee concluded that New Hampshire was a dual-client state.

Analysis

These opinions are inconsistent. The ethical issue in each case turns on a preliminary question of insurance law that remains largely unsettled in New Hampshire: Whether an attorney hired by an insurance company to represent an insured represents only the insured or represents both the company and the insured. We believe that in the 1993 ethics opinion, we may have relied too strongly on the dicta in the *Gibbs* case. Similarly, upon further review, we believe we may have overstated the reach of the holding in the *Dumas* matter in the 2000 opinion.

In *Gibbs*, the issue was whether a law firm could withdraw from its representation of the insured when the hiring insurance company stopped paying for the lawyer's services, due to insolvency. The Court ruled that the primary client in insurance defense is the insured and declined to allow the withdrawal. This is certainly consistent with the general rule that the insured is *always* the client in such situations. *See Restatement (Third) of the Law Governing Lawyers, § 134, cmt. f (*"[A] lawyer designated to defend the insured has a client-lawyer relationship with the insured")*; Gibbs*, 828 F.Supp. at 7.

In so ruling, however, the *Gibbs* Court also remarked that the insurer was not the attorney's client, an observation that was not essential to the district court's holding (and therefore dicta). We believe that the Committee in its 1993 opinion relied too heavily on this dicta to decide that the governing rule in New Hampshire was the single-client rule and thus that the insurance company could never be a client. Were such a broad ruling to be made in a diversity case such as this, the Court would have needed to address the Supreme Court's *Dumas* decision, which it did not.

We note, however, that where the defense lawyer and company agree that the lawyer will represent only the insured, the conclusion of the 1993 opinion that the plaintiff's lawyer may contact the adjustor without permission of defense counsel is correct. However, we withdraw the opinion since the broad reasoning on which that opinion is premised is incorrect.

Upon reconsideration, we also believe this Committee in the 2000 opinion may have read the *Dumas* decision in an overly broad manner. *Dumas* dealt with whether, in a subsequent action between the insured and the insurance company over the failure to settle, the file of the defense lawyer was privileged. The Supreme Court found, as a factual matter, that the lawyer represented both the company and the insured. *Dumas,* 111 N.H. at *49; see also Baker v. CNA Ins. Co.*, 123

F.R.D. 322, 325 (1988) (finding that the defense lawyer had confidential discussions with both the company and the insured and relying on these conversations in finding dual representation). Despite this, the Court allowed the discovery because of the rule that there is no privilege between co-clients in a subsequent action between the two parties. In its 2000 opinion, the Ethics Committee read *Dumas* to have "adopted the 'dual-client' model." In reviewing the 2000 opinion, we believe the Committee may have overreached.

Based on *Dumas*, we believe that the seemingly contradictory conclusion in our 2000 opinion stating that there is "no definitive answer to the nature of the tripartite relationship" is correct and that we should not have proceeded to predict the insurance relationship rule that the New Hampshire Supreme Court would adopt. We also note that *Dumas*, which permitted the insured and insurer to both be clients of the defense lawyer, seems to eliminate the possibility that New Hampshire is a mandatory single-client state. Despite this modification, we believe the rule of the 2000 opinion to be sound since the confidentiality duty on which the opinion was based is the duty to the insured, who will under any test always be a client.

After careful review of the court decisions and committee opinions, we are unable to determine if the New Hampshire Supreme Court, when confronted with the question in the future, would adopt the dual client rule or would follow the Restatement. The Restatement quite sensibly, we think, concludes that in an insurance situation "…a lawyer designated to defend the insured has a client-lawyer relationship with the insured." *Restatement (Third) of the Law Governing Lawyers, § 134, cmt. f.* The comment goes on to conclude that the lawyer can also create a client-lawyer relationship with the company, unless a potential conflict situation is presented. *Id.* Of course the lawyer for the insured even if not representing the company, must remain mindful of the contractual obligation of the insured to cooperate with the insurance company. It is not within our purview, however, to decide this question of insurance law.

Conflict Between Clients – Insured and Insurer

While neither of the opinions in question addressed the following factual issue, we believe it might make this opinion more useful if we highlight the context in which this dilemma most commonly arises and the conflict of interest it can cause. In our experience, this controversy most often presents itself when the insured, often just before a mediation or deposition, reveals to the lawyer facts that would render the insured ineligible for insurance coverage, such as that the defendant engaged in intentional conduct. Whether the lawyer may or must reveal this information to the company, and whether the lawyer must withdraw from the matter depend on the resolution of the relational issue.

If the single-client rule were to be followed in the above factual situation, the lawyer would be barred from disclosing the harmful facts to the insurance company and, unless faced with perjury or other similar ethical issue, could continue defending the insured. However, if New Hampshire were a dual-client state, the lawyer in the example would have duties of communication to the company. Since those duties would conflict with his or her duty of confidentiality to the insured, the lawyer would, at least, need to withdraw from the case since there would be two clients with differing interests. If the state were to adopt the Restatement position, the resolution would depend on what the parties had agreed to.

The Committee wishes it could resolve this issue to provide certainty for the Bar. In light of the holding in *Dumas,* however, we can only suggest that, until this issue is resolved by our Supreme Court, lawyers be clear whom they represent in their engagement letters and in communication with the insurance company. If they want to have a relationship only with the insured, something that will avoid possible future conflicts if the insured provides information such as in the above example, they should make this clear to the insurance company.

The insurance company might not be willing to decline the representation (which would avoid this potential conflicts for the lawyer) since the insurance company also then might not have a malpractice claim if the lawyer makes significant mistakes in the defense or have a claim of privilege for the normal, periodic communications with the insurance company necessary to satisfy the insured's duty to cooperate.

The *Restatement* recognizes these important issues and suggests that even if the lawyer has avoided a relationship with the company, the company should be allowed to sue for malpractice since it is the real party at interest and that all communication in the normal course of the representation should be privileged. *Restatement (Third) of the Law Governing Lawyers, § 134, cmt. f.* There is certainly no settled law supporting this reasonable resolution. *See e.g., Pine Island Farmer's Coop v. Erstad and Reimer,* 649 N.W.2d 444 (Minn. 2002). In light of this, the Committee notes that one way to protect the privilege in single-party representation might be to execute a joint defense agreement with the insurance company.

If the insurance company insists that it also have an attorney client relationship with the lawyer for privilege, malpractice, and communication purposes, then the potential conflicts under NH RPC Rule 1.7 described above may require the lawyer to withdraw in some situation. Such withdrawal could prove costly to the company, especially if the conflict arises late in the litigation, as the company will have to hire a new lawyer for the insured and, to protect its non-coverage claims, one for itself as well.

NH RULES OF PROFESSIONAL CONDUCT:

Rule 1.7
Rule 4.2

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

Ethics Committee Formal Opinion #1993/94-15 (Communication with Insurance Representative Without Consent of Defense Counsel) (N.H. 1993)

N.H. Bar Ethics Committee Advisory Opinion #2001-01/05 (Release of Billing Statements to Third Party Auditors) (N.H. 2000)

SUBJECTS:

Conflicts of Interest
Contact with Represented Parties

- **By the NHBA Ethics Committee**
  This opinion was submitted for publication to the NHBA Board of Governors at its May 6, 2019 meeting.

SN073 ALI-ABA 475

American Law Institute - American Bar Association Continuing Legal Education
ALI-ABA Course of Study
May 15 - 16, 2008

Accountants' Liability

*475 ETHICAL CONSIDERATIONS IN DEFENDING THE INSURED PROFESSIONAL

John H. Eickemeyer
Vedder Price P.C.
New York, New York

*477 Introduction

The majority of lawsuits against accountants are defended by attorneys who have been retained by the accountant's professional liability insurer. For all but the largest national and regional firms — which have insurance programs that permit them to select their own defense counsel and that carry sizeable self-insured retentions (or deductibles) — the policy will provide that the insurer may select counsel, control the defense of the action, require the insured accountant to cooperate and ultimately settle or compromise the action if the insurer sees fit, subject to the insured's consent. In such cases, the insurer, the insured and the appointed counsel embark on what has come to be known as “the tripartite relationship.” Despite a widespread impression that this relationship is always fraught with conflict, it often proceeds without incident or with insurer-insured conflicts being muted and often solved with the application of common sense and compromise.

However, conflicts arise often enough that a substantial body of law has developed concerning the rights and responsibilities of the parties to the relationship. While many courts hold that defense counsel has duties that run to both of the other parties to the tripartite relationship, it still appears to be widely accepted that the attorney's paramount duty of loyalty in the event of a conflict is to the insured client and that counsel may not take actions that will impair the insured's rights, even against the insurer. However, the insurer's right to exert at least some degree of oversight and even cost control is also recognized, subject to the attorney's responsibility to exercise his independent professional judgment with respect to the representation. Counsel who defend accountants under liability policies, or who advise accountants about their liability exposure and insurance coverage, must be sensitive to the various conflicts and issues that can arise in the defense of the insured professional, some of which are outlined herein.

Conflicts Requiring Independent Defense Counsel

When the action against the accountant is a simple negligence claim, not involving allegations of fraud, and where there are no counterclaims, no issues that might affect the accountant's right to coverage under the policy and no real possibility of a verdict in excess of the policy limits, the likelihood of a conflict of interest is slim. The insurer appoints counsel, who proceeds to defend the action and who is paid by the insurer. Ultimately, the insurer will make the decision whether to settle or to go to trial, and the impact on the insured, other than its deductible, the time consumed in assisting in the defense (which is often considerable) and wounded pride (also a very real matter to some), is not terribly material or long-lasting. The financial impact of the case (at least on an out-of-pocket basis) is borne almost entirely by the insurer and the insurer thus makes the significant decisions.

But life is frequently not so simple. Often, the complaint's allegations may include claims for which there is no coverage, such as fraud or other intentional misconduct, as well as *478 covered claims. In such cases, the insurer is generally obligated to defend the entire case, but may not be responsible for all, or any, of the verdict, depending on how the case is resolved. Also, the complaint may seek damages in excess of the policy limits or punitive damages, which are usually excluded from coverage by contract and/or law. These factors and others may lead the insurer to issue a reservation of rights letter, by which

the insurer agrees to provide a defense but reserves its rights to disclaim coverage in the event that one of the policy exclusions proves to be applicable.

In some cases, the conflict posed by the reservation will be so serious that the insurer will be required to provide independent counsel — that is, one not on its "preferred counsel" list — to conduct the insured's defense. While some states still apparently adhere to the view that any reservation by the insurer entitles the insured to select independent counsel [FN1], the majority of states now seem to give the insured a right to independent counsel only when the manner of the defense will necessarily affect the existence of coverage. [FN2] In such cases, the liability and coverage issues are deemed to be inextricably intertwined. Some cases, outside the professional liability context, have referred to this as the "pivotal fact" analysis. *See Executive Aviation, Inc. v. National Ins. Underwriters*, 94 Cal. Rptr. 347 (Cal. App. 1971).

Perhaps the best known case in this area is *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal.App. 3d 358, 208 Cal. Rptr. 494 (Cal. App. 1984). In *Cumis*, the California Court of Appeals explicitly recognized the insured's right to independent counsel where the insured had reserved its rights to disclaim coverage. However, the *Cumis* decision was later modified by statute effectively to restrict the insured's right to independent counsel to situations in which the outcome of the coverage issue may be affected by the acts of defense counsel. Cal. Civ. Code §2860. [FN3] The most obvious example of this is the situation in which both fraud and negligence claims are made, and defense counsel could, theoretically, strive to avoid a negligence verdict by presenting evidence more suggestive of fraud. Where a conflict of this nature arises, most jurisdictions now recognize the insured's right to insist on independent counsel, if it so chooses.

***479** However, the Hawaii Supreme Court took a different approach in *Finley v. Home Insurance Company*, 975 P.2d 1145 (Hawaii 1998). In *Finley*, the insurer had provided defense counsel to the defendants, who had already retained counsel at their own expense, but did so under a reservation of rights. The defendants did not at that time object to the appointment of defense counsel by the insurer, but did continue to employ their own counsel at their own expense. Subsequently, after the plaintiffs settled with defendants and took an assignment of their rights, a claim was instituted against the insurer for the fees of the independent counsel (the insurer had paid the fees of the defense counsel that it had provided) on the ground that the reservation of rights entitled the insured to independent counsel at the insurer's expense.

The Hawaii Supreme Court recognized the potentially divergent economic interests that could result where the insurer reserves its right to disclaim coverage upon the outcome of the case, but nonetheless expressly rejected the *Cumis* approach:

> Upon balancing the respective pros and cons of suggested solutions to the issue, we are convinced that the best result is to refrain from interfering with the insurer's contractual right to select counsel [footnote omitted] and leave the resolution of the conflict to the retained defense counsel. Adequate safeguards are in place already to protect the insured in the case of misconduct. If the retained attorney scrupulously follows the mandates of the Hawaii Rules of Professional Conduct (HRPC), the interests of the insured will be protected. In the event that the attorney violates the HRPC, the insured has recourse to remedies against both the attorney and the insurer.

975 P.2d at 1151-52. The *Finley* court went on to reaffirm that the insured is the retained defense counsel's *sole* client — thereby departing from those cases finding an attorney-client relationship to exist also between defense counsel and the insurer, and rejecting the ABA Formal Opinion. *Id*. at 1152-53. The Court held that this result was required by the HRPC, which allows representation of an insured by counsel paid for by the insurer, but only where the arrangement assures counsel's "professional independence." Dual representation, the Court stated, would be inconsistent with this requirement.

The *Finley* court also held that the insured was entitled to reject the counsel chosen by the insurer but that the insured would then be solely responsible for payment of attorneys' fees. Significantly, however, the Court held that the insurer in that situation would still be responsible for indemnification for a judgment within the scope of the insurance coverage. While this would seem to give the insurer the worst of all possible worlds — being potentially responsible for the payment of the claim but with no voice in, and little oversight of, the defense — the Court did offer the insurer the option of defending without reservation, in which case the insured would not be able to select its own counsel. *Id*. at 1155.

Finley thus puts the attorney squarely in the position of policing the tripartite relationship. The Court expressly noted several times that an attorney who fails to conduct the defense strictly in accordance with his sole duty to the insured will be exposed both to malpractice liability and to professional sanction. While the insurer has a greater entitlement to select defense counsel than under the *Cumis* approach, it may be deprived of that entitlement at the insured's option — though the insured must then pay the cost of its choice. The insured itself has the ultimate choice ***480** of counsel, but only at its own expense, which

in many cases may make the choice illusory. Moreover, the defense counsel retained by the insurer may face some difficult pressures. The *Finley* Court made it clear that counsel's sole obligation and duty is to the insured. However, where counsel has a long-term relationship with the insurer, the situation — though perhaps clear from a legal standpoint — can become awkward at best and contentious at worst, particularly if the scope of counsel's duty is not made clear to all parties at the outset.

Where the insured is entitled to independent counsel at the insurer's expense, there remains the issue of who actually selects the independent counsel and the level of counsel's compensation. The majority rule is that the insured is entitled to select counsel. [FN4] However, some states have chosen a middle ground, allowing the insured to select defense counsel, but allowing the insurer to participate in the selection process as well. For example, Cal. Civ. Code §2860 permits the insured to select counsel, but allows the insurer to require that counsel selected by the insured have certain minimum qualifications, including (1) five years of civil litigation experience, including substantial defense experience in the subject at issue in the case, and (2) errors and omissions coverage. Alaska has a similar statute. [FN5] New Jersey courts are generally a favorable forum for insureds; however, on this issue, they have taken a more draconian approach, allowing the insured to select counsel, but requiring it to bear the cost of defense in the first instance. The insured has a right to reimbursement if it is determined in the underlying action that the claim falls within the insurer's indemnity obligation. *Burd v. Sussex Mutual Insurance Co.*, 267 A.2d 7, 12 (N.J. 1970). The practical effect of this rule likely is to cause insureds more frequently to waive their right to independent counsel.

A few states still permit the insurer to select the "independent" counsel, including Louisiana and Michigan. Washington also allows the insurer to select "independent" counsel, but imposes on the insurer an "enhanced duty of good faith," requiring a through investigation of the claim, retention of competent independent counsel, full information regarding the progress of the case to the insured and refraining from actions that "would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." *Tank v. State Farm Fire & Casualty Co.*, 715 P. 2d 1133, 1137 (Wash. 1986).

Florida allows the insurer to participate in the selection of counsel where a coverage defense is asserted by prohibiting an insurer from denying coverage unless, after a timely reservation of rights, it either declines to defend, obtains a non-waiver agreement from the insured or retains independent counsel agreeable to both it and the insured. Fla. St. §627.426 (1996). Reasonable fees may be agreed upon by the parties or, if no agreement can be reached, established by the court. *Id.*

***481** There is precious little caselaw regarding the fees that the insurer may be required to bear for the independent counsel's defense efforts. One California court (*Center Foundation v. Chicago Insurance Co.*, 278 Cal. Rptr. 13, 21 (Cal. App. 1991)) suggested that an independent counsel's billing practices might be subjected to stricter scrutiny than would be the case where the client pays the bills out of its own pocket. The usual "marketplace" standard might not be permissible in the tripartite context, the court observed, although it offered no specifics regarding the precise practices that would be found acceptable and those that would be objectionable. [FN6]

Who Is The Client and How Many Are There?

One of the most frequently-litigated issues in this area in recent years has been the identity of insurer-appointed counsel's client or clients. There is no doubt that the insured is a client of appointed counsel and that counsel owes the insured a fiduciary duty of loyalty and a duty to exercise due professional care. But to what degree does counsel owe a duty to the appointing insurer? If so, what happens when interests of insured and insurer diverge, as may often happen where there is a reservation of rights or possible grounds for a denial of coverage emerge in the course of a case?

ABA Formal Opinion 96-403 states that absent an express agreement specifying the identity of the lawyer's clients, a lawyer hired by an insurer to defend an insured may be found to have a lawyer-client relationship only with the insured or with both the insurer and the insured. However, there is still substantial support — frequently reaffirmed in the face of insurer efforts to control defense counsel activities or subject bills to outside audit and discussed in the following section — for the traditional view that defense counsel owes its principal duty to the insured. *See, e.g.*, Colorado Bar Association Ethics Committee Formal Opinion 91 (1993)("This Committee has concluded that in the context of this tripartite relationship, the better rule is that the lawyer's client is the insured and not the carrier."); Ohio Board of Commissioners on Grievances and Discipline Opinion 2000-3 (2000).

The issue of whether defense counsel engaged by an insurer has one client or two remains the subject of a sharp split in authority. The majority of the decided cases permit an insurer as well as an insured to maintain a negligence claim against insurer-appointed counsel. Some courts reach this result by finding that insurer-appointed counsel has two clients — the insured

and the insurer — and owes a duty of due care to both. *See, e.g., Spratley v. State Farm Mutual Auto Ins. Co.*, 78 P.3d 603 (Utah 2003); *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 79 Cal. App.4th 114, 93 Cal. Rptr.2d 534 (Cal. App. 2000). *See also Home Indemnity Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322 (9th Cir 1995); *State and County Mutual Fire Ins. Co. v. Young*, 490 F.Supp.2d 741 (N.D. W.Va. 2007). Other courts have found that the insurer has only one client — the insured — but have nonetheless allowed the insurer to maintain a malpractice claim on a theory of subrogation to the insured's rights or on ***482** some other theory. *See, e.g., Atlanta International Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991).

This result makes sense since, in the majority of cases, most of the economic impact of malpractice by defense counsel will be borne by the insurer in the form of an adverse judgment or an unfavorable settlement. But while the dual-client approach to standing appears to predominate at the moment, most courts have also expressed the view that in the case of a conflict between insurer and insured, the insured's interests must take precedence. Indeed, some courts continue to reject any kind of attorney-client relationship between insurer-appointed defense counsel and the insurer. *See Essex Ins. Co. v. Tyler*, 309 F.Supp.2d 1270 (D. Colo. 2004)(finding no attorney-client relationship between insurer-appointed counsel and insurer under Colorado law and rejecting excess insurer's attempt to assert malpractice claim under equitable subrogation theory); *Finley, supra*, 975 P.2d at 1153; *Metropolitan Life v. Aetna Casualty & Surety Co.*, 730 A.2d 61, 65 (Conn. 1999) ("We have long held that even when an insurer retains an attorney in order to defend a suit against its insured, the attorney's only allegiance is to the client."); *Safeway Management General Agency v. Clark & Gamble*, 975 S.W.2d 166 (Tex. App. 1998) ("In Texas, the law is well settled that no attorney-client relationship exists between an insurance carrier and the attorney it hires to defend one of the carrier's insureds").

Two state supreme court cases illustrate courts' efforts to protect the economic interests of the insurer while underscoring that, where the interests of the insurer and the insured diverge, retained counsel's first loyalty must be to the insured — notwithstanding that counsel's long-tern relationship, not to mention its long-term economic interest — might be with the insurer. In *Paradigm Insurance Company v. Langerman Law Offices, P.A.*, 24 P.3d 593 (2001), the Arizona Supreme Court gave at least qualified endorsement to the view that appointed defense counsel can have duties to both insured and insurer. Langerman was retained by the insurer (Paradigm) to defend a physician against a malpractice claim. After Langerman was forced to withdraw because of a conflict, the new appointed counsel discovered that primary coverage for the physician was available from another insurer; however, the other insurer rejected the tender of the claim as untimely and Paradigm was forced to settle the claim using its own funds. When Langerman sought his fees from Paradigm, the insurer brought a malpractice counterclaim against him for failing to advise it of the existence of the alternative coverage.

The trial court dismissed Paradigm's claim on summary judgment because it believed there was no attorney-client relationship between Langerman and the insurer who had appointed him. However, the intermediate appellate court reversed. The Arizona Supreme Court affirmed the reversal, though it declined to find that the appointed defense counsel always had an attorney-client relationship with the appointing insurer, at least until a conflict developed between duties to the insurer and to the insured. The Court believed that it did not need to decide that issue on the facts before it because, it found, the appointing insurer could also be considered a non-client to whom the attorney owes a duty of care. The insurer, the Court reasoned, depends on the appointed defense counsel to defeat, or at least minimize, its exposure to pay damages on behalf of the insured. The Court concluded that

> When an insurer assigns an attorney to represent an insured, the lawyer has a duty to the insurer arising from the understanding that ***483** the lawyer's services are ordinarily intended to benefit both insurer and insured when their interests coincide. This duty exists even if the insurer is a nonclient.

24 P.3d at 602. [FN7] While the court thus sidestepped the dual-client issue, it nonetheless endorsed the concept that appointed defense counsel could owe a duty of care to both insured and insurer, at least where there was no conflict of interest between insurer and insured, or only the potential for such a conflict. But the Court did approvingly refer to earlier Arizona cases which held that where an actual conflict develops between counsel's duty to the insurer and to the insured, his exclusive obligation is to the insured. 24 P.3d at 597.

The Minnesota Supreme Court was confronted with this issue in *Pine Island Farmers Coop v. Erstad & Reimer, P.A.*, 649 N.W.2d 444 (Minn. 2002), in which an insurer and its insured both sought to maintain a malpractice action against the retained

defense counsel. The Minnesota Court rejected the view that defense counsel can never have an attorney-client relationship with the insurer, but held that such a relationship could arise only where defense counsel (or some other attorney) explains the implications, advantages and risks of dual representation to the insured and, after such consultation, the insured expressly consents to the dual representation. 649 N.W.2d at 452. The Court found that, on the facts before it, no such consent had been obtained and so the insurer could not maintain a malpractice claim against defense counsel in its own right. *Id. See also Swiss Reinsurance Am. Corp. v. Roetzel & Andress*, 837 N.E.2d 1215, 1221-23 (Ohio App. 2005)(mere retention of defense counsel by insurer and resulting communications between counsel and insurer held insufficient to create attorney-client relationship between insurer and defense counsel where insurer's interests conflicted with those of insured).

The *Pine Island* approach is one of the most practical and, from counsel's point of view, most helpful approaches yet articulated to what the Court described as the "exceedingly awkward position" in which defense counsel may find itself when the interests of insurer and insured diverge. Responsibilities are made clear from the outset to all parties and the attorney has clear guidance as to how it must proceed in most situations. While there is still the potential for ruffled feathers and, in some cases, bruised feelings that can damage counsel's long-term relationship with the insurer, the attorney can always point to the clear understanding as to where, at least as a matter of law, his loyalties must lie. This approach seems far preferable to the more ambiguous dual-client approach underlying — though not explicitly adopted in — the *Langerman* decision. By forcing the parties to confront the issue of client identity expressly at the outset, it also provides more bright-line guidance than the *Finley* approach, in which the ***484** attorney may be fully aware of the rule established by his local courts but the insurer — perhaps located on the other side of the country — may have a different set of expectations. Defense counsel can only hope that more courts will take a pragmatic approach that sets out the scope of their duties more explicitly rather than leaving them to be the policeman at the middle of the tripartite fracas.

Florida's Rules of Professional Conduct now require attorneys who are engaged to represent a defendant under an insurance policy to ascertain at the outset of the representation who precisely is the client:

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

Rule 4-1.7(e), Florida Rules of Professional Conduct. Florida's rule, and the *Pine Island* court's approach, should serve as a guide to counsel in any jurisdiction about the wisdom of establishing with both insurer and the insured at the outset who shall be considered a client and what the scope of counsel's responsibilities to each party shall be.

The hazards of failing to establish such an understanding at the outset are illustrated by the decision in *Shaya B. Pacific LLC v. Wilson Elser Moskowitz Edelman & Dicker, LLP*, 38 A.D.3d 34, 827 N.Y.S.2d 231 (2d Dept. 2006). In that case, the defendant law firm had been engaged by plaintiff's insurer to defend a personal injury action for an amount far in excess of the primary insurer's policy limits of $1 million. Two years after the action was commenced, defendant attempted to tender the claim to the issuer of a potentially-applicable excess policy (issued to an entity other than plaintiff), which then disclaimed on the grounds of late notice. After a judgment off more than $6 million was entered, plaintiff commenced an action against its former counsel based on the allegedly negligent failure to timely notify the excess carrier.

Defendant argued its duty was limited by the primary insurer's letter to plaintiff accepting coverage while noting the $1 million policy limit and stating that plaintiff may wish to engage separate counsel to act on its behalf with regard to any "potential excess judgments." While the trial court granted defendant's motion to dismiss, the New York appellate court reversed. The court found that the primary insurer's letter also noted that the defense of the matter would be conducted through the defendant firm, and concluded that "the letter, standing alone, failed to resolve conclusively all material issues of fact regarding the scope of the defendant's representation." 827 N.Y.S.2d at 234.

The court expressly rejected defendant's argument that insurer-appointed counsel could never have a duty to advise plaintiff on coverage issues, in effect contending that it was prevented from doing so by an attorney-client relationship with the primary insurer. The court did not decide the issue of whether the insurer was in fact a client here, but found that in these ***485** circumstances there would be no conflict once it was clear the verdict could not be kept within the policy limits. The existence of excess coverage would be of interest only to plaintiff, not to the primary insurer. Advising on the existence of excess

coverage, the court concluded, thus would not violate counsel's duties under the tripartite relationship. 827 N.Y.S.2d at 237-38. [FN8] While this case is somewhat unique, it illustrates that counsel appointed by an insurer to defend a case should make no assumptions about the limitations of its representation unless and until they have been expressly explained to the insured.

Control of the Defense

Professional liability policies typically give the insurer the right to "control" the defense of the claims where it has a duty to defend. Where the insurer defends without reservation and the claim is less than the policy limits, this generally poses few practical problems. Although the insured is still the client — or at least one of the clients — as a matter of law, if the insured bears none of the financial risk of the lawsuit, there is unlikely to be any reason for conflict between insured and insurer over the defense of the claim — and little justification for depriving the insurer of the ability to control a risk that it alone bears. In this situation, defense counsel is likely to be faced with a conflict only if the insured has substantial reputational interests that might be advanced by activities which would otherwise be unnecessary solely from the viewpoint of minimizing liability exposure. Where an insurer is unwilling to undertake such activities but the insured insists, defense counsel is faced with a practical dilemma since he may be obligated to undertake the activities in order to further the objectives of his insured client but may not be assured of payment by the insurer. These reputational interests can also become an issue in attempting to settle insured claims, as discussed below.

However, where a conflict does exist, and particularly where independent counsel has been selected, the issue of control over the defense is far more complex. One principle is well-established: where the insured is entitled to independent counsel, even if selected by the insurer, the insurer must relinquish its right to control the defense of the claim. The insurer is still generally free, though, to appoint its own counsel to participate in the litigation on its behalf, although this participation probably extends only to coverage-related issues, and may not involve any actual control over the defense.

Regardless of who appoints defense counsel, though, counsel may face ethical issues arising from the insurer's cost-control efforts. Recently, there has been considerable debate over the extent to which (a) attorneys may ethically agree to abide by insurer-issued "guidelines" for defense counsel that they retain, and (b) may allow their bills to be scrutinized by outside auditing services retained by the insurer. Several states initially addressed these issues through ethics opinions.

***486** A Massachusetts professional ethics committee weighed these issues in Bar Opinion No. 00-4, issued in 2000. The opinion considered insurer "litigation guidelines" that purported to restrict certain activities to be undertaken by the insurer-retained counsel and required that certain activities, such as preparation of deposition notices, be handled by paralegals. While the Rules of Professional Conduct clearly allow the imposition of certain limits on defense counsel's activities, the Committee noted in particular that the rules forbid an attorney to allow a person paying the cost of legal services provided for another to direct the attorney's professional judgment in providing such services. After quoting several provisions of the Rules, the Committee noted that they offer "no guidance as to what is ethically acceptable." The Committee therefore attempted to provide some guidance with respect to particular activities. With respect to the use of paralegals, the Committee noted that the attorney is ultimately responsible for determining whether a particular task can properly be delegated to a paralegal. It added that this is a judgment upon which the "Committee can offer no general opinion." With respect to the deposition notice restriction, the Committee said that in some situations the precise wording of a deposition notice could be sufficiently significant that he could not ethically delegate the task to a paralegal. If the insurer challenged the attorney's judgment in this regard and refused to provide payment, then the attorney should consider "whether the issue is significant enough to warrant withdrawing from the representation."

The Massachusetts Committee also addressed the use of outside auditors to review the insurer-retained attorney's bills. The ethical issue, in the Committee's view, involved disclosure of the "subject" of confidential communications between attorney and client (presumably through descriptions in the bills). The Committee stated that since confidential information may not be disclosed to third parties without the "client's consent after consultation," an attorney may not disclose such information to either the insurer or an outside auditor without first obtaining the client's consent. The Committee opined that the attorney is obligated to inform the insured of the possible ramifications of disclosure and of non-disclosure, including in the latter case the possibility that the insurer may discontinue coverage due to a lack of cooperation. While insurers typically require attorneys to submit bills that describe their activities in detail, with itemizations of each conversation and a reference to the subject of the

conversation, the Massachusetts opinion suggests that at the least, attorneys should not include descriptions of the substance of conversations with their insured clients in bills submitted to the insurer.

A Vermont Advisory Ethics Opinion (No. 98-7) made a distinction between in-house insurer staff members who review attorney bills and outside auditing firms retained by insurers to perform such scrutiny, saying that the "use of outside auditors raises ethical concerns." The Vermont opinion stated that the attorney must obtained the insured's consent before bills possibly containing confidential information may be disclosed to the outside auditor. Noting that obtaining such consent is "highly problematic," the Opinion states that the attorney must make clear to the insured "the kind of information to be found in the billing records, as well as the possible legal effects of the release of such information upon the insured client's rights." Accordingly, the Opinion concluded that an attorney could not provide bills containing confidential information to an outside auditor retained by the insurer. The Opinion did not discuss why disclosure to the insurer would be acceptable whereas disclosure to the outside auditor would not. The Opinion also discussed compliance with insurer litigation guidelines, stating that the attorney "must inform the insured of the [insurer's] demands and/or restrictions with regard to trial preparation." The Opinion concluded that the attorney could not ethically ***487** comply with insurer guidelines in the absence of "the client's full knowledge and consent," and that if the insurer insisted on compliance with the guidelines, the attorney would be required to withdraw from the representation. [FN9]

The Montana Supreme Court addressed the issues raised by insurer guidelines in a declaratory judgment action brought by several defense counsel seeking to determine whether such guidelines violated the Rules of Professional Conduct. *In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 299 Mont. 321, 2 P.3d 806 (2000). The Court found as an initial matter that the insurance contract could not be construed to create a dual-client relationship involving defense counsel, the insured and the insurer:

> We decline to recognize a vast exception to the Rules of Professional Conduct that would sanction relationships colored with the appearance of impropriety in order to accommodate the asserted exigencies of the insurance market.

2 P.3d at 814. Accordingly, the Court found that the insured is the sole client of defense counsel. The Court did note, though, that defense counsel were still required by the Rules to charge reasonable fees and that defense counsel did not have a blank check to escalate litigation costs. The Court also stated that its holding should not be construed to mean that defense counsel need never consult with the insurer or that defense counsel cannot be held accountable for their work. 2 P.3d at 814. However, the Court did not issue any specific guidance for defense counsel trying to figure out what how these generalities applied to any specific situations.

The Montana Court went on to conclude that the guidelines' requirement for pre-approval from the insurer for certain activities by defense counsel violated the Rules of Professional Conduct since it "fundamentally interferes with defense counsels' exercise of their *independent* judgment." 2 P.3d at 815. The Court further found that the pre-approval requirement "creates a substantial appearance of impropriety in its suggestion that it is insurers rather than defense counsel who control the day to day details of a defense." *Id*. Thus, the Court held, counsel who submit to the requirement of prior approval violate their duties under the Rules. 2 P.3d at 817.

***488** Finally, the Montana Court found that while billing information could properly be shared by defense counsel with the insurer, third-party auditors engaged by the insurer to review counsel's bills were outside the "magic circle" that shares a community of interests with the insured since their mission is to find fault with counsel's bills, not to further the representation of the insured. Thus, the court concluded, disclosure of billing information to third-party auditors could not be deemed impliedly authorized. Accordingly, any such disclosure could not properly be made under the Rules of Professional Conduct governing disclosure of client confidences without informed consent by the insured that was made contemporaneously with the disclosure and with the facts and circumstances of which the insured should be aware. 2 P.3d at 821-22. A majority of the states now agree with this approach. [FN10]

In 2001, the American Bar Association's ethics committee issued Formal Opinion 01-421, which dealt at length with the issues facing counsel appointed by an insurer to defend its insured and so also to protect the insurer's interests under the insurance policy. (The Opinion did not expressly deal with situations in which independent counsel had been appointed due to a conflict between insurer and insured.) The Opinion provides that

> If the lawyer reasonably believes her representation of the insured will be impaired materially by the insurer's guidelines or if the insured objects to the defense provided by a lawyer working under insurance company guidelines, the lawyer must consult with both the insured and the insurer concerning the means by which the objectives of the representation are being pursued.

In the event that the insurer does not withdraw its direction and the insured refuses to consent to the limitation on counsel's representation, the Opinion advises, "the resulting conflict implicates Rule 1.7(b) [of the Model Rules] and unless the lawyer is willing to represent the insured without compensation from the insurer, requires the lawyer to terminate the representation of both clients." While, as the Opinion notes, it will be unlikely that some resolution to the impasse cannot be negotiated, in such situations "the lawyer has few alternatives available to him"—an observation that is cold comfort indeed.

Opinion 01-421 further advised insurance defense counsel that they should decline to share confidential billing data with an insurer's outside auditor in the absence of client consent; the committee believed that since disclosure would not be essential to the representation, it could be deemed a waiver of the attorney-client privilege.

The real question in any given case is whether the insurer guidelines will be applied so inflexibly as to lead a reasonable attorney to believe that the interests of the insured are being compromised and that the attorney's professional judgment is being interfered with. Where guidelines are interpreted by the insurer as hard and fast "rules," they are more likely to breed conflicts and to create a perception, if not a reality, of a conflict for defense counsel between his ***489** obligations to the insurer and his duties to the insured. Prior approval for certain defense activities and for the retention of experts in and of itself should not pose a problem. If the insurer fails consistently to permit activities that counsel believes are necessary or delays unduly or unreasonably in approving experts, counsel may have no choice but to challenge the guidelines, to seek to withdraw from the representation or to go forward with the activities it believes are necessary, even at the risk of non-payment by either the insurer or the insured.

The experience of most counsel with most insurers is that guidelines are interpreted and applied reasonably. Even if viewed cynically, insurers have an interest in maintaining a good relationship with their insureds, particularly in a competitive market where new entrants and established insurers are battling for market share. In the majority of cases, insurer management of the insured's defense presents few controversies and any issues that may arise are often resolved without serious conflict. This is especially true where the insurer has extensive experience with professional liability claims and recognizes both the complexities of such claims and the sophistication of many insureds.

However, independent counsel, by definition, operates in a situation in which the insured faces the risk of personal liability. In such situations, the insurer's desire to make and enforce judgments regarding cost-effectiveness can be more problematic. From counsel's point of view, it must be particularly sensitive to insurer efforts to control fees by restricting the defense activities that the lawyer reasonably believes are necessary to protect the insured's interests. In such situations, defense counsel must be prepared to undertake the activities that it believes necessary to defend its client's interests, even if it cannot be assured of payment short of litigating against the insurer. [FN11] The *Finley* court was very clear on this point:

> . . .while the insurer may have a contractual right to select defense counsel, the insurer's desire to limit expenses must yield to the attorney's professional judgment and his or her responsibility to provide competent, ethical representation to the insured. . . . When retained counsel, experienced in the handling of insurance defense matters, is allowed full rein to exercise professional judgment, the interests of the insured will be adequately safeguarded.

975 P.2d at 1154. *See also Givens v. Mullikin*, 75 S.W.2d 383, 394-95 (Tenn. 2002). The bottom line for defense counsel, from an ethical point of view, is that rules of professional conduct, not the insurance contract, provide the last word on the scope of the attorney's obligations and, where an irreconcilable conflict develops between the attorney's obligations to the insured client and the insurer's exercise of the rights it may assert under the insurance policy, ***490** the attorney must undertake the defense activities that she believes are necessary to protect the insured's interests, without regard to whether the insurer is willing to pay.

Information Affecting Both Defense And Coverage

Where there is no serious conflict between the insurer and its insured, the issue of reporting by the defense counsel to the insurer will be uncontroversial. Insurers generally require regular status reports from counsel, including periodic evaluations of the insured's liability exposure. This enables the insurer to gauge its risk and to make determinations such as whether the case should be settled and what defense efforts would likely be cost-effective. This, of course, is only reasonable since, once again, it is the insurer who is bearing virtually all of the risk.

In a conflict situation requiring independent counsel, the question of reporting can become very sensitive and often places counsel in an extremely delicate position. Since the insurer is usually paying the defense bills, and may still wish to contribute to, if not fund entirely, a settlement rather than continue defense expenditures or risk an adverse verdict that may turn out to be covered, it certainly has a legitimate interest in receiving complete information about the case, including defense counsel's candid assessment of the insured's liability exposure. However, the insured has an obvious interest in not having information that may compromise its coverage released to the insurer by its defense counsel.

The simple solution would be to have defense counsel report only to the insurer on matters regarding defense and say nothing about coverage issues. But rarely do issues break down neatly along such bright lines. While most states permit defense counsel to disclose information regarding the defense of the action to the insurer, except that defense counsel may not reveal privileged or confidential information relating to coverage, that is only the beginning of the analysis. Counsel must consider in each case whether the information to be imparted may have some impact on the coverage issues raised by the insurer's reservation. Insurers have occasionally sought disclosure of privileged information that while pertinent to defense issues may also have an impact on coverage, arguing that the "common interest" of insurer and insured overcomes any privilege that might otherwise attach. The majority of the reported decisions have rejected the "common interest" argument, though it has had some success, most notably the Illinois Supreme Court's decision in *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 579 N.E.2d 322 (Ill. 1991). Courts more often have found that the conflict that precipitated the appointment of independent counsel negates any notion of a commonality of interests. These courts reason that since the independent counsel has been appointed to represent the insured and only the insured, there cannot possibly be a common interest that would justify overcoming the traditionally-recognized attorney-client privilege.

Counsel should thus be aware that where there is a conflict between the insurer and the insured with respect to coverage, they may not disclose information that would compromise the insured's coverage rights. *See, e.g.,* *Farmers Insurance Co. v. Vagnozzi*, 675 P.2d 703, 708 (Ariz. 1983). Indeed, even if the insurer has not reserved its rights to deny coverage, defense counsel must take care not to disclose information to the insurer that would lead to the discovery of a hitherto unasserted coverage defense. The best practice for defense counsel in these situations is to discuss any disclosures that might impact on coverage with the insured in ***491** advance. ABA Formal Opinion 01-421 specifies that such any such proposed disclosure to the insurer may only be made after obtaining the informed consent of the insured. The Opinion also discusses the nature and extent of the disclosure to the insured in the following terms:

> "The disclosure to the client-insured in order to obtain informed consent within the meaning of [Model] Rule 1.6 must adequately and fairly identify the effects of disclosure and non-disclosure on the client's interests. Although the Model Rules do not specify the nature of the information that must be told to the client to obtain "consent after consultation," we stated in Formal Opinion 98-411 that in lawyer-to-lawyer consultations, the lawyer seeking his client's permission to consult another lawyer should inform his client of the possibility that privileges may be waived under applicable law and of the potential adverse effect of disclosure on the client's interest in the matter."

The Opinion also suggests that at the outset of a representation under an insurance policy, counsel should consult with the insured about the types of information that will likely have to be disclosed to the insurer in the normal course during the representation and discuss the likely uses and effects of the disclosure.

Conflicts Relating to Settlement

Professional liability insurance policies generally give the insurer the exclusive right to settle or compromise any claim, subject to the insured's consent. [FN12] However, unless the claim is within the policy limits and there is no claim by the insured for its fees (a not uncommon occurrence in professional liability cases), a conflict, and resulting ethical dilemmas, can arise in the settlement context even without the presence of independent counsel.

For example, the presence of an excess claim alone will generally not give rise to a conflict sufficient to require independent counsel. However, once a demand within the policy limits is issued, a potential conflict is obvious since the insured will have an interest in settling within the limits, regardless of the amount, while the insurer's interest will be to get the cheapest settlement possible. If the insurer turns down a settlement within the limits and an excess verdict is later rendered, the insurer runs the risk of a bad faith action by the insured, though such actions are not easily won.

Defense counsel's position in such situations can be extremely difficult. The insurer understandably believes that it is entitled to all relevant information regarding the action in deciding whether to make a settlement. But some of the information that may be important to a settlement determination may also impact on coverage issues. Indeed, it may be in the insured's ***492** interest with regard to settlement to convey certain negative information, but this very information (for example, evidence suggesting fraudulent conduct by the insured) may also endanger the insured's coverage position. This creates a difficult dilemma for defense counsel.

Unfortunately, there is little caselaw to provide guidance. Perhaps the most sensible course, though by no means an easy one, is for defense counsel to inform the insured of the settlement offer and of the insurer's need for complete information in order to evaluate the offer and to advise the insured that provision of such information may have a negative impact on the coverage position. The insured should then be permitted to make whatever choice it wishes about disclosure. For obvious reasons, counsel should document this interchange in writing. However, it is clear that without client consent, privileged or confidential information that may impair the insured's coverage position may not be communicated to the insurer by defense counsel.

Even without a coverage conflict, an offer to settle an excess claim within limits can pose a problem for counsel because of the potential divergence in the parties' interest. This dilemma was considered by the Mississippi Supreme Court in *Hartford Accident & Indemnity Co. v. Foster*, 528 So.2d 255 (1988), which was not a professional liability claim, but which did an involve an excess claim that could have been settled within the policy limits. The court suggested that defense counsel should inform both the insurer and the insured of the settlement offer, but should decline to advise the insured other than to state that it is obviously to his financial advantage that the offer be accepted. Defense counsel should advise the insured to seek independent counsel if there is any "objective reason" for doing so, the court said, though it offered no inkling of what such a reason might be.

The *Foster* court added that the defense counsel should inform the insurer that it is presented with a conflict of interest and has a legal duty to protect the interests of its insured, but probably should refrain from any recommendation, especially if that recommendation might place its insured client in peril. The court unhelpfully concluded that defense counsel's ethical dilemma "would tax Socrates," and suggested that the lawyer, while not prohibited from offering honest evaluations on liability issues, must "scrupulously guard against" urging any course on the insurer that might violate his ethical obligations to the insured client. As the court said in conclusion, "This is a tortuous, perilous path." [FN13]

Although defense counsel may try simply to answer factual questions about witnesses and evidence without recommendations, it is almost unnatural for anyone to provide such information without offering some subjective evaluation. While the safest course for defense counsel may be to refrain from making any recommendation to the insurer, this may not always be in the best interests of the insured in the long run, since it might lead the insurer to decide not to settle because it does not have complete information. Further, withholding a recommendation is definitely unfair to the insurer, which is deprived of the opinion of the person in the best position to provide an informed and accurate evaluation of the insured's prospects at trial. Since ***493** a thorough investigation by the insurer is essential to avoidance of bad faith liability, the inability of defense counsel to respond to requests for an evaluation creates additional difficulties. [FN14]

Insurers can avoid this problem by retaining their own counsel at the outset of the case to monitor its progress and to make an independent evaluation. However, this can significantly increase the insurer's costs since, in order to make a truly thorough investigation and evaluation that is not dependent on the defense counsel's efforts and reports, the insurer's counsel itself may well have to attend certain key proceedings in the case. Insurers will obviously be reluctant to undertake such additional expense except in cases that carry large exposure. Thus, it is unlikely that defense counsel will find a ready solution to their ethical dilemmas, particularly in view of the effort to cut legal costs that pervades all aspects of business today, including the insurance industry.

Professional liability claims also often involve claims by the professional for his fees — indeed, many actions begin this way and provoke malpractice counterclaims. The malpractice plaintiff will rarely be willing to settle the claim yet still pay the professional's fees. The insurer, of course, will often want to settle and have the insured drop its fee claim as part of the settlement. While defense counsel can convey this request, and perhaps even advise that dropping the fee claim would be the wisest course (particularly if there is an excess claim), he should not get into the position of urging this course at the insurer's behest. Quite often, the practicalities of the situation win out and the insured decides that discretion really is the better part of valor. However, where the insured adheres to its fee demand, the wisest course for the appointed defense counsel is to advise

the insured to retain personal counsel to handle the fee claim (which it generally should have done in any event) and let the insured or his personal counsel discuss the matter directly with the insurer's claims handler or independent counsel.

A potential conflict may also develop where the insurer wants to accept a settlement that is largely, if not entirely, within the insured's deductible. If the deductible does not apply to defense costs (or if only a portion of the deductible is available for defense costs), the insurer will certainly have an interest in accepting the settlement in order to stem the flow of legal fees. However, this may not be the insured's point of view, since it is not paying for the defense. This will be particularly true if the settlement is for a relatively small amount and the insured believes the claim is without merit. But at least one case, decided outside the professional liability context, permits an insurer to settle using the insured's money without the insured's consent. *Orion Insurance Co. v. General Electric Co.*, 493 N.Y.S.2d 397 (Sup. Ct. Queens Co. 1985), *aff'd*, 509 N.Y.S.2d 778 (2d Dept. 1986). Since professional liability policies generally require the insured's consent for a settlement, defense counsel may still find himself in an ethical dilemma where a settlement largely or entirely within the insured's deductible is proposed. Unfortunately, there again appears to be little caselaw guidance for counsel. Thus, counsel must once again rely on general principles of professional ethics in determining how to proceed, ***494** bearing in mind that in conflict situations, courts tend to find that counsel's primary responsibility is to the insured rather than the insurer.

Finally, conflicts can develop due to the provision in most professional liability insurance policies requiring that the insured consent to any settlement. This provision recognizes the reputational interest present in professional liability cases which is generally absent in most other types of insured claims. The insured's veto is counterbalanced, though, by another provision that allows the insurer to cap its liability for defense and indemnity at the amount of a settlement it — but not the insured — was prepared to accept plus defense costs accrued to that point. These provisions underscore the importance of defense counsel keeping the insured in the loop throughout the settlement negotiation process, even where the payment will ultimately be funded entirely by the insurer.

Where the insured declines to agree to a settlement acceptable to the insured, defense counsel again may find herself in an awkward position. The policy's provisions and general principles of professional ethics require that the insured's rejection of the settlement be honored. But defense counsel can and probably should make the insured aware that the policy's provisions may limit the insured's ability to continue to have the insurer continue to bear the costs of defense and any possible future judgment or settlement. Defense counsel can also advise as to the problems that may crop up down the road concerning the cost of defense and/or the ability to fund a settlement at a later stage in the case, when the insured's enthusiasm may have waned. However, while defense counsel may recommend the settlement to the insured if she believes it to be in the insured's best interests, and advise about the possible consequences, she cannot convey threats from the insurer to invoke the policy cap. That must be done by the insurer itself or counsel specially retained by the insurer for that purpose.

In many, if not most, cases, the insured's resistance to settlement generally will yield to the practical consideration that it may soon be required to fund the defense and face substantial personal exposure if the proffered settlement is rejected. But when that is not the case, defense counsel may find that the insurer that appointed her is soon out of the case and that she now clearly has only one client — the insured, with whom she or may not have had a prior relationship. In such cases, the insured often chooses to replace defense counsel with another attorney, perhaps one with which it has a prior relationship. If not, though, counsel would be wise to enter into a retainer agreement with the insured that makes clear the scope of the services counsel will provide and the insured's obligation to fund the defense once the cap imposed on the insurer's liability for defense costs has been reached.

[FN1]. *See, e.g., Herbert A. Sullivan, Inc. v. Utica Mutual Insurance Co.*, 788 N.E.2d 522, 539 (Mass. 2003); *State Farm Mut. Auto Ins. Co. v. Ballmer*, 899 S.W.2d 523 (Mo. 1995); *Medical Protective Co. v. Davis*, 581 S.W.2d 25 (Ky. 1979).

[FN2]. *See, e.g., Public Service Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 442 N.Y.S.2d 422 (N.Y. 1981); *Travelers Indemnity Co. of Illinois v. Royal Oak Enterprises, Inc.*, 344 F. Supp.2dy 1358, 1374 (M.D. Fla. 2004); *Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 71 Cal. Rptr.2d 882 (Cal. App. 1998). *See also Twin City Fire Ins. Co. v. Ben Arnold Sunbelt Beverage Co. of S.C.*, 433 F.3d 365 (4th Cir. 2005)(collecting cases on both positions and, considering issue of first impression under South Carolina law, holding that insurer's reservation of rights does not give rise to *per se* conflict entitling insured to defense by independent counsel ay insurer's expense).

[FN3]. Under this statute, the insured is free to waive, in writing, any conflict and agree to a defense by the insurer-appointed counsel.

[FN4]. States whose law has been construed to give the insured the right to select to independent counsel in this situation include Georgia, Illinois, Maryland, Massachusetts, Minnesota, New York, Ohio, Pennsylvania and Texas.

[FN5]. Alaska St. §21.89.100 (1995).

[FN6]. California has sought to avoid disputes over the rates that independent counsel may charge by enacting a statute limiting the insurer's obligation to pay fees to the independent counsel to the rates it normally pays to defense counsel in the relevant area for similar claims, unless the policy provides for a different arrangement. Cal. Civ. Code §2860(c)(1996).

[FN7]. A Virginia federal district court recently held that, while Virginia law would not recognize an attorney-client relationship between an insurer and defense counsel engaged by the insurer to represent an insured, the insurer could nonetheless maintain a malpractice claim as a non-client, as contemplated by Section 51c of the *Restatement (Third) of the Law Governing Lawyers* (2000). *General Sec. Ins. Co. v. Jordan Coyne & Savits, LLP*, 357 F.Supp.2d 951, 957 (E.D.Va. 2005). In this case, the claim was dismissed because of the court's conclusion that the insurer could not demonstrate that it had suffered any damages.

[FN8]. The court did note that "a conflict may have arisen here had the issue concerned the scope or nature of the coverage afforded to the plaintiff by Lloyd's primary policy." 827 N.Y.S. at 237.

[FN9]. Similar conclusions regarding the use of outside auditors have been reached in opinions issued in, *inter alia*, Virginia (Legal Ethics Opinion 1723), Florida (Ethics Opinion 20591), Utah (State Bar Opinion 98-003), South Carolina (Ethics Advisory Opinion 97-22), Alabama (Opinion No. RO-98-02), Kentucky (Opinion E-404), North Carolina (Ethics Opinion 10) and Indiana (State Bar Association Opinion 4 of 1998). In addition, it has been universally held that an insurer-retained attorney may not ethically comply with an insurer's litigation management guidelines where doing so would interfere with the lawyer's exercise of his independent professional judgment. See, e.g., Colorado Bar Association Ethics Committee Formal Opinion 91 (1993); Ohio Board of Commissioners on Grievances and Discipline Opinion 2000-3 (2000); Texas Committee of Professional Ethics Opinion No. 532 (1999); Virginia Committee on Legal Ethics Opinion 1723 (1998).

[FN10]. Czanecki, *Ethical Considerations Within The Tripartite Relationship—Who Is The Real Client?*, 74 Def. Couns. J. 172, 183 n.61.

[FN11]. See also Rule 1.8(f) of the Model Rules of Professional Conduct, which prohibits a lawyer from accepting compensation from a party other than the client except where the client consents and there is "no interference with the lawyer's independence of professional judgment." Of course, if the situation has gotten to the point that litigation between insured/counsel and the insurer is a realistic possibility, there has clearly been a failure by one side or both to manage the conflicts inherent in the independent counsel situation.

[FN12]. The insured's ability to withhold consent is correspondingly limited by the insurer's right to cap its liability at the amount of any settlement offer acceptable to the insurer that is rejected by the insured, plus defense costs accrued to the time of the insured's refusal.

[FN13]. The Mississippi court concluded in this case that the insurer was not guilty of bad faith in refusing to settle based on defense counsel's recommendation that the offer be rejected.

[FN14]. If defense counsel is deemed to be the insured's agent, his refusal to provide a recommendation could conceivably be attributed to the insured and might later damage the insured's case in a bad faith action.

SN073 ALI-ABA 475

End of Document

MVT MA-CLE 5-1

Massachusetts Continuing Legal Education, Inc.

2023
Massachusetts Motor Vehicle Torts: Liability and Litigation
Chapter 5

THE TRIPARTITE RELATIONSHIP OF INSUREDS, INSURERS, AND DEFENSE COUNSEL—THREE VIEWS

Michael F. Aylward, Esq. [FNa]
Morrison Mahoney LLP, Boston
Paul M. Moretti, Esq. [FNb]
Curtin, Murphy & O'Reilly, PC, Boston
Jeffery D. Woolf, Esq. [FNc]
Board of Bar Overseers, Boston

5th Edition 2023

PART I Outside Defense Counsel: Relationship with Insured and Insurer

§ 5.1 INTRODUCTION
§ 5.2 OBLIGATIONS OF THE INSURED
§ 5.2.1 Honesty
§ 5.2.2 Notice
(a) Prompt Notice Delayed
(b) Knowledge of Claim
(c) Late Notice
(d) Cooperation
§ 5.3 OBLIGATIONS OF THE INSURER
§ 5.3.1 Insurer's Right to Disclaim Coverage
(a) Reservation of Rights
(b) Nonwaiver Agreements
(c) Estoppel
(d) Seeking Declaratory Relief
§ 5.3.2 Duty to Defend
(a) Extrinsic Facts
(b) Scope of Duty When Some Claims Are Not Covered
(c) Breach of Duty to Defend
(d) Obligations of Insured Following Insurer's Breach
§ 5.3.3 Insurer's Right to Control Defense
§ 5.3.4 Insurer's Duty to Settle
(a) When Liability Is Reasonably Clear
(b) Insured's Objections to Settlement
§ 5.3.5 Potential Excess Judgments
(a) Offers of Settlement in Excess of Policy Limits
(b) Insurer's Duty to Defend After Offering Policy Limits
(c) Settlement Conditioned on Release
§ 5.4 OBLIGATIONS OF OUTSIDE DEFENSE COUNSEL
§ 5.4.1 Avoiding Early Missteps

§ 5.4.2 Dual Representation
§ 5.4.3 Satisfying Ethical Obligations
§ 5.4.4 Confidential Information
§ 5.4.5 Discovery
§ 5.4.6 Balancing Competing Interests
§ 5.4.7 Withdrawal from Case
§ 5.5 DEFENSE COUNSEL'S ROLE IN VALUING A CASE FOR SETTLEMENT
§ 5.5.1 Viewpoint in Favor of Outside Counsel's Nonparticipation
§ 5.5.2 Viewpoint Against Outside Counsel's Nonparticipation
(a) Obligation to Evaluate the Merits
(b) Further Arguments Against Nonparticipation
(c) Distinguishing Cases in Support of Nonparticipation
§ 5.5.3 Defense Counsel's Competing Obligations
PART II The Ethical Framework

§ 5.6 INTRODUCTION
§ 5.7 CLIENT CONSENT NEEDED FOR WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY
§ 5.8 COST CONTAINMENT MAY AFFECT A LAWYER'S DUTY OF COMPETENT REPRESENTATION
§ 5.9 WHO IS THE CLIENT?
§ 5.9.1 Formation of the Relationship
§ 5.9.2 Conflicts Generally
§ 5.9.3 Confidentiality Generally
§ 5.10 PARTICULAR RULES APPLICABLE TO INSURANCE DEFENSE
§ 5.10.1 Rule 1.2—Scope of Representation
§ 5.10.2 Rules 1.3 and 1.4
§ 5.10.3 Rule 1.6
§ 5.10.4 Rule 1.7—Conflict of Interest
§ 5.10.5 Rule 1.8—Conflicts of Interest: Prohibited Transactions
§ 5.10.6 Rule 1.9—Conflict of Interest: Former Client
§ 5.10.7 Rule 1.13—Organization as Client
§ 5.10.8 Rule 1.16
§ 5.10.9 Rule 2.1—Advisor
§ 5.10.10 Rule 2.3—Evaluation for Use
§ 5.10.11 Rule 3.3 and Rule 4.1
§ 5.10.12 Rule 5.4—Professional Independence of a Lawyer
§ 5.10.13 Rule 5.5—Unauthorized Practice of Law
§ 5.10.14 Rules 7.1 and 7.5—Information About Legal Services
§ 5.11 CONCLUSION
PART III The Legal Framework

§ 5.12 INTRODUCTION
§ 5.13 THE LEGAL FRAMEWORK OF CLAIMS-HANDLING DISPUTES
§ 5.13.1 The Law of Insurance
(a) Determining the Duty to Defend
(b) Losing the Right to Defend
(c) Sources of Conflict
§ 5.13.2 The Law of Professional Responsibility
(a) Protecting Client Confidences
(b) Conflicting Client Responsibilities
(c) Role of Nonclient Payor

§ 5.14 WHO IS THE CLIENT OF DEFENSE COUNSEL?
§ 5.14.1 Rules Governing Client Relationships
§ 5.14.2 Malpractice Actions Based on "Client" Status
(a) Is an Insurer Vicariously Liable for the Conduct of Defense Counsel?
(b) May an Insurer Sue Defense Counsel for Malpractice?
§ 5.15 ETHICAL ISSUES CONFRONTING THE INSURER'S RIGHT TO DEFEND
§ 5.15.1 Insurer Litigation Management Guidelines
§ 5.15.2 Insurer Use of Staff Counsel
§ 5.15.3 Fee Disputes
EXHIBIT 5A—Sample Reservation of Rights Letter
EXHIBIT 5B—Sample Nonwaiver Agreement
EXHIBIT 5C—Sample Complaint for Declaratory Judgment
EXHIBIT 5D—Sample Excess Judgment Letter
EXHIBIT 5E—MBA Ethics Opinion No. 1991-5
EXHIBIT 5F—Preliminary Statement of Office of Bar Counsel
EXHIBIT 5G—Sample Letter Concerning Noninvolvement in Coverage Disputes

Scope Note

This chapter provides three separate views of the complex relationships that exist among insureds, insurers, and defense counsel. The chapter discusses their respective obligations and examines the governing standards from the Massachusetts and Model Rules of Professional Conduct.

PART I Outside Defense Counsel: Relationship with Insured and Insurer [FNa1]

§ 5.1 INTRODUCTION

Before an automobile can be registered in Massachusetts, the owner must purchase four-part compulsory auto insurance coverage. As part of the coverage afforded under the standard auto insurance policy, the insurer selects and pays outside defense counsel to represent the insured in defeating a plaintiff's claims in the event of a lawsuit. Defense counsel's relationship with the insured and the insurer imposes a duty to provide a defense against the plaintiff's claims. However, this triangular relationship may cause defense counsel to question who controls the litigation. Because the typical Massachusetts automobile policy provides that the insurer has "the right to defend any lawsuit" (*see* Massachusetts Automobile Insurance Policy, 2016 edition), the insurer controls the litigation.

Practice Note

Following the implementation of regulatory reforms several years ago, automobile insurers may file their own policy forms with the Division of Insurance. These filings are often based in whole or in part on the 2016 edition of the Massachusetts Automobile Insurance Policy, prepared by the Automobile Insurers Bureau of Massachusetts, but insurers may prepare and file their own policy forms as well. Practitioners should be sure to identify the specific policy issued to the insured for the relevant coverage period.

Notwithstanding insurer control, designated counsel owes the insured the same obligations and loyalty as if personally retained by the insured; counsel must represent the insured zealously within the bounds of the law. *Commonwealth v. Michel*, 381 Mass. 447, 456 (1980). Simultaneously, defense counsel owes the same obligations to the insurer. This representation raises no issue of conflict unless a dispute arises between the interests of the insured and those of the insurer. While the insured and the insurer should be natural allies to defeat the claim, certain aspects of the defense and the development of facts may create a

schism between the insurer and the insured, placing defense counsel in a precarious position. Before discussing these potential conflicts, it is important to understand the obligations of both the insured and the insurer.

§ 5.2 OBLIGATIONS OF THE INSURED

Liability attaches under an automobile insurance policy only when

- an effective policy is in force,
- no exclusion in the policy negates liability,
- the insured promptly notifies the insurer of the accident or loss, and
- the insured cooperates with the insurer.

Absent these factors, an insurer may not be liable under the policy.

§ 5.2.1 Honesty

A policy may be rescinded if it was issued based on fraudulent representations by the insured. Such misrepresentations could include material misstatements about driving history, drivers' ages, and the intended use of the motor vehicle. A misrepresentation is material if it is made with actual intent to deceive or if the matter misrepresented increases the risk of loss. G.L. c. 175, § 186. Generally, if an insured falsely states a fact that would have resulted in an increased premium, the misrepresentation is material, even if the "actual risk of loss" would not have increased. *Barnstable Cty. Ins. Co. v. Gale*, 425 Mass. 126, 128-29 (1997); *Holzberg v. Metlife Auto & Home Ins. Agency, Inc.*, 99 Mass. App. Ct. 1122 (2021) (unpublished decision; text available at 2021 WL 1663633, at *2). However, unless the policy or the renewal application contains an explicit disclosure requirement, an insured need not disclose changes even if those changes are material and increase the insurer's risk of loss. *Quincy Mut. Fire Ins. Co. v. Quisset Props., Inc.*, 69 Mass. App. Ct. 147, 153-54 (2007); *cf. IDS Prop. Cas. Ins. Co. v. Gov't Emps. Ins. Co.*, 985 F.3d 41, 56-58 (1st Cir. 2021).

§ 5.2.2 Notice

The insured must notify the insurer within twenty-four hours of the theft of an automobile or the instance of a hit-and-run accident. For all other claims, prompt notification to the insurer is required. Prompt notice permits an insurer to expedite the claim. *See* *Segal v. Aetna Cas. & Sur. Co.*, 337 Mass. 185, 188-89 (1958). With prompt notice, there is an opportunity to investigate the claim at an early point. *See* *Fireman's Fund Ins. Co. v. Valley Manufactured Prods. Co.*, 765 F. Supp. 1121, 1127 (D. Mass. 1991), *aff'd without op., Fireman's Fund Ins. Co. v. Valley Screw Prods., Inc.*, 960 F.2d 143 (1st Cir. 1992). The memories of the witnesses are still fresh and there is a greater likelihood that the automobile's condition has not changed much since the accident; prompt notice also gives the insurer the prospect to settle or at least to minimize damages. *Fireman's Fund Ins. Co. v. Valley Manufactured Prods. Co.*, 765 F. Supp. at 1127-28.

(a) *Prompt Notice Delayed*

Twenty-four-hour notification may be excused if the insured suffers from a disability that precludes notification. *See* *Royal-Globe Ins. Co. v. Craven*, 411 Mass. 629, 632-33 (1992). Once the disability is removed, however, the insured must notify the insurer "promptly." *Royal-Globe Ins. Co. v. Craven*, 411 Mass. at 631-32. Notice is prompt if it is "as soon as practicable." *See* *Depot Cafe, Inc. v. Century Indem. Co.*, 321 Mass. 220, 223 (1948) (burden on insured to establish that notice was made "as soon as practicable"). An insurer must be notified within a reasonable time under the circumstances. *Segal v. Aetna Cas. & Sur. Co.*, 337 Mass. 185, 187-88 (1958). Thus, in one circumstance, one month's notice may not be prompt, *Brackman v. Am. Emp'rs' Ins. Co.*, 349 Mass. 767, 767 (1965), yet in another, that same time delay may be reasonable in light of the circumstances. *La Pointe v. Shelby Mut. Ins. Co.*, 361 Mass. 558, 564-65 (1972). Whether notice was made in a reasonable time, when the facts are undisputed, is a matter of law. *See* *Depot Cafe, Inc. v. Century Indem. Co.*, 321 Mass. at 224.

(b) *Knowledge of Claim*

Notice to an insurer cannot be obscure. For example, the insured's notice of a claim on the last page of a fifty-seven-page renewal was insufficient to alert the insurer to the claim. *W.R. Grace & Co. v. Md. Cas. Co.*, 33 Mass. App. Ct. 358, 368-69 (1992). Clearly, the notice requirement applies only when the insured knows of a claim or potential claim. *In re Acushnet River & New Bedford Harbor*, 725 F. Supp. 1264, 1278 (D. Mass. 1989), *aff'd in part and rev'd in part,* *Lumbermen's Mut. Cas. Co. v. Belleville Indus., Inc.*, 938 F.2d 1423 (1st Cir. 1991) (actual knowledge prerequisite for notice). The insured's belief that a claim or a potential claim is not viable does not abrogate the duty to notify. *See* *Segal v. Aetna Cas. & Sur. Co.*, 337 Mass. 185, 188 (1958); *Powell v. Fireman's Fund Ins. Cos.*, 26 Mass. App. Ct. 508, 514 (1988). Moreover, an insured may have a duty both to investigate an occurrence that could lead to a claim and to notify the insurer of such occurrence. *See* *Fireman's Fund Ins. Co. v. Valley Manufactured Prods. Co.*, 765 F. Supp. 1121, 1127 (D. Mass. 1991), *aff'd without op., Fireman's Fund Ins. Co. v. Valley Screw Prods., Inc.*, 960 F.2d 143 (1st Cir. 1992).

(c) ***Late Notice***

Failure to notify, alone, typically does not give an insurer an avenue to disclaim coverage. Before an insurer may disclaim coverage for failure to notify, the insurer must show prejudice. *See* G.L. c. 175, § 112; *see also* *Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 280-81 (1980) (burden of proof on insurer to show prejudice). Prejudice requires more than mere failure to notify promptly. *Lighter v. Lumbermens Mut. Cas. Ins. Co.*, 43 Mass. App. Ct. 415, 417 (1997). Length of time, standing alone, is insufficient to establish prejudice. *Darcy v. Hartford Ins. Co.*, 407 Mass. 481, 486 (1990). "This is true even if the delay could be fairly characterized as 'extreme.'" *Lighter v. Lumbermens Mut. Cas. Ins. Co.*, 43 Mass. App. Ct. at 417 (citing *Darcy v. Hartford Ins. Co.*, 407 Mass. at 485). To meet its burden, an insurer must present evidence that "demonstrates that the insurer's interests have been actually harmed." *Darcy v. Hartford Ins. Co.*, 407 Mass. at 486; *see also Lighter v. Lumbermens Mut. Cas. Ins. Co.*, 43 Mass. App. Ct. at 417 ("The insurer bears the burden of identifying precisely how the delay has caused it to suffer prejudice.") (citation omitted). Actual harm may consist of lost opportunities to interview witnesses, unalterable changes to evidence during the period of delay, and other circumstances that render an investigation inadequate. *See* *Hoppy's Oil Serv., Inc. v. Ins. Co. of N. Am.*, 783 F. Supp. 1505, 1508 (D. Mass. 1992) (destruction of evidence in addition to delay). Compare, however, *Royal-Globe Insurance Co. v. Craven*, 411 Mass. 629, 633-34 (1992), for an example wherein prejudice need *not* be shown.

In certain circumstances, acts by the insurer may waive the insurer's right to disclaim for late notice. If an insurer responds to a complaint or a possible default, the insurer cannot later plead failure to notify. *See* *Rose v. Regan*, 344 Mass. 223, 229 (1962); *see also* *Sarnafil, Inc. v. Peerless Ins. Co.*, 418 Mass. 295, 305 (1994) (failure to investigate or failure to act).

(d) ***Cooperation***

It is the insured's duty to cooperate with the "investigation, settlement and defense" of the action. *See* Massachusetts Automobile Insurance Policy, 2016 edition, at 34. As with notice, the purpose of cooperation is to allow the insurer an opportunity to protect its interests and thoroughly evaluate the action. The insured must be candid about the facts and circumstances surrounding an accident. *Fistel v. Car & Gen. Ins. Corp.*, 304 Mass. 458, 460 (1939). This obligation applies not only to acts of the insured but also to a failure to act if such failure impedes the insurer from successfully defending the action.

Again, as in the typical case of lack of notice, an insurer must show prejudice by the failure to cooperate to disclaim coverage. *See* *Darcy v. Hartford Ins. Co.*, 407 Mass. 481, 491 (1990). Although *Darcy* explicitly requires prejudice, an insurer always has had to prove that the breach of cooperation was material and substantial. Acts by the insured sufficient to prove breach of cooperation include the failure to appear at trial, *Foshee v. Ins. Co. of N. Am.*, 359 Mass. 471, 473 (1971), and material misrepresentations, *Williams v. Travelers Ins. Co.*, 330 Mass. 476, 479 (1953).

Although an insured has a duty to cooperate, it is the insurer's duty to seek that cooperation. *Imperiali v. Pica*, 338 Mass. 494, 498-99 (1959). Absent a good-faith and due diligent effort to secure cooperation, an insurer cannot succeed under a breach-of-

cooperation theory. *See* *Darcy v. Hartford Ins. Co.*, 407 Mass. at 491 (inadequate efforts to locate insured). Moreover, an insurer who "exercise[s] dominion over the case at an important point which made a significant and irrevocable change in [the insured's] position without disclaiming liability or reserving rights" waives its right to disclaim for noncooperation. *DiMarzo v. Am. Mut. Ins. Co.*, 389 Mass. 85, 99 (1983). As with notice, an insurer who fails to properly discharge its defense obligation may excuse an insured's lack of cooperation. *Sarnafil, Inc. v. Peerless Ins. Co.*, 418 Mass. 295, 305 (1994). *But see* *Atlas Tack Corp. v. Liberty Mut. Ins. Co.*, 48 Mass. App. Ct. 378 (1999) (insured's breach of voluntary payment clause discharged insurer's defense obligation).

§ 5.3 OBLIGATIONS OF THE INSURER

§ 5.3.1 Insurer's Right to Disclaim Coverage

An insurer is entitled to deny coverage when there is a reasonably debatable question of policy interpretation. *See* *Rischitelli v. Safety Ins. Co.*, 423 Mass. 703, 704 (1996); *Bos. Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 15 (1989). In situations where the insurer has doubt as to the availability of coverage, it can preserve its rights by providing a defense under a reservation of rights or a nonwaiver agreement. By employing either of these two methods, the insurer may defend without being estopped or waiving its right to disclaim coverage. *Shapiro v. State Farm Mut. Ins. Co.*, 355 Mass. 54, 56-57 (1968); *Powell v. Fireman's Fund Ins. Cos.*, 26 Mass. App. Ct. 508, 512 (1988); *see also* *Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc.*, 419 Mass. 462, 468 (1995) (good-faith denial of coverage does not give rise to Chapter 93A liability).

(a) ***Reservation of Rights***

A reservation of rights is usually made in the form of a letter to the insured advising the insured that the insurer reserves its rights to later deny coverage. *Preferred Mut. Ins. Co. v. Vt. Mut. Ins. Co.*, 87 Mass. App. Ct. 510, 516 (2015). See the sample letter included as **Exhibit 5A**, Sample Reservation of Rights Letter. The letter is a unilateral act by the insurer and usually does not require or contemplate a response from the insured. To be effective, the reservation of rights notice must be communicated in a timely manner and must state the reasons for the insurer's reservation. When stating the basis for potentially denying coverage in its initial reservation of rights notice, the insurer should set forth the specific provisions of the policy that it believes would exclude liability for the claim in the circumstances and should include all grounds that may provide a basis for a denial of coverage in the circumstances of the case. Even though other grounds not initially raised will not be deemed waived unless some prejudice is shown, including them in the reservation of rights letter is prudent. *Cf.* *Sheehan v. Commercial Travelers Mut. Accident Ass'n*, 283 Mass. 543, 552-53 (1933). At the least, the insurer should state that it may supplement the notice with other grounds if and when they become known.

Once the insurer delivers the reservation of rights notice, the insurer may then take whatever steps are necessary to protect the insured's rights; the insurer will not be estopped from disclaiming coverage. *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 276 (1970); *French King Realty, Inc. v. Interstate Fire & Cas. Co.*, 79 Mass. App. Ct. 653, 666-68 (2011); *Powell v. Fireman's Fund Ins. Cos.*, 26 Mass. App. Ct. 508, 511-12 (1988).

The rationale for a reservation of rights notice by the insurer to the insured is that, where the insurer has sufficient information to warrant a disclaimer of liability, its continued defense of the lawsuit may lead the insured to rely on its protection when the insured might otherwise have protected himself or herself. *See* *Salonen v. Paanenen*, 320 Mass. 568, 573-74 (1947); *cf.* *Merrimack Mut. Fire Ins. Co. v. Nonaka*, 414 Mass. 187, 189 (1993). In *Salonen*, the insurer defended the insured but reserved its rights under a nonwaiver agreement. In holding that the insurer was not estopped from subsequently disclaiming liability, the *Salonen* court recognized the dilemma confronting an insurance company when it discovers in the course of the defense of an action that it has a probable basis for disclaiming liability. If the insurer continues to defend without taking other action, it risks losing its right to later disclaim coverage. If it severs its connection with the case, it risks incurring liability for breaching its duty to defend. Thus, "[w]here an insurer seasonably notifies its insured that it is continuing to defend the case subject to its right to disclaim later, the insured is in no position to say that he has been misled, and can take the necessary

steps to protect his rights," and the notification will not estop the insurer from subsequently disclaiming liability. *Salonen v. Paanenen*, 320 Mass. at 573.

(b) ***Nonwaiver Agreements***

Although not as common as a reservation of rights, a nonwaiver agreement (see the sample agreement included as **Exhibit 5B**, Sample Nonwaiver Agreement) may be entered into by the insurer with the insured, wherein it is agreed that the insurer will defend without waiving the right to deny liability to the insured. The nonwaiver agreement is a bilateral agreement whereby the insurer agrees to incur the costs of investigation and defense, and the insured acknowledges that the insurer's participation will not operate as a waiver of the insurer's right to deny indemnity. *See* *Salonen v. Paanenen*, 320 Mass. 568, 573 (1947); *O'Roak v. Lloyds Cas. Co.*, 285 Mass. 532, 534-35 (1934); *Liddell v. Standard Accident Ins. Co.*, 283 Mass. 340, 343-44 (1933); *Emp'rs Ins. of Wassau v. George*, 41 Mass. App. Ct. 719, 727-28 (1996).

(c) ***Estoppel***

An insurer that undertakes a defense of the insured after exercising the right to control over an important point in the litigation without notifying the insured that it is reserving its rights or obtaining a nonwaiver agreement may lose its ability to later deny coverage. *Powell v. Fireman's Fund Ins. Cos.*, 26 Mass. App. Ct. 508, 511 (1988); *Sheehan v. Commercial Travelers Mut. Accident Ass'n of Am.*, 283 Mass. 543, 551 (1933); *cf.* *Merrimack Mut. Fire Ins. Co. v. Nonaka*, 414 Mass. 187, 189 (1993). The insurer's continued defense may serve to induce the insured to rely on the insurer's protection. The insurer may be estopped from employing a coverage defense in such circumstances because the insured may be misled, deceived, or prejudiced. Thus, when the insurer believes that the facts ultimately will fall outside the policy provisions, a conflict of interest may arise between the insurer and the insured when the insurer continues to defend the insured (without reservation), and at the same time marshals together evidence to deny coverage. *Cf.* *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 276-77 (1970); *Salonen v. Paanenen*, 320 Mass. 568, 572-73 (1947). When the insurer reserves its rights, however, there is a potential for a conflict of interest. *See* Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds* § 4:20 (West 5th ed. 2008) [hereinafter *Insurance Claims and Disputes*].

> [T]he existence of a reservation of rights does not automatically give rise to a conflict of interest between the insurer and the insured with regard to the conduct of the insured's defense. The only conflict of interest that necessarily arises when the insurer reserves its right later to deny coverage is a conflict of interest between the insurer and the insured with regard to the existence of a duty to indemnify.

Insurance Claims and Disputes § 4:20, at 4-172.

(d) ***Seeking Declaratory Relief***

As stated above, if the allegations of the complaint are "reasonably susceptible" to an interpretation that they state a claim covered by the policy terms, the insurer must undertake the defense. *See* *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677, 681-82 (1964). However, the insurer

> can, by certain steps, get clear of the duty from and after the time when it demonstrates with conclusive effect on the third party that as a matter of fact—as distinguished from the appearances of the complaint and policy—the third party cannot establish a claim within the insurance.

Sterilite Corp. v. Cont'l Cas. Co., 17 Mass. App. Ct. 316, 323 (1983).

A declaratory judgment action is the typical vehicle that insurers employ to make such a demonstration. *See* *Bos. Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 15-16 (1989) ("[T]he availability of an action for declaratory relief should not be ignored by insurance companies. The existence of the duty to defend can be established quickly and efficiently in such an action."); *Sterilite Corp. v. Cont'l Cas. Co.*, 17 Mass. App. Ct. at 323 ("A declaratory judgment action, in which the necessary interests are represented, may serve [to relieve the insurer's obligation to defend]."). See the sample complaint included as **Exhibit 5C**, Sample Complaint for Declaratory Judgment.

§ 5.3.2 Duty to Defend

Under the standard Massachusetts automobile policy, the insurer has not only the right but also the duty to defend claims against its insured. *See* Massachusetts Automobile Insurance Policy, 2016 edition, at 25 ("We have the right to defend any lawsuit brought against anyone covered under this policy .... We also have a duty to defend ...."). Traditionally, the obligation of a liability insurer to defend claims against its insured has been determined by matching the allegations of the complaint with the provisions of the policy. *See* *Vappi & Co. v. Aetna Cas. & Sur. Co.*, 348 Mass. 427, 430-31 (1965); *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677, 681-82 (1964); *Fessenden Sch., Inc. v. Am. Mut. Liab. Ins. Co.*, 289 Mass. 124, 130 (1935). Generally, if the allegations of the complaint are "reasonably susceptible" of stating a claim that would fall within the zone of covered injuries, the insurer must undertake the defense. *Cont'l Cas. Co. v. Gilbane Bldg. Co.*, 391 Mass. 143, 146 (1984); *Vappi & Co. v. Aetna Cas. & Sur. Co.*, 348 Mass. at 430-31. There is no requirement that the allegations of the complaint state a claim specifically within the policy coverage. *Sterilite Corp. v. Cont'l Cas. Co.*, 17 Mass. App. Ct. 316, 319 (1983). The process is one of "envisaging what kinds of loss may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy." *Sterilite Corp. v. Cont'l Cas. Co.*, 17 Mass. App. Ct. at 318 (footnote omitted); *see also* *SCA Serv., Inc. v. Transp. Ins. Co.*, 419 Mass. 528, 531-32 (1995); *Utica Mut. Ins. Co. v. Fontneau*, 70 Mass. App. Ct. 553, 557 (2007) (defense obligation arises on "possibility" and not "probability" of indemnity).

Construing the language of an insurance contract is a question of law. *Assetta v. Safety Ins. Co.*, 43 Mass. App. Ct. 317, 318 (1997). In interpreting insurance policies, courts may "consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." *Assetta v. Safety Ins. Co.*, 43 Mass. App. Ct. at 318 (quoting *Hazen Paper Co. v. U.S. Fid. & Guar. Co.*, 407 Mass. 689, 700 (1990)). Courts will not interpret disputed policy language against an insured when that language is clear and unambiguous, even if it is inconsistent with the authorizing statutory framework. *Hanover Ins. Co. v. Shedd*, 424 Mass. 399, 402-03 (1997).

Similarly, the merits of a claim are not grounds on which an insurer can refuse to defend its insured. *See* *Wolov v. Michaud Bus Lines, Inc.*, 21 Mass. App. Ct. 60, 64-65 (1985); *see also* *Bos. Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 10 (1989) ("[t]he obligation of an insurer to defend is not, and cannot be determined by reference to the facts proven at trial"). It is only necessary to find that a possibility of coverage exists, and any doubt as to the allegations will be resolved so as to trigger the duty to defend. *Sterilite Corp. v. Cont'l Cas. Co.*, 17 Mass. App. Ct. at 319. Moreover, in Massachusetts, exclusions from coverage contained in the policy are strictly construed, and ambiguities are resolved against the insurer. *Vappi & Co. v. Aetna Cas. & Sur. Co.*, 348 Mass. at 431.

(a) ***Extrinsic Facts***

Although the duty to defend is typically determined by the facts alleged in the complaint, extrinsic facts "known or readily knowable by the insurer" can operate to create a duty to defend, even if the allegations of the complaint alone would not give rise to such a duty. *See* *Insurance Claims and Disputes* § 4:3, at 4-71; *see also* *Bos. Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 10-11 (1989) ("the duty to defend is based on facts alleged in the complaint and those facts which are known by the insurer"); *Terrio v. McDonough*, 16 Mass. App. Ct. 163, 167 (1983) ("there is no duty to defend unless facts alleged in the complaint, or known or readily knowable by the insurer, place liability with the coverage of the policy") (dictum). However, extrinsic evidence cannot be used to relieve the insurer of its duty to defend an insured. *See* *Insurance Claims and Disputes* § 4:4, at 4-79; *cf.* *Desrosiers v. Royal Ins. Co. of Am.*, 393 Mass. 37, 40 (1984) (court relied on "known or readily knowable" standard to relieve insurer of its duty to defend in a case involving the tractor-trailer exclusion; however, contested issue was one of indemnity, and the court's reference to the duty to defend dealt with collateral issue).
Intuitively, the phrase "or readily knowable" contemplates that the insurer has an obligation to investigate. However, the insurer is relieved of the duty to investigate when "the allegations lie expressly outside the policy coverage and its purpose." *Terrio*

v. McDonough, 16 Mass. App. Ct. at 168; *see also Insurance Claims and Disputes* § 4:3, at 4-76 n.10 ("[t]he insurer should not, however, be obligated to investigate unless it first has knowledge of some fact indicating that an investigation might disclose information giving rise to a duty to defend").

(b) ***Scope of Duty When Some Claims Are Not Covered***

Occasionally, some of the plaintiff's claims are covered by the insurance policy and some are not. Although not decided in Massachusetts, the general rule is that the insurer is obligated to defend the entire lawsuit, even if some of the claims are not covered. *See* *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 537 (8th Cir. 1970). No case indicates otherwise; rather, the Supreme Judicial Court has suggested that Massachusetts follows the general rule. *GMAC Mortg., LLC v. First Am. Title Ins. Co.*, 464 Mass. 733, 738 (2013) ("the general rule in Massachusetts in the general liability insurance context is that 'an insurer must defend the entire lawsuit if it has a duty to defend any of the underlying counts in the complaint.'") (quoting *Liberty Mut. Ins. Co. v. Metro. Life Ins. Co.*, 260 F.3d 54, 63 (1st Cir. 2001)); *see also* *Marculetiu v. Safety Ins. Co.*, 98 Mass. App. Ct. 553, 561 n.6 (2020). This makes sense because it would be cumbersome and costineffective to have counsel designated by the insurer defend the insured against one count and have privately retained counsel defend the insured against another count when both counts stem from the same set of facts or circumstances. For example, a complaint may have an intentional tort count and a negligence count. Because most policies exclude coverage for acts that are "expected or intended," the intentional tort claim would not be covered. *See, e.g.,* *Newton v. Krasnigor*, 404 Mass. 682, 684 (1989); *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 84-85 (1984). The scope of the insurer's obligation to defend applies to the counts in the complaint that are covered under the policy of insurance as well as to those counts that are not covered. *Simplex Techs., Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 199 (1996) (approving the "in for one, in for all" defense obligation). In such circumstances, most insurers defend subject to a reservation of rights applicable to the claims not covered. *See also* *Liquor Liab. Joint Underwriting Ass'n v. Hermitage Ins. Co.*, 419 Mass. 316, 324 (1995) (insurer who failed to defend cast with burden to prove allocation between covered and noncovered claims). The duty to defend, however, does not extend to the prosecution of a counterclaim, even though the counterclaim may be defensive in nature and connected to the claims being defended. *Mount Vernon Fire Ins. Co. v. VisionAid, Inc.*, 477 Mass. 343, 348-49, 352-53 (2017); *cf. HSBC Bank USA, N.A. v. Morris*, 490 Mass. 322, 330 n.17 (2022) (citing *Mt. Vernon*).

An insurer may be relieved of the duty to defend, however, when the plaintiff files an amended complaint that omits the claims that originally gave rise to the duty. *See, e.g.,* *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 394-95 (2003) (although initial claim was covered under policy in which insurer agreed to defend under reservation of rights, allegations in amended complaint, even when viewed favorably to insured, were not reasonably susceptible of a construction that would bring them within purview of claims covered under policy).

(c) ***Breach of Duty to Defend***

If an insurer unjustifiably refuses to defend the insured and coverage exists, the insurer may be bound by the result, which includes any defense and settlement costs incurred by the insured. *See Palermo v. Fireman's Fund Ins. Co.*, 42 Mass. App. Ct. 283, 290 (1997); *Polaroid Corp. v. Travelers Indem. Co.*, 414 Mass. 747, 762-65 (1993). Additionally, an insurer that breaches its duty to defend will be liable for the reasonable attorney fees incurred by the insured to establish the duty to defend. *Rubenstein v. Royal Ins. Co. of Am.*, 429 Mass. 355, 357-58 (1999); *Preferred Mut. Ins. Co. v. Gamache*, 426 Mass. 93, 95-98 (1997). *But cf. John T. Callahan & Sons, Inc. v. Worcester Ins. Co.*, 453 Mass. 447 (2009) (*Gamache* limited to recovery by insured; does not extend to insurer in successful contribution action against cocarrier). The insurer, however, is not liable for fees incurred by an insured to establish the duty to indemnify. *Wilkinson v. Citation Ins. Co.*, 447 Mass. 663, 672-75 (2006) (court refuses to extend *Gamache* line of cases to duty to indemnify). Moreover, any prejudgment interest due on legal fees begins to run for the purposes of G.L. c. 231, § 6C on the date the insured actually incurred the expense—that is, the date of payment of the legal bills, not the date the insurer refused to defend. *See* *Sterilite Corp. v. Cont'l Cas. Co.*, 397 Mass. 837,

841-42 (1986). Where an insurer commits a breach of its duty to defend and the insured defaults, the insurer is bound by the factual allegations in the complaint in determining whether the insurer has a duty to indemnify. *Creamer v. Arbella Ins. Grp.*, 95 Mass. App. Ct. 56, 59 (2019).

In addition, an insurer that refuses to defend an action against its insured may be liable under the Massachusetts Consumer Protection Act, G.L. c. 93A, if such refusal is unreasonable or where bad faith or ulterior motive on the part of the insurer is proved. *See* *Bos. Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 14-15 (1989); *DiMarzo v. Am. Mut. Ins. Co.*, 389 Mass. 85, 95-97 (1983).

(d) *Obligations of Insured Following Insurer's Breach*

An insured has the responsibility to retain private counsel for defense of the lawsuit if the insurer justifiably refuses to defend because the policy will not cover any ensuing default judgment. A fortiori "[i]f the allegations in the complaint did not give rise to a duty to defend, they will not, by virtue of the entry of a default judgment, give rise to a duty to indemnify." *Insurance Claims and Disputes* § 4:18, at 4-163. There may be circumstances where the duty to defend arises some time after the insurer justifiably refused to defend. For example, the plaintiff may amend the complaint to include facts that "state or adumbrate a claim covered by the policy terms." *Sterilite Corp. v. Cont'l Cas. Co.*, 17 Mass. App. Ct. 316, 318 (1983). In this situation, the insured is obligated to notify the insurer of the amendment and request a defense.

§ 5.3.3 Insurer's Right to Control Defense

Under the standard Massachusetts automobile insurance policy, the insurer has the right to control the insured's defense. Under certain circumstances, however, an insured may reject the defense offered and insist on controlling the defense. For example, if the insurer defends under a reservation of rights, the insured may insist on selecting counsel and controlling the defense, and the insurer must then either waive its coverage defenses and retain control of the defense or reserve its coverage defenses and relinquish control of the defense to the insured. *See* *Emp'rs' Liab. Assurance Corp. Ltd. v. Vella*, 366 Mass. 651, 657 (1975); *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 275-76 (1970); *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677, 685 (1964); *Rose v. Regan*, 344 Mass. 223, 227-29 (1962). If the insurer elects to relinquish control, it must pay a reasonable fee to the independent counsel retained by the insured. *See* *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. at 685. However, the insured is not entitled to independent counsel at the expense of the insurer if the insured acquiesces in being represented by the attorney selected by the insurer. *See* *Emp'rs' Liab. Assurance Corp. v. Vella*, 366 Mass. at 657; *Salonen v. Paanenen*, 320 Mass. 568, 574 (1947). The insured also is not entitled to a reimbursement of defense costs where an insurer offered to defend without a reservation of rights and the insured refused to relinquish control of the litigation. *See* *OneBeacon Am. Ins. Co. v. Celanese Corp.*, 92 Mass. App. Ct. 382, 389-93 (2017).

If the insured insists on controlling the defense following an insurer's reservation of rights, an insurer may be bound by the obligations of any settlement/assignment agreements executed by the insured and the plaintiff, including any interest that may arise from the settlement. *Commerce Ins. Co. v. Szafarowicz*, 483 Mass. 247, 263-66 (2019). Balancing the risk of collusion against the obligations contained in the policy as well as the public policy consideration of encouraging settlement agreements, the *Szafarowicz* court held that an insurer who defends a claim under a reservation of rights is bound by the amount of the judgment arising from the prejudgment settlement/assignment agreement where

- the insurer is given notice of the settlement/assignment agreement and is presented with an opportunity to be heard by the court before judgment enters,
- the insurer contests the judgment, and
- the insured meets the burden of showing that the settlement is reasonable in amount.

Commerce Ins. Co. v. Szafarowicz, 483 Mass. at 265.

The *Szafarowicz* court, however, limited the amount of damages that a plaintiff may recover under a settlement/assignment agreement where an insurer contests coverage.

> Because the consequence of a settlement/assignment agreement is that the plaintiff may collect damages only from the insurer, having released the insured defendants from personal liability, a reasonable settlement amount may not exceed the limits of the insured's potential insurance coverage, because the plaintiff may recover in damages no more than that from the insurer.

Commerce Ins. Co. v. Szafarowicz, 483 Mass. at 266 (citations omitted).

§ 5.3.4 Insurer's Duty to Settle

Insurers have a duty of good faith and fair dealing in the settlement of claims under a contract of insurance. *See Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. 184, 187 (1959). Good faith requires that the insurer make the decision whether to settle a claim within the policy limits or to try the case as it would if no policy limit were applicable to the claim. *Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. at 187. Stated another way, an insurer should not make a decision to try a case on the basis that its liability is limited and it can be indifferent to the consequences. "Good faith also requires that [the insurer] exercise common prudence to discover the facts as to liability and damages upon which an intelligent decision may be based." *Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. at 187 (citations omitted). Thus, the insurer should evaluate the case and assess the likelihood that a judgment might enter against the insured in excess of the policy limits. Based on this evaluation and the facts known or those that should have been known to the insurer that there is a likelihood of an excess judgment, the insurer should attempt to settle the case within the policy limits. The insurer's decision "will not be held to prophesy, but it will not be excused for indifference." *Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. at 187 (citations omitted). The insurer should not ask for any contribution from the insured for a settlement within the policy limits.

In *Hartford Casualty Insurance Co. v. New Hampshire Insurance Co.*, 417 Mass. 115 (1994), the Supreme Judicial Court issued its first statement since *Murach* concerning an insurance company's common law liability for bad faith settlement. In the underlying tort case, a claimant who fell down an elevator shaft sought to recover damages from the owner of the building, who had primary insurance with New Hampshire Insurance Co. and an excess policy with Hartford Casualty Insurance Co. The jury returned a verdict against the insured that was substantially in excess of the $500,000 primary coverage provided by New Hampshire. As a result, Hartford paid $1.5 million and then brought claim against New Hampshire on the basis that New Hampshire had improperly failed to settle the claim within its policy limits. The jury ultimately rejected Hartford's bad faith and negligence theories, and the trial judge rejected Hartford's G.L. c. 93A claim. The Supreme Judicial Court affirmed the judgment in favor of New Hampshire.

The court rejected the argument that an insurer can be liable for bad faith if it fails to settle when the claimant merely proves that "a reasonably prudent insurer, exercising due care, would have settled." The Supreme Judicial Court explained that an insurer's common law duty to settle is measured by a negligence standard.

> The test is not whether a reasonable insurer might have settled the case within the policy limits, but rather whether no reasonable insurer would have failed to settle the case within the policy limits. This test requires the insured (or its excess insurer) to prove that the plaintiff in the underlying action would have settled the claim within the policy limits and that, assuming the insurer's unlimited exposure (that is, viewing the question from the point of view of the insured), no reasonable insurer would have refused the settlement offer or would have refused to respond to the offer.

Hartford Cas. Ins. Co. v. N.H. Ins. Co., 417 Mass. at 121 (footnote omitted).

The court noted that this negligence standard is not significantly different from the good-faith standard that has evolved in previous Massachusetts cases involving the duty to settle. *Hartford Cas. Ins. Co. v. N.H. Ins. Co.*, 417 Mass. at 121.

In addition to a common law duty to settle, insurers have a statutory duty to "effectuate prompt, fair and equitable settlement of [a] claim in which liability has become reasonably clear." G.L. c. 176D, § 3(9)(f); *see also Clegg v. Butler*, 424 Mass. 413, 421 (1997) (duty to settle does not arise until liability has become reasonably clear and liability encompasses both fault and damages). Violation of this duty gives rise to liability under G.L. c. 93A. *See R.W. Granger & Sons v. J & S Insulation, Inc.*, 435 Mass. 66, 75-76 (2001); *Van Dyke v. St. Paul Fire & Ins. Co.*, 388 Mass. 671, 675 (1983); *see also Drywall Sys., Inc. v. ZVI Constr. Co.*, 435 Mass. 664, 668-69 (2002) (discussing insurance cases in reaching conclusion that arbitrator may award multiple damages in Chapter 93A cases). Under that test, a fact finder must "determine whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insurer was liable to the plaintiff." *DeMeo v. State Farm Mut. Auto. Ins. Co.*, 38 Mass. App. Ct. 955, 956-57 (1995); *accord Terry v. Hosp. Mut. Ins. Co.*, 101 Mass. App. Ct. 597, 607 (2022) (quoting *DeMeo* and *Chiulli v. Liberty Mut. Ins., Inc.*, 97 Mass. App. Ct. 248, 255 (2020)). The facts in *DeMeo* concerned a rear-end collision that may have been caused in part by negligence of a car that was not involved in the collision. The court concluded that although the defendant was probably liable to the plaintiff, liability was

not "reasonably clear." The probability that the accident was caused by a third party was as likely as the probability that the defendant solely caused the accident. On this basis, the court ruled that the insurer did not breach a duty to settle.

(a) ***When Liability Is Reasonably Clear***

An insurer has a statutory obligation to "effectuate prompt, fair and equitable settlements" of claims for which "liability has become reasonably clear." G.L. c. 176D, § 3(9)(f). Courts use an objective standard taking into account the totality of the circumstances. Whether liability is reasonably clear depends on "whether a reasonable person with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insurer was liable." *Nyer v. Winterthur Int'l*, 290 F.3d 456, 461 (1st Cir. 2002) (quoting *Demeo v. State Farm Mut. Auto Ins. Co.*, 38 Mass. App. Ct. 955, 956-57 (1995)). Failure to effectuate a settlement of a claim in which liability is reasonably clear is an unfair settlement practice and also an unfair or deceptive act or practice under G.L. c. 93A. *See* *Lazaris v. Metro. Prop. & Cas. Ins. Co.*, 428 Mass. 502, 502 (1998). However, where liability was reasonably clear by the date that the insurer received a G.L. c. 93A demand letter from the plaintiff, but where the percentage of damages attributable to the insurer and another insurer remained the subject of a good-faith disagreement, the extent of the insurer's liability could not, as a matter of law, have been clear at the time the insurer received the demand letter. *See* *Bobick v. U.S. Fid. & Guar. Tr.*, 439 Mass. 652, 659-63 (2003).

(b) ***Insured's Objections to Settlement***

Under the standard Massachusetts automobile insurance policy, an insurer may exercise its own judgment with respect to settlement. No consent by the insured to settle is necessary under the automobile policy. An insurer has "the right to settle any claim or lawsuit as [it sees] fit," even if instructed otherwise by the insured. *See* Massachusetts Automobile Insurance Policy, 2016 edition, at 25.

If, however, the insured requests that the insurer not settle and the insurer respects the request, the insurer should not be held liable to the insured for any excess judgment. *See* *Insurance Claims and Disputes* § 5:3, at 5-26. (This assumes, of course, that there is no excess insurer.) In such a circumstance, the insurer should advise the insured in writing that it has not entered into a settlement at the insured's request and that it is relieved of any obligation for any judgment in excess of the policy limits. Such a scenario is rare and typically occurs only in situations where the insurer intends to offer the policy limits. As a practical matter, if the insurer has the opportunity to settle under the limits of the policy, it will do so and will not run the risk of having to pay the limit because the insured protests. Moreover, with the 2016 edition of the Massachusetts automobile insurance policy and its provision that an insurer can pay the policy limits and relieve itself of the duty to defend (see discussion below), it is unlikely that such a scenario will occur in the future.

§ 5.3.5 Potential Excess Judgments

An insurer should inform the insured of the possibility of an excess judgment as soon as the potential for an excess judgment presents itself. This usually is accomplished by delivering to the insured an "excess judgment letter" (see the sample letter included as **Exhibit 5D**, Sample Excess Judgment Letter) advising of the potential and inviting the insured's personal counsel to participate in the defense of the case. In addition, the insurer should keep the insured informed of settlement negotiations. It is also advisable for designated defense counsel to apprise the insured of the potential for an excess judgment and similarly advise the insured that they may desire personal counsel to participate in the defense of the case.

(a) ***Offers of Settlement in Excess of Policy Limits***

In Massachusetts, an insurer has the duty to attempt to settle a case, even if the plaintiff has not made a demand within the policy limits, if it appears that there is a reasonable risk of an excess judgment. *See* *DiMarzo v. Am. Mut. Ins. Co.*, 389 Mass. 85, 95 (1983). The insurer should initiate settlement negotiations in such circumstances to attempt to reduce the settlement demand to within the policy limits.

(b) ***Insurer's Duty to Defend After Offering Policy Limits***

General Principles

Under liability policies containing a duty-to-defend provision, the question sometimes arises whether an insurer must continue to defend an insured after it has tendered its policy limits. This issue arises in situations where an insurer believes that there is a reasonable likelihood for a judgment in excess of the policy limits and tenders its policy limit to save defense costs.

In *Aetna Casualty & Surety Co. v. Sullivan*, 33 Mass. App. Ct. 154 (1992), the Appeals Court construed a standard Massachusetts automobile insurance policy and held that an insurer had a continuing duty to defend, even though it had tendered its policy limits to the tort plaintiff. The standard policy in *Sullivan* stated that "[o]ur duty to settle or defend ends when we have paid the maximum limits of coverage under the policy." *Aetna Cas. & Sur. Co. v. Sullivan*, 33 Mass. App. Ct. at 155. The court held that this provision permitted the insurer to terminate its defense obligation only "if it should make a payment equal to the maximum policy limits either to settle a claim against the insured or in total or partial satisfaction of a judgment against the insured upon conclusion of the litigation." *Aetna Cas. & Sur. Co. v. Sullivan*, 33 Mass. App. Ct. at 157. In *Sullivan*, the insurer had tendered its policy limits, but there had been neither a settlement of the tort plaintiff's claims nor a judgment against the insured. Consequently, the insurer had a continuing duty to defend.

An insurer's decision to continue to control the defense postverdict through appeal, however, may result in an assessment of postjudgment interest, regardless of policy limits. *See* *Davis v. Allstate Ins. Co.*, 434 Mass. 174 (2001) (majority of courts assign entire postjudgment interest notwithstanding that policy limits may cover only a portion of the judgment).

Modification to Standard Automobile Insurance Policy

In response to *Sullivan*, the standard Massachusetts automobile insurance policy was modified with respect to the duty to defend, effective for policies renewed or issued subsequent to January 1, 1993. Other changes to this language have been made as well. The 2016 edition policy, effective January 1, 2016, provides as follows:

> We have the right to defend any lawsuit brought against anyone covered under this policy for damages which might be payable under this policy. We also have a duty to defend any such lawsuit, even if it is without merit, but our duty to defend ends when we tender, or pay to any claimant or to a court of competent jurisdiction, with the court's permission, the maximum limits of coverage under this policy. We may end our duty to defend at any time during the course of the lawsuit, by tendering, or paying the maximum limits of coverage under the policy, without the need for a judgment or settlement of the lawsuit or a release by the claimant.
>
> We have the right to settle any claim or lawsuit as we see fit. If any person covered under this policy settles a claim without our consent, we will not be bound by that settlement.

Under the 2016 edition policy, an insurer need not offer any defense if a mere tender of the maximum limits of coverage under the policy is made.

Tendering the maximum limits of coverage under the policy has had serious implications where

- there is excess coverage,
- the insured has significant assets, and
- multiple claimants are involved.

(c) *Settlement Conditioned on Release*

A question often arises whether an insurer can insist that a claimant release all claims against an insured when liability has become reasonably clear and the case involves a potential excess judgment. In *Thaler v. American Insurance Co.*, 34 Mass. App. Ct. 639 (1993), *overruled by* *Lazaris v. Metropolitan Property & Casualty Insurance Co.*, 428 Mass. 502 (1998), the Appeals Court held that "insistence on a release by an insurer as a condition of payment of the policy limits where liability of its insured is undisputed and damages clearly exceed the policy limits amounts to an unfair settlement practice." *Thaler v. Am. Ins. Co.*, 34 Mass. App. Ct. at 643. Following *Thaler*, insurers were placed in the uncomfortable position of either facing an unfair settlement practice claim from claimants for demanding a release or facing a lawsuit from an insured for not securing a release. The Supreme Judicial Court resolved this conflict in two separate decisions decided on the same day, *Lazaris v. Metropolitan Property & Casualty Insurance Co.*, 428 Mass. 502 (1998), and *Premier Insurance Co. of Massachusetts v.*

Furtado, 428 Mass. 507 (1998). Interestingly, neither case raised the precise issue created by *Thaler*. Nevertheless, the Supreme Judicial Court took the opportunity to overrule *Thaler* and also clarified the role of the insurer.

Lazaris concerned a motor vehicle accident in which the claimant, a pedestrian, was hit by a car driven by the insureds' son. The insurer had questions concerning liability that were based on road conditions and the dark clothing worn by the claimant, among other issues. The insurer offered to pay the policy limits but demanded release of the claims against the driver. The claimant declined.

General Laws Chapter 176D, § 3(9)(f) provides that an unfair or deceptive act or practice under Chapter 93A occurs when an insurer fails to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." The Supreme Judicial Court held that liability was not ""reasonably clear," and therefore, the insurer did not violate G.L. c. 176D, § 3(9)(f). Even though the case did not involve *Thaler*, the Supreme Judicial Court analyzed the plain meaning of Section 3(9)(f) and overruled *Thaler*, noting the existence of several pending cases challenging the case. *Lazaris v. Metro. Prop. & Cas. Ins. Co.*, 428 Mass. at 504-06. The Supreme Judicial Court distinguished the payment of a claim from the settlement of a claim, noting that "[a] settlement typically involves the 'release or termination of further claims against the tortfeasor.'" *Lazaris v. Metro. Prop. & Cas. Ins. Co.*, 428 Mass. at 504-05 (quoting *MacInnis v. Aetna Life & Cas. Co.*, 403 Mass. 220, 226 (1998)). The Supreme Judicial Court recognized that payment on a policy in exchange for a release may not be fair and equitable when damages exceed policy limits. "[T]he best that the insurance company can do in effectuating settlement is to offer the policy limit in exchange for a release. As we have said, to pay without a release is not a settlement. The claimant can either accept the offer or proceed to trial." *Lazaris v. Metro. Prop. & Cas. Ins. Co.*, 428 Mass. at 506 (footnote omitted). As in *Lazaris, Premier Insurance* involved a motor vehicle accident and a driver other than the vehicle's owner. Also as in *Lazaris*, damages exceeded the policy limits. The driver pleaded guilty to two counts of motor vehicle homicide, and thus, liability was "reasonably clear" within the meaning of Section 3(9)(f). However, liability of the owner was in question, because the driver claimed she operated the car for her own use. The insurer refused to pay the policy limits without releases for both the owner and the driver. Thereafter, the insurer sought a declaration of its obligations from the court. Here, the Supreme Judicial Court found no violation, even applying *Thaler*, because the insurer had a reasonable and good-faith belief that it was not obligated to pay and took affirmative steps to resolve the dispute (the declaratory action). Because the insurer had not challenged *Thaler* in the Superior Court, the Supreme Judicial Court did not accept the insurer's belated challenge on appeal, and thus, it did not apply the rule of *Lazaris*. However, in a footnote, the Supreme Judicial Court stated as follows: "Premier has no obligation to settle as to the insured whose liability is not reasonably clear and would have no obligation to settle as to the insured whose liability is reasonably clear, in the absence of a release, if the rule of the *Lazaris* case were applicable." *Premier Ins. Co. of Mass. v. Furtado*, 428 Mass. at 509 n.5.

The Supreme Judicial Court stated that "[i]f the Legislature wants to require an insurance company, without obtaining a settlement, to pay the policy limits in a case [like this one], it may amend the statute." *Lazaris v. Metro. Prop. & Cas. Ins. Co.*, 428 Mass. at 506.

§ 5.4 OBLIGATIONS OF OUTSIDE DEFENSE COUNSEL

An attorney provided by an insurance company to defend claims against its insured is in a distinct relationship. In the context of a defense provided under the standard Massachusetts automobile policy, defense counsel represents both the insured and the insurer for the purpose of defeating the plaintiff's claims. *See* *McCourt Co. v. FPC Props., Inc.*, 386 Mass. 145, 147 (1982) ("The law firm is attorney for the insured as well as the insurer."); *Imperiali v. Pica*, 338 Mass. 494, 499 (1959) ("[A]n attorney undertaking the defense of the case covered by the policy is an attorney for both the insurer and the insured and owes to each a duty of good faith and due diligence in the discharge of his duties."). In such circumstances, both the insured and the insurer are united for a common purpose, and the attorney's representation of both presents little conflict. This is true even where an insurer's staff legal counsel is retained to defend the policyholder. *See generally* Propriety of Insurer's Use of Staff Attorneys to Represent Insureds, 2 A.L.R. 6th 537 (2005); Restatement (Third) of Law Governing Lawyers § 134 cmts. d, f; reporter's note cmt. f; *see also* ABA Formal Op. 03-430, Propriety of Insurance Staff Counsel Representing the Insurance Company and Its Insureds (July 9, 2003) ("[I]nsurance staff counsel ethically may undertake such representations so long as the lawyers (1)

inform all insureds whom they represent that the lawyers are employees of the insurance company, and (2) exercise independent professional judgment."). However, there are occasions where conflicts arise between the insured and the insurer that present potential conflicts to defense counsel. Some of the common problems are discussed below. Designated defense counsel hired by the insurer to represent the insured in an effort to defeat the plaintiff's claims is to be distinguished from insurance coverage counsel retained to advise the insurer on the availability of insurance coverage and to represent the insurance company against the insured in any ensuing declaratory judgment action.

Under the standard Massachusetts automobile policy, the insurer agrees to provide insurance protection up to the policy limits to the insured, and the insured agrees to pay the premium when due and cooperate with the insurer in the event of accidents or claims. The policy grants the insurer the right to control the defense of the lawsuit and obligates the insurer to pay for the cost of defense. Occasionally, because the duty to defend is broader than the duty to indemnify, *see, e.g.,* *A.W. Chesterton Co. v. Mass. Insurers Insolvency Fund*, 445 Mass. 502, 527 (2005), the insurer will defend a suit, typically under a reservation of rights, for which it believes it has no indemnity obligation. Such cases present a potential pitfall for defense counsel—the insurer would be paying for the defense while the insured would be responsible to satisfy the entirety of any judgment or settlement. Defense counsel would need to advise on resolution while carefully not intruding on the coverage aspects of the case. More common than a coverage dispute under the standard automobile policy is the potential for a judgment in excess of the policy limits, which also presents a potential conflict. The obligations of defense counsel and the potential conflicts of interest in an excess judgment situation are discussed below.

It is important at the outset to identify the fiduciary and ethical obligations of defense counsel because failure to discharge these obligations may subject defense counsel to disciplinary action and liability to the insured and the insurer. An attorney hired by an insurance company to represent an insured owes the insured the same fiduciary duties as if the attorney had been retained directly by the insured. *See* *McCourt Co. v. FPC Props., Inc.*, 386 Mass. at 146; *see also* *Coke v. Equity Residential Props. Tr.*, 440 Mass. 511, 517 (2003) (holding that "lateral transfers or law firm mergers" that may affect fiduciary duties owed should be disclosed to clients to apprise them "of any potential conflicts").

Because an attorney hired by an insurance company pursuant to a policy of insurance to defend an insured represents both the insured and the insurer to defeat the plaintiff's claims, both the insured and insurer are entitled to be kept apprised of the progress of the litigation. *See* *Moores v. Greenberg*, 834 F.2d 1105, 1108 (1st Cir. 1987). In addition, the insurer may require defense counsel to provide an evaluation of the credibility of witnesses, including the insured, as well as the likelihood of success.

As stated above, the interests of the insurer and the insured may on occasion be in conflict;

- there may be a dispute over coverage or the meaning of a policy term,
- the plaintiff's demand may exceed the policy limits, or
- the attorney may have a reasonable belief that a judgment could be in excess of the policy limits.

Before examining some of the more substantive problems that face designated defense counsel, it is important to discuss the rather obvious but often overlooked issues that can arise in such situations.

§ 5.4.1 Avoiding Early Missteps

Defense counsel could easily misstep an obligation to the insured early in the litigation. For example, when answering a complaint, defense counsel should not always rely on the insurer's recitation of the facts and the information provided in the company's claim file but may be obligated instead to consult with the insured, especially about allegations particular to the insured. Failure to consult the insured may result in an admission that is against the insured's best interests; even information as simple as the insured's name and address could affect the course of the litigation.

At this point, defense counsel must also ensure that service of process was properly made on the insured. If service was improper and would have constituted a valid and successful defense, defense counsel risks a malpractice suit by answering the complaint and in effect accepting service on the insured's behalf. *Rose v. Regan*, 344 Mass. 223, 226 (1962).

§ 5.4.2 Dual Representation

As in other litigation scenarios, counsel may represent codefendants in a motor vehicle tort case as long as their individual interests are not adverse such that counsel cannot adequately represent both interests. For example, counsel may represent both the owner and the driver in an action arising from a motor vehicle accident. If, however, the claim is for negligent entrustment, the codefendants are adverse and their interests cannot be adequately represented by the same defense counsel. This situation

requires a more difficult resolution than a situation where a conflict between the insured and the insurer exists. When a conflict exists between the insurer and the insured, defense counsel may comply with Mass. R. Prof. C. 1.7 even though the insurer and the insured have adverse interests, as long as counsel remains focused on the plaintiff's claims against the insured and ignores coverage issues. Representation of codefendants, however, requires counsel to focus equally on each client's interest. If their interests are truly adverse, separate counsel must be retained. It is the obligation of counsel to recognize an unwaivable conflict and to advise both defendants.

§ 5.4.3 Satisfying Ethical Obligations

At the heart of defense counsel's obligation to the insured and the insurer is the obligation to comply with Mass. R. Prof. C. 1.7; that is, clients with adverse, or potentially adverse, interests may be represented by the same attorney only if they consent after full disclosure of the conflict and the attorney clearly can provide adequate representation of the clients' interests. *See* *Maddocks v. Ricker*, 403 Mass. 592, 597 (1988) (applying standards under the disciplinary rules then in effect). In cases where the policy provides adequate coverage, the requisites of Mass. R. Prof. C. 1.7 are easily met; these cases present little or no potential for dispute between the insurer and its insured. Coverage is not in question, nor is the insured at risk for an excess judgment.

Defense counsel may run afoul of Mass. R. Prof. C. 1.7, however, in cases where the interests of the insured and the insurer are not in such harmony. At first glance, it may appear more difficult to meet the requirements of Mass. R. Prof. C. 1.7 when the insurer claims inadequate coverage or defends under a reservation of rights. Either situation places the insured and the insurer at seemingly adversarial positions. However, if counsel focuses solely on the task at hand—i.e., providing an adequate defense for the claims against the insured—this may minimize the risk of violating Mass. R. Prof. C. 1.7.

To provide an adequate defense that is sufficient to satisfy the attendant ethical obligations, counsel must defend as if there were no insurance or as if the insurance policy had no limits. Although sometimes difficult to ignore, coverage issues are not within defense counsel's realm; defense counsel does not represent the insurer or the insured with respect to potential or actual disputes concerning the insurance policy.

The key to abiding by the strictures of Mass. R. Prof. C. 1.7 is to concentrate on the insured's defense. Thus, defense counsel may not stipulate to facts against the insured's interests. Similarly, defense counsel cannot take the insured's deposition to establish a coverage defense for the insurer.

Practice Note

Keeping clients informed in a timely and consistent manner tends to avoid future areas of disagreement or confusion. The same principle is even more important in the tripartite relationship. Establish early in the relationship the lines of communication and consistently include both insured and insurer on all written communications.

§ 5.4.4 Confidential Information

As with other clients, confidential information provided by the insured cannot be used to the insured's disadvantage. *See* Mass. R. Prof. C. 1.6. Thus, defense counsel may not reveal to the insurer client confidences protected as a privileged communication, even if they provide a basis for a coverage defense. This prohibition applies only to information subject to the attorney-client privilege because an attorney cannot keep secrets from a client; it does not apply to information gathered outside that privilege. Information obtained outside the privilege may be revealed to the insurer, and in fact, such disclosure is required to keep the insurer properly apprised of the litigation. For example, if the insured fails to appear for a deposition or a trial, the insurer is entitled to be informed of that fact, even if the insurer may later use that information to disclaim coverage on the basis of breach of cooperation. Since defense counsel jointly represent the insurer and the insured, communications can be shared while maintaining the privilege. As defense counsel, you have two clients, the insured and the insurer, and you cannot keep secrets from either one. In the face of a conflict, counsel must withdraw from representing both the insurer and the insured. 3 John M. Bjorkman, David L. Leitner & Reagan W. Simpson, *Law and Practice of Insurance Coverage Litigation* § 33:15 (Thomson/West 2000).

§ 5.4.5 Discovery

Defense counsel may not conduct discovery that is designed to elicit harmful information or otherwise damage the insured's best interests. However, information helpful to the insurer's interests gathered through the normal course of discovery is permitted. As with information not within the attorney-client privilege, this information may be disclosed to the insurer.

§ 5.4.6 Balancing Competing Interests

Some conflicts of interest between the insured and the insurer have little significance to the plaintiff's claim but may present significant points of dispute to competing clients of defense counsel. For example, the insurer's interest in limiting defense costs may inhibit the insured's interest and right to be zealously defended. Defense counsel treads a fine line in attempting to appease these competing interests. Once again, counsel is advised to focus on providing an adequate defense for the insured. Needless and costly discovery may be avoided; however, counsel cannot avoid proper and necessary discovery. Although the insurer may control the costs of the litigation, defense counsel cannot permit the insurer to "direct or regulate the lawyer's professional judgment." *See* Mass. R. Prof. C. 5.4(c); *see also* MBA Ethics Op. 2000-4 (discussing an insurer's use of "litigation guidelines"; focusing in particular on provisions relating to the use of paralegals and outside billing auditors); ABA Formal Op. 01-421, Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions (discussing insurance company guidelines and a lawyer's professional judgment). This professional judgment includes deciding whether certain discovery is needed. In addition, defense counsel representing policyholders under a "flat fee" arrangement may be tempted to skirt ethical edges. The critical inquiry is whether the compensation relates to the proper defense of the claim. Discounts or other business accommodations to insurers place attorneys at risk of favoring one client's interests over the other's. Defense counsel's representation of the insured must be governed by common sense and honesty while keeping the insured's best interests in mind. Therefore, if the insured acts in a manner that is inconsistent with their duties under the policy, defense counsel must warn the insured that such conduct may give rise to a successful disclaimer of coverage by the insurer. Acts by the insured that may imply a failure to cooperate place the insurer especially at risk, and the insured should be notified of the possible effect of the lack of cooperation before the full and real consequences evolve. The duty to defend does not include an obligation to pursue every avenue of appeal. *P. Gioioso & Sons, Inc. v. Liberty Mut. Ins. Co.*, 92 Mass. App. Ct. 1124 (unpublished decision; text available at 2018 WL 560629), *review denied*, 479 Mass. 1104 (2018). The decision to appeal or not rests on the good faith obligation of the insurer to the insured. *P. Gioioso & Sons, Inc. v. Liberty Mut. Ins. Co.*, 2018 WL 560629, at *4-5. Thus, an insurer cannot resolve a claim to advance its interests to the disadvantage of its insured.

If it is in the best interest of the insured to file a counterclaim, counsel must do so, but the expense will be borne by the insured and not the insurer. *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343, 354 (2017). Clear communication on the scope of the duty to defend—and its limits—will aid all parties in the tripartite relationship.

§ 5.4.7 Withdrawal from Case

Finally, in situations where the insurer disclaims coverage after initially providing a defense, designated counsel may not freely withdraw from the litigation. Instead, counsel must ask leave of court for withdrawal, gain the assent of the insured, and notify the court of the existence of substitute counsel. *See, e.g.,* *Hammond v. T.J. Little & Co.*, 809 F. Supp. 156, 159-60 (D. Mass. 1992); Mass. R. Prof. C. 1.16.

§ 5.5 DEFENSE COUNSEL'S ROLE IN VALUING A CASE FOR SETTLEMENT

The standard Massachusetts automobile policy gives the insurer the absolute right to settle the case. In circumstances of questionable liability where a settlement offer at or near the policy limit has been tendered, a conflict of interest exists between the insured and the insurer.

The insurer, who has an interest in paying the least amount possible, may elect to try the case rather than settle for the policy limit. Intuitively, the insured would elect to accept any offer of settlement within the policy limits. To balance these competing interests, Massachusetts courts have consistently held that the insurer has an obligation of good faith toward the insured and must give as much consideration to the insured's interest as to its own. This good-faith requirement substantially limits the discretion of the insurer to try the case when the settlement value is at or near the policy limit.

§ 5.5.1 Viewpoint in Favor of Outside Counsel's Nonparticipation

In recent years, the propriety of outside defense counsel's participation in valuing a case for settlement has been the subject of continuing discussion. In 1991, the Massachusetts Bar Association (MBA) issued Ethics Opinion 1991-5, which states as follows:

> Once an attorney hired by an insurance carrier to represent an insured makes a good faith determination that there is a potential for an award in excess of the policy limits, the attorney may not provide the carrier with the attorney's opinion as to the merits of the claim or the value for settlement purposes if the attorney knows or has strong reason to believe that the case can be settled within the policy limits.

See the full text of this opinion, which is included as **Exhibit 5E**, MBA Ethics Opinion 1991-5. Moreover, MBA Ethics Opinion 1991-5 mandates that the insurer must retain separate defense counsel for such purposes.

§ 5.5.2 Viewpoint Against Outside Counsel's Nonparticipation

The MBA opinion, which is only advisory, has been subject to criticism from diverse sectors. For example, shortly after the MBA Ethics Opinion was published, the Bar Counsel of the state Board of Bar Overseers issued a preliminary statement commenting as follows:

> MBA Ethics Opinion No. 1991-5 attempts to set out a rigid prohibition. Bar Counsel is not convinced that such rigidity is required or desirable. In light of the different interpretations of counsel's duty in these circumstances, it is preferable to interpret the conflict of interest rules flexibly and according to the particular facts of each case.

See the full text of this preliminary statement, which is included as **Exhibit 5F**, Preliminary Statement of Office of Bar Counsel. Thus, it has been argued that MBA Ethics Opinion 1991-5 may be impracticable and seems to misapprehend the role of outside defense counsel in that the opinion fails to recognize that outside defense counsel represents both the insured and the insurer for the narrow purpose of defeating the plaintiff's claims. *See* *McCourt Co. v. FPC Props., Inc.*, 386 Mass. 145, 147 (1982); *Imperiali v. Pica*, 338 Mass. 494, 499 (1959); *see also* MBA Ethics Op. 1977-16 ("[w]hen an attorney is retained by a casualty insurance company to represent an insured, the attorney is in fact representing not only the insurance company's interest in defeating the plaintiff's litigation, but also is representing the insured").

Designated defense counsel understands that they do not represent either the insurer or the insured with respect to disputes involving the insurance policy but are ethically obligated to competently (Mass. R. Prof. C. 1.1) and diligently (Mass. R. Prof. C. 1.3) defend against the plaintiff's claims. In the course of providing a competent defense, designated counsel has a duty to advise whether a case can and should be settled.

(a) ***Obligation to Evaluate the Merits***

Moreover, designated counsel, in consideration of information about the circumstances of the case obtained through discovery (e.g., medical expenses, wage loss, pain and suffering, credibility of witnesses, and impairment), has a duty to provide an opinion as to the amount in which a claim can or should be settled. This obligation to evaluate the merits of the case, the potential damages award, and the settlement value exists irrespective of the existence of insurance. *See, e.g.,* *Hamilton v. State Farm Ins. Co.*, 83 Wash. 2d 787, 790, 523 P.2d 193, 196 (1974) ("When an attorney is employed by an insurance company to represent the company and its insured in the defense of a claim [in excess of the policy limits], the attorney and the insured acquire an attorney/client relationship in which the law requires that the lawyer conduct himself as if his client either (1) had no insurance or (2) as if the insurance policy has no limits.").

MBA Ethics Opinion 1991-5 advises that counsel should be prohibited from communicating such an opinion to the insurer whenever there is a potential conflict for an award in excess of the policy limits. In the factual situation of a potential excess judgment presented by MBA Ethics Opinion 1991-5, designated counsel would be prohibited even from advising the insurer that the case ought to be settled and can be settled within the policy limits. Under this argument, MBA Ethics Opinion 1991-5 seems to hinder rather than encourage settlement by not permitting defense counsel to communicate counsel's evaluation of the case; an insurer most likely would not be persuaded to settle a claim without designated counsel's assessment and evaluation.

(b) ***Further Arguments Against Nonparticipation***

The suggestion that an insurer must retain separate counsel to render an opinion as to the merits of the claim or its settlement value might result not only in delay but also in added legal expense, which would eventually be passed on to policyholders. In addition, new counsel retained for evaluation purposes could not be as knowledgeable of the case as designated counsel

unless discovery is duplicated. Certainly, the prohibition of MBA Ethics Opinion 1991-5 would prevent designated counsel from sharing *any* opinion, including the credibility of witnesses, with new "evaluation" counsel.

(c) *Distinguishing Cases in Support of Nonparticipation*

In support of its opinion, the MBA Ethics Committee relies on two cases. The first, *Murach v. Massachusetts Bonding & Insurance Co.*, 339 Mass. 184 (1959), is inapposite because it did not concern the duty of designated counsel but, rather, the common law duty of an insurer to act in good faith when confronted with a demand in excess of the policy limit. The adverse interests of the insured and the insurer in the potential excess judgment situation seem to be minimized by the requirement of *Murach* that

> good faith requires that it [the insurer] make the decision (whether to settle a claim within the limits of the policy or to try the case) as it would if no policy limit were applicable to the claim .... [and] also requires that it exercise common prudence to discover the facts as to liability and damages upon which an intelligent decision may be based.

Murach v. Mass. Bonding & Ins. Co., 339 Mass. at 187 (citations omitted).

The second case cited to support MBA Ethics Opinion 1991-5, *Hartford Accident & Indemnity Co. v. Foster*, 528 So. 2d 255 (Miss. 1988), does concern the obligations of defense counsel but does not support the position advocated by MBA Ethics Opinion 1991-5. In *Hartford*, the insured commenced an action against the insurer and defense counsel for bad faith refusal to settle within the policy limits and breach of fiduciary duty. The decision contained an exhaustive discussion on the issue of dual representation. The *Hartford* court observed that the insured's liability was tenuous, even though the plaintiff had significant injury. Similar to the factual scenario presented by MBA Ethics Opinion 1991-5, there was a potential for an award in excess of the policy limit, and defense counsel knew that the case could be settled within that limit. Nonetheless, defense counsel believed that there would be a defense verdict. Contrary to the implication of MBA Ethics Opinion 1991-5, the *Hartford* court did not suggest that defense counsel should refuse to express an opinion on settlement value. Indeed, the court observed that "[t]o say nothing is to deprive his clients of what could be extremely important advice." *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d at 271. Moreover, there was no suggestion that defense counsel was required to withdraw from representation pursuant to the applicable rules of professional conduct; the court explicitly rejected this alternative. Significantly, the court recognized that defense counsel "should not be prohibited from honestly and carefully answering questions pertaining to the law and facts of the case, his impressions of the witnesses, the jury, and the trial judge, such as he would normally be asked as attorney, and expected to be able to answer." *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d at 273.

In contrast, MBA Ethics Opinion 1991-5 states that defense counsel "cannot even begin to consider [the settlement value of the case] objectively without adversely affecting the attorney's obligation to the insured to settle the case for any amount up to the policy limit." The rationale for this conclusion is that the insurer hired defense counsel and that the insurer has a potential conflict of interest with the insured with respect to the settlement of the excess claim. Moreover, the opinion goes so far as to prohibit defense counsel from rendering an opinion as to the merits of the case.

§ 5.5.3 Defense Counsel's Competing Obligations

MBA Ethics Opinion 1991-5 seems to suggest that defense counsel is obligated to effect settlement if requested to do so by the insured, notwithstanding the merits of the case. Defense counsel has no such obligation. Defense counsel is obligated to effect a settlement if the merits of the case require one, not because the insured requests settlement. For example, there are many instances where the insured would like to see the plaintiff prevail, especially in situations where the insured is sued by a family member. However, the courts have continually recognized in such circumstances that defense counsel's obligation is to defeat the claim. *See, e.g.,* *Sorensen v. Sorensen*, 369 Mass. 350, 365 (1975). Moreover, the courts have recognized the potential conflict between the insurer and its insured and have required insurers to consider objectively the insured's interests. *See Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. 184, 187 (1959). Because insurers can make settlement decisions as "if no policy limits were applicable," it appears that defense counsel should also be so capable. *But see* ABA Formal Op. 96-403, Obligations of a Lawyer Representing an Insured Who Objects to a Proposed Settlement Within Policy Limits (Aug. 2, 1996) ("If the lawyer knows that the insured objects to a settlement, ... he may not proceed without giving the insured an opportunity to assume responsibility for his own defense at his own expense.").

As stated above, the 2016 edition of the Massachusetts automobile insurance policy provides that the insurer has

> a duty to defend any such lawsuit, even if it is without merit, but our duty to defend ends when we tender, or pay to any claimant or to a court of competent jurisdiction, with the court's permission, the maximum limits of coverage under this policy. We may end our duty to defend at any time during the course of the lawsuit, by tendering, or paying the maximum limits of coverage under the policy, without the need for a judgment or settlement of the lawsuit or a release by the claimant.

This duty-to-defend policy provision should not prevent outside defense counsel from rendering an opinion as to the merits of the case, the potential damages award, or the settlement value. In situations where there is a potential for excess judgment, defense counsel should notify the insured about this in writing and advise the insured that they may desire personal counsel to participate in the defense of the case. In addition, defense counsel should send a letter to both the insured and the insurer (see the sample letter included as **Exhibit 5G**, Sample Letter Concerning Noninvolvement in Coverage Disputes) stating that designated counsel is employed in the case to defend the insured on the merits of the claim asserted against the insured in the pending litigation and that designated counsel does not represent either the insured or the insurer with respect to any dispute that may arise concerning insurance coverage.

PART II The Ethical Framework

§ 5.6 INTRODUCTION

The classic tripartite insurance defense relationship has been described as follows:

> In a typical tripartite insurance relationship, involving an insurer, the insured, and the insurance defense attorney, the insurer has a duty to retain and pay for an attorney to represent the policyholder/ insured when the insured is sued by a third party. *See* Randall Riopelle, Note, *When May an Insurer Fire Counsel Hired to Represent the Insured?*, 7 Geo. J. Legal Ethics 247 (1993). As such, the insurer maintains the right to control the defense, the settlement of a claim, and the payment of a claim within the policy limits.

Marten Transp., Ltd. v. Hartford Specialty Co., 533 N.W.2d 452, 457 (Wis. 1995).

Insurers have taken aggressive steps to control the cost of legal expenses in recent years. There is no reason to expect that this trend will not continue. Some of the steps to control costs conflict with an attorney's ethical obligations. As insurers request attorneys to comply with their cost control guidelines, attorneys need to give careful consideration to their professional responsibility under the applicable rules of professional conduct.

Often, the insurer engages an outside auditor to review the billing for the legal work involved. This may include examination for advance authorizations for services restricted by the insurer's guidelines or compliance with directions by the insurer that an attorney or support staff perform particular tasks. Insurers or their auditors may dictate measures that would cut costs in defending the insured client, who might not agree with such decisions and their impact on the outcome of the insured's case, and auditors may be in a position to access information the client would consider confidential.

Obviously, issues of professional responsibility for the insurance defense attorney do not end with the response to insurers' cost control activities. However, since this is an area of concern that is likely to be with us for some time, this discussion starts with these issues before moving on to a general review of the ethical responsibilities for attorneys defending claims on behalf of insured parties.

§ 5.7 CLIENT CONSENT NEEDED FOR WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY

Without the insured's consent, an attorney retained by the insurer may not reveal confidential billing data to an outside auditor. "[I]n most cases, undivided loyalty to the insured ... would be fully consistent with undivided loyalty to the insurance company and its directives." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421 (2001). The American Bar Association (ABA) opinion noted that Rule 1.6 of the Model Rules of Professional Conduct obviates the need for client consent where disclosure is "impliedly authorized in order to carry out the representation of the insured." However, the opinion cautioned that implied authorization does not permit attorneys to disclose confidential information to a third-party auditor hired by the insurer without the consent of the insured client.

"Unlike the disclosure of the insured confidential information to secretaries and interpreters, the disclosure of confidential information to those with no employment or direct contractual relationship, is not deemed essential to the representation and therefore results in an unintended waiver of the privilege." ABA Formal Op. 01-421, at 168. In obtaining valid informed consent, the lawyer should discuss both the nature of the information sought by the auditor and the risk that releasing the information to third-party auditors could be obtained by others because it results in the loss of the attorney-client privilege. Further, if the

client consents to the release of the information to the third-party auditor, the lawyer should seek to minimize the risk to the client by "avoiding, however possible, disclosures that could result in a waiver of the attorney-client privilege or materially affect a material interest of the insured client." ABA Formal Op. 01-421.

A New Hampshire Bar Association (NHBA) Ethics Committee Advisory Opinion enunciates a more stringent stance. "[B]arring circumstances in which the benefits of disclosure outweigh any potential harm—circumstances that are difficult to imagine—an attorney may not, ethically, comply with an insurer's request to seek the consent of a client to disclose billing statements to third party auditors even when informed consent is possible." NHBA Ethics Op. 2000-01/05.

§ 5.8 COST CONTAINMENT MAY AFFECT A LAWYER'S DUTY OF COMPETENT REPRESENTATION

The Supreme Court of Montana decided that the "requirement of insurer's prior approval fundamentally interferes with defense counsels' exercise of their independent judgment." *In re Rules of Professional Conduct*, 2 P.3d 806 (Mont. 2000). This reasoning could extend to counsel's independent judgment as to delegating work to subordinates and paralegals.

For an interesting discussion regarding cost containment in insurance defense cases, see MBA Ethics Opinion 2000-4. Insurers may demand that the lawyer cut costs by delegating tasks to paralegals, which may adversely affect the lawyer's duty of competent representation if the paralegals are not thoroughly competent to perform the tasks. The lawyer must then oversee and exercise supervision to ensure that all tasks performed are up to the standards set forth. *See* Mass. R. Prof. C. 5.3.

§ 5.9 WHO IS THE CLIENT?

> No man can serve two masters; for either he will hate the one, and love the other, or else he will hold to the one, and despise the other.
>
> *Matthew* 6:24

The application of the rules of legal ethics to the problem of the so-called insurance triangle—the tripartite or triadic relationship among insurer, insured, and defense lawyer—is anomalous and perhaps unique in the practice of law. Insurance defense is a field of the law that is rife with problems of conflict of interest and confidentiality that are resolved, perhaps unavoidably, in ways that likely would not be acceptable in other areas of practice.

§ 5.9.1 Formation of the Relationship

Even, or perhaps particularly, the initial formation of the attorney-client relationship is atypical. By the terms of the insurance policy, the insurance company is obligated not only to indemnify but also to defend the insured in lawsuits. The duty to defend generally includes the right to control the defense and to select counsel. Thus, defendants are routinely represented by counsel who have been chosen and paid for by their insurers. While often both the insurer and the insured benefit from the insurer's selection of talented and experienced counsel, there are certain common instances in which their interests may differ.

Other case law suggests that the insurer has the right to have input into, if not to control, the defense of the insured for which it pays. *E.g., Marten Transp., Ltd. v. Hartford Specialty Co.*,533 N.W.2d 452, 457 (Wis. 1995) ("the insurer maintains the right to control the defense, the settlement of the claim, and the payment of a claim within the policy limits"). Of course, as pointed out by the coauthors of this chapter, Massachusetts case law exposes the insurer to liability for unfair insurance practices in defense of its insured. See, for example, § 5.3.4, Insurer's Duty to Settle, above. *See also Chapter 93A Rights and Remedies* ch. 13 (MCLE, Inc. 5th ed. 2022).

Lawyers are not permitted to allow persons who recommend or pay for the lawyer's services to direct or regulate the lawyer's independent professional judgment. As a practical matter, these restrictions do not work in the context of insurance defense. The same lawyer may be hired by the insurer for multiple unrelated cases, while the insured may need representation only once. When interests diverge, the attorney's loyalty may lie with the one who is footing the bill. Consider, for example, the insurer who attempts to place limitations on the amount of discovery that counsel can conduct.

However, were the issue simply that counsel for the litigant is being paid by an insurer, the ethical problems would not be as vexing. The more fundamental problem is the question of who is the client—the insurer and the insured, or only the insured? This issue permeates all the discussion that follows.

Both the majority rule and the rule in Massachusetts appear to be that the attorney represents both the insured and the insurer—the "dual client doctrine." *McCourt v. FPC Props., Inc.*, 386 Mass. 145, 146 (1982) ("the law firm is attorney for the insured as well as the insurer"); *Imperiali v. Pica*, 338 Mass. 494, 499 (1959) ("an attorney undertaking the defense of the case is

an attorney for both the insurer and the insured and owes to each a duty of good faith and due diligence in the discharge of his duties"); *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995); *Mitchum v. Hudgens*, 533 So.2d 194, 198 (Ala. 1988); *Nandorf, Inc. v. CNA Ins. Cos.*, 479 N.E.2d 988, 991 (Ill. App. Ct. 1985); *Am. Home Assurance Co. v. Unauthorized Practice of Law Comm.*, 121 S.W.3d 831, 838 (Tex. Ct. App. 2003) ("Reality and common sense dictate that the insurance company is also a client."); *Marten Transp., Ltd. v. Hartford Specialty Co.*, 533 N.W.2d 452 (Wis. 1995). The duty as articulated in *Imperiali* was recently recognized by the federal court in *Walter & Shuffain, P.C. v. CPA Mutual Insurance Co.*, No. 06cv10163-NG, 2008 WL 885994, at *5 (D. Mass. Mar. 28, 2008). However, a vocal minority of jurisdictions maintains that only the insured is the client. *Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 108 (2d Cir. 1991); *In re A.H. Robins Co.*, 880 F.2d 709, 751 (4th Cir. 1989); *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669, 671 (Ark. 1990).

§ 5.9.2 Conflicts Generally

Conflicts of interest pose hazards for insured, insurer, and counsel alike. The insured, for example, runs the risk of loss of coverage, *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677 (1964), while the insurer runs the risk of a later bad faith claim by the insured or by the plaintiff as the insured's assignee. *Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. 184 (1959). Counsel, of course, may be subject to malpractice actions by the insurer or the insured. *See Walter & Shuffain, P.C. v. CPA Mut. Ins. Co.*, No. 06cv10163-NG, 2008 WL 885994, at *5 (D. Mass. Mar. 28, 2008).

It is in the interests of all concerned that the attorney never put the interests of the insurance company above the interests of the insured. When conflicts arise, the attorney must examine the situation and determine what action is necessary. Sometimes, such as in the situation where the insurance company is defending under a reservation of rights, the insurer may be required to pay for independent counsel for the insured. *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677 (1964). Other times, such as in a situation where the claim exceeds the policy limits, the attorney, after consultation with the insured, may be able to represent the insured alone. *Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. 184 (1959); MBA Ethics Op. 1991-5 (included as **Exhibit 5E**, MBA Ethics Opinion No. 1991-5).

§ 5.9.3 Confidentiality Generally

The other major ethical issue that arises from the insurance triangle is the problem of confidentiality. The general rule is that, as between commonly represented clients, the privilege does not attach.

Thus, if counsel truly represents both the insurer and the insured, the expectation would be that information obtained from, or concerning, the insured that is detrimental to the insured's interests (for example, information that jeopardizes coverage) would be disclosed to the insurer. Again, and obviously, this general rule will not work in the insurance defense situation.

§ 5.10 PARTICULAR RULES APPLICABLE TO INSURANCE DEFENSE

While all of the Massachusetts Rules of Professional Conduct are, of course, binding upon insurance defense counsel, certain ones, discussed below, are particularly on point.

§ 5.10.1 Rule 1.2—Scope of Representation

Subsection (a) of Mass. R. Prof. C. 1.2 requires the attorney to seek the client's lawful objectives through reasonably available means. It further states that the lawyer "shall abide by the client's decision whether to accept an offer of settlement of a matter." Subsection (b) provides that the lawyer may limit the objectives of the representation if the client consents after consultation.

Again, we return to the problem of who is the insurance defense lawyer's client. The insured may wish to accept an offer of settlement that is within the policy limits, but the insurer refuses to settle. Or an insurer may want to accept an offer of settlement in a situation where an insured professional, concerned with reputation, wishes to litigate.

As previously suggested, it may be that when conflicts of this type arise, defense counsel and the insurer both must recognize that the insured is the attorney's only client. MBA Ethics Op. 1991-5; *Bogard v. Emp'rs Cas. Co.*, 210 Cal. Rptr. 578, 583 (1985). However, at a minimum, the lawyer is obligated to advise the insured that a claim in excess of policy limits has been made and to suggest that the insured has the right to separate counsel at his or her own expense. Moreover, and regardless of the insurer's contractual right to settle without the insured's consent, insurance defense counsel must keep the insured advised of all major developments in the case, including offers to settle within the policy limits. *Rogers v. Robson, Masters, Ryan,*

Brumund & Belom, 407 N.E.2d 47 (Ill. 1980). And, of course, the insured (or the plaintiff, by assignment from the insured) retains the right to pursue a later claim of bad faith failure to settle against either the carrier or the attorney, or both. *Allstate Ins. Co. v. Campbell*, 639 A.2d 652 (Md. 1994); *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 407 N.E.2d 47 (Ill. 1980); *see also* *DiMarzo v. Am. Mut. Ins. Co.*, 389 Mass. 85 (1983).

§ 5.10.2 Rules 1.3 and 1.4

Rule 1.3 of the Massachusetts Rules of Professional Conduct requires zealousness, reasonable diligence, and promptness in representing a client. Rule 1.4 requires the lawyer to keep the client reasonably informed about the status of a matter, to comply promptly with reasonable requests for information, and to explain the matter to the extent reasonably necessary for the client to make informed decisions.

Again, and as described in § 5.10.1, Rule 1.2—Scope of Representation, above, whether or not an insurance defense lawyer can take direction from the insured as to the conduct of the litigation, there seems to be no question that the lawyer has an obligation to keep the insured informed and, in particular, to advise the insured when issues arise that may raise conflicts with the insurer.

§ 5.10.3 Rule 1.6

Rule 1.6 of the Massachusetts Rules of Professional Conduct is the confidentiality rule. As noted previously, the general rule is that, as between commonly represented clients, the privilege does not attach. *See* Mass. R. Prof. C. 1.7 cmt. 30. But obviously, the lawyer cannot disclose to the insured, and the insurer cannot properly expect to receive, information obtained by the lawyer from or concerning the insured that is adverse to the insured's interests.

The most common example of this problem is the situation in which the lawyer receives information that jeopardizes coverage. Regardless of whether the lawyer uncovers the information or whether the insured provides it, insurance defense counsel is generally prohibited from sharing it with the insurer. *Parsons v. Cont'l Nat'l Am. Grp.*, 550 P.2d 94 (Ariz. 1976); *Emp'rs Cas. Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973); *Montanez v. Irizarry-Rodriguez*, 641 A.2d 1079 (N.J. Super. Ct. App. Div. 1994).

Note that Mass. R. Prof. C. 1.6(b) permits, and in some instances, requires the lawyer to reveal confidential information under certain circumstances. In particular, confidential information can or must be disclosed to prevent the commission of certain types of criminal or fraudulent acts and, except in certain criminal defense matters, to rectify client fraud in which the lawyer's services have been used. This issue is addressed in the discussion of Mass. R. Prof. C. 3.3 in § 5.10.11, Rule 3.3 and Rule 4.1, below.

If confidential information that is detrimental to the insured cannot be revealed, must the lawyer withdraw because there is now an actual conflict of interest? See the discussion of this issue in § 5.10.8, Rule 1.16, below.

§ 5.10.4 Rule 1.7—Conflict of Interest

Rule 1.7 of the Massachusetts Rules of Professional Conduct is the general rule on conflicts of interest. It covers both conflicts between current clients and conflicts between clients and counsel personally. In the insurance defense area, lawyers are less likely to have issues under Mass. R. Prof. C. 1.7(a) (conflicts where the clients are directly adverse to each other) and more likely to be concerned with Mass. R. Prof. C. 1.7(b), amended effective July 1, 2015, which now provides as follows:

> 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.

To the extent that the lawyer considers both the insurer and the insured to be the lawyer's clients, and even assuming there is no actual conflict, the implication of the amended Mass. R. Prof. C. 1.7(b) is that, at a minimum, the lawyer should always apprise the insured of the fact that the lawyer is also representing the insurer, explain the consequences of that fact, and obtain informed consent in writing.

It is also clear that, once an actual conflict arises, the lawyer cannot ""reasonably believe" that the representation will not be adversely affected. *Bryan Corp. v. Abrano*, 474 Mass. 504 (2016); *Altova GmbH v. Syncro Soft SRL*, 320 F. Supp. 2d 314, 320 (D. Mass. 2018). In such circumstances, the lawyer may be required to withdraw or, depending on the circumstances, to advise either the insurer or the insured to retain separate counsel. Thus, a claim in excess of coverage limits may require the lawyer

to advise the insurer to retain its own counsel. MBA Ethics Op. 1991-5; *L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d 1298, 1303 (Ala. 1987). A reservation of rights by the insurer may require the lawyer to advise the insured to retain independent counsel, paid for by the insurer, *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 208 Cal. Rptr. 494 (Ct. App. 1984), or again may lead to the conclusion that only the insured, and not the insurer, is counsel's client. *L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d at 1303. In some cases, the obligation to notify the insured of a conflict of interest rests with the insurer. *E.g.*, *Moeller v. Am. Guar. & Liab. Ins. Co.*, 707 So. 2d 1062, 1069 (Miss. 1996); *Twin City Fire Ins. Co. v. City of Madison*, 309 F.3d 901 (5th Cir. 2002). Furthermore, information received from the insured jeopardizing coverage may require, or at least permit, withdrawal.

§ 5.10.5 Rule 1.8—Conflicts of Interest: Prohibited Transactions

Rule 1.8 of the Massachusetts Rules of Professional Conduct sets forth a list of particular types of conflicts of interest, such as conflicts in business transactions and conflicts when opposing counsel is a relative. From the standpoint of insurance defense counsel, the relevant subsections of this rule are (b), (f), and (g).

Rule 1.8(b) reinforces the obligation of confidentiality by clarifying that confidential information (which Mass. R. Prof. C. 1.6 says cannot be revealed without consent) also cannot be used to the client's disadvantage or for the advantage of the lawyer or a third person without the client's consent, except as Mass. R. Prof. C. 1.6 or Mass. R. Prof. C. 3.3 permit or require. Thus, to the extent that confidential information could be used against the insured and for the insurer's advantage without actually revealing it, that, too, is prohibited.

Rule 1.8(f) is the rule on accepting compensation from one other than the client. This rule mandates that

- the client must consent,
- there must be no interference with the lawyer's independence or professional judgment or the lawyer-client relationship, and
- confidential information must be protected.

Subsection (b) obviously presents thorny problems in the insurance defense context and will continue to do so.

Finally, Mass. R. Prof. C. 1.8(g), addressing aggregate settlements for multiple clients, requires that each client must have given informed consent after being advised of the existence and nature of all the claims and of the participation of each person in the settlement, and that consent must be in writing signed by each client (i.e., not merely memorialized in a letter to the client by the lawyer). Defense counsel representing multiple insureds must comply with this rule when a global settlement is contemplated.

§ 5.10.6 Rule 1.9—Conflict of Interest: Former Client

Rule 1.9 of the Massachusetts Rules of Professional Conduct is the rule on conflicts with former clients. The basic rule described in Mass. R. Prof. C. 1.9(a)—the so-called substantial relationship test—is consistent with the standard propounded by the Supreme Judicial Court in *Adoption of Erica*, 426 Mass. 55 (1997), resolving what had been an open question under Massachusetts law for many years.

The rule states that a lawyer who has formerly represented a client in a matter may not subsequently represent another person "in the same or a substantially related matter" in which the current client's interests are ""materially adverse" to the interests of the former client unless the former client consents.

As just one obvious example in the insurance defense context, counsel who represented an insured may not subsequently represent the insurer in a coverage dispute unless the insured consents. Even apart from questions of confidentiality, such representation would obviously be "substantially related" to the prior representation.

Rule 1.9(c) then states the obvious with respect to the lawyer's obligation of confidentiality to a former client. This rule mirrors the confidentiality obligations to current clients set forth in Mass. R. Prof. C. 1.6 and Mass. R. Prof. C. 1.8(b). Specifically, a lawyer may not reveal confidential information of a former client or use that information to the former client's disadvantage or to the advantage of the client or a third person except as permitted or required by Mass. R. Prof. C. 1.6, 3.3, or 4.1. *E.g.*, Admonition No. 09-08 (Mass. Bd. Bar Overseers 2009) (admonition for attorney who violated Rule 1.9(c)(1) by using confidential information she obtained while working for an asset and location recovery firm to her own advantage by soliciting that firm's clients after she formed her own practice doing the same work).

§ 5.10.7 Rule 1.13—Organization as Client

Rule 1.13 of the Massachusetts Rules of Professional Conduct addresses representing organizations such as corporations. It is of interest to insurance defense counsel because certainly the insurance company, and often the insured as well, are entities whose representation is covered by this rule.

An organizational client is an entity that can act only through its constituents, such as officers, directors, employees, and shareholders. If, for example, counsel is undertaking an investigation of the incident that has given rise to the claim being defended, a communication by an employee or other constituent to counsel is generally protected as confidential under Mass. R. Prof. C. 1.6. However, if the constituent is not the lawyer's client, the constituent must be so advised if their interests are adverse to those of the entity. Mass. R. Prof. C. 1.6(d).

Subject to the general conflict-of-interest rule, Mass. R. Prof. C. 1.7, it is not improper for defense counsel to also represent a director, an officer, an employee, or other constituent of the entity. Mass. R. Prof. C. 1.13(g). If the organization's consent to the dual representation is required under Mass. R. Prof. C. 1.7 (specifically, if there is a potential conflict of interest that must be waived), the consent must be given by an appropriate official other than the individual being represented.

Defense counsel representing both the entity and a constituent (for example, employer and employee) may of course face the usual scope-of-employment or other conflict issues inherent in any respondeat superior situation. Again, the prevailing rule is that the privilege does not attach, as between commonly represented clients, such as the employer and employee. Mass. R. Prof. C. 1.7 cmt. 30. It is critical that joint clients be advised at the outset that "the lawyer will have to withdraw, if one requests that some matter material to the representation be kept from the other." Mass. R. Prof. C. 1.7 cmt. 31.

§ 5.10.8 Rule 1.16

If the lawyer is not permitted to reveal to the insurer information detrimental to the insured that would affect the insurer's obligations, does the lawyer's relationship with the insurer nonetheless require that the lawyer withdraw? Rule 1.16 of the Massachusetts Rules of Professional Conduct sets out the circumstances in which withdrawal is required and those in which it is permitted. To the extent that the attorney now has a conflict of interest, it would seem that withdrawal might be mandated under Mass. R. Prof. C. 1.16(a)(1) ("the representation will result in a violation of the rules of professional conduct") or permitted under any of several sections of Mass. R. Prof. C. 1.16(b).

However, withdrawal may not necessarily be practical. For example, it may not be possible to withdraw without alerting the insurer to the possibility of a coverage defense, to the detriment of the insured and in violation of counsel's duty of loyalty. Moreover, successor counsel could face the same conflict.

On the other hand, Mass. R. Prof. C. 1.7 cmt. 4 provides in pertinent part as follows:

> 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.

Rule 1.9(a), amended effective July 1, 2015, in turn provides as follows:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(The amendment specifies "informed consent" and the additional requirement that it be "confirmed in writing.") Except for the peculiarities of insurance defense and the fact that the insurer may by definition understand that it has to waive the conflict in this type of circumstance, it would be difficult to see how the lawyer could continue as counsel to the insured only.

§ 5.10.9 Rule 2.1—Advisor

Rule 2.1 of the Massachusetts Rules of Professional Conduct requires a lawyer to give honest advice that is not influenced by loyalties and interests outside the lawyer's independent professional judgment.

An insurance defense attorney may come up against this rule when an insurer refuses to follow counsel's recommendation to conduct additional investigation, pleading, or discovery under circumstances where the attorney believes that the activity refused by the insurer is essential to the defense.

§ 5.10.10 Rule 2.3—Evaluation for Use

Rule 2.3 of the Massachusetts Rules of Professional Conduct permits a lawyer to undertake an evaluation of a matter affecting a client for the use of someone other than the client but only if the client consents after consultation and the lawyer reasonably believes that making the evaluation will be "compatible with other aspects of the lawyer's relationship with the client." A typical example outside the insurance defense context would be an opinion letter on the title to security that is provided to a lender considering a loan to a borrower client.

The rule is difficult to apply to the insurance defense area if both the insurer and the insured are considered to be clients. However, it may be that a request by an insurer for an evaluation whose results will not be ""compatible" with the insured's interests raises a conflict of interest that in itself does not permit dual representation.

For example, in MBA Ethics Opinion 1991-5, a lawyer was asked by an insurer to value a claim in a situation in which the plaintiff had offered to settle within the policy limits. The MBA's opinion was that the lawyer could not undertake this evaluation and that the scenario posed a conflict of interest that could only be resolved by the attorney's advising the insurance company to retain its own counsel. In essence, the MBA felt that the fact that the evaluation was not in the interests of the insured meant both that the lawyer could not represent both parties and that the lawyer could not make the evaluation.

§ 5.10.11 Rule 3.3 and Rule 4.1

Although the rules on confidentiality generally prohibit the attorney from revealing to the insurer information that is detrimental to the insured, Mass. R. Prof. C. 3.3 and Mass. R. Prof. C. 4.1 impose certain new obligations on attorneys with respect to client fraud that, in limited circumstances, may require disclosure of otherwise confidential information.

In particular, and except in criminal cases, as provided in Mass. R. Prof. C. 3.3(e), Mass. R. Prof. C. 3.3(a)(2) requires the attorney to disclose a material fact to a tribunal when necessary to avoid assisting the client in a criminal or fraudulent act. *E.g., In re Tendler*, 30 Mass. Att'y Disc. R. 404 (2014) (In reciprocal discipline case, court ruled that respondent had failed to disclose to the U.S. Patent and Trademark Office that his client's patent application included misstatements of material fact; six-month suspension). Comment 3 to Mass. R. Prof. C. 4.1 notes that "assisting" under this rule has a special meaning and is not limited to conduct that would make the lawyer liable criminally as an aider or abettor or civilly as a joint tortfeasor.

Several lawyers in Massachusetts have been suspended from the practice of law for assisting their clients in committing fraud. *E.g., In re Harlow*, 20 Mass. Att'y Disc. R. 212 (2004) (respondent suspended for six months for violating Rule 4.1(b) by representing to the Department of Public Health that his client, a nursing home operator, had complied with an escrow account requirement without revealing that restrictive loan terms were used in funding the account and that the funds were returned to the lender shortly after they were deposited in the account); *In re Segal*, 14 Mass. Att'y Disc. R. 686 (1998) (two-year suspension where attorney knew, but did not disclose, that specific housing units were being purchased with prohibited mortgages and that submitted documentation contained false information); *In re Thurston*, 13 Mass. Att'y Disc. R. 776 (1997) (six-month suspension where attorney failed to disclose conflict of interest and made misrepresentations to one corporate partner to conceal fraud by another partner and attorney); *In re Eastwood*, 10 Mass. Att'y Disc. R. 70 (1994) (one-year suspension for attorney who acted as settlement agent at real estate closings in which he assisted parties in concealing second mortgages).

With the same Mass. R. Prof. C. 3.3(e) exception for criminal cases, Mass. R. Prof. C. 3.3(a)(3) prohibits offering evidence that is known to be false and requires the attorney to take reasonable remedial measures if the lawyer or the lawyer's client or witnesses have in fact offered material evidence that is known to be false. These duties continue to the conclusion of the proceeding, including all appeals. The lawyer should seek to dissuade the client from offering the false evidence, or if it has already been offered, the lawyer should try to persuade the client to correct the record. However, if the client refuses, the lawyer must make disclosure. Mass. R. Prof. C. 3.3 cmts. 5, 6.

Any lawyer faced with this problem should first focus on the definition of the word "known" in Mass. R. Prof. C. 1.0(g), the definitions section: "'Knowingly,' 'known,' and 'knows' denote actual knowledge of the fact in question," although knowledge may be inferred from the circumstances. Mere suspicion, however, is not sufficient to trigger the obligation to breach confidentiality.

The issue of what is "known" has particular relevance to insurance defense counsel who have discovered information that is unknown to the insurer that may jeopardize the insured's coverage or that is otherwise detrimental to the insured. The disclosures mandated by Mass. R. Prof. C. 3.3 should not be used to do an end run around confidentiality requirements or as a backdoor method of bringing to the insurer's attention issues that are damaging to the insured. Only if counsel knows that the evidence is both false and material to the claim are the Mass. R. Prof. C. 3.3 obligations triggered. *Montanez v. Irizarry-Rodriguez*, 641 A.2d 1079 (N.J. Super. Ct. App. Div. 1994).

Rule 4.1 imposes a similar obligation upon the lawyer in dealings with others, but with an important distinction. Rule 4.1(b) requires lawyers to disclose material facts to third persons "when necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Mass. R. Prof. C. 1.6." Comment 3 to Rule 4.1 clarifies that "assisting" means assistance sufficient to render the lawyer liable as an aider or abettor under criminal law or as a joint tortfeasor under principles of tort and agency law. If the client has committed a fraud, but not on a tribunal, the lawyer may feel that it is necessary to withdraw from the representation. However, it will be a comparatively rare circumstance in which disclosure to third persons —be it the insurer or the plaintiff's counsel—is permitted.

§ 5.10.12 Rule 5.4—Professional Independence of a Lawyer

Rule 5.4(c) of the Massachusetts Rules of Professional Conduct is the rule on payment of legal fees by persons other than the client. It prohibits lawyers from permitting a person who "recommends, employs, or pays the lawyer to render legal services for another" to direct or regulate the lawyer's professional judgment.

Rule 5.4(a) and (b) prohibit sharing legal fees with nonlawyers or forming partnerships with nonlawyers if one of the activities of the partnership is the practice of law. See related discussion below.

§ 5.10.13 Rule 5.5—Unauthorized Practice of Law

Rule 5.5(b) of the Massachusetts Rules of Professional Conduct prohibits a lawyer from assisting in the unauthorized practice of law by a person who is not a member of the bar. Comment 3 to the rule points out that the rule does not prohibit providing professional advice and instruction to nonlawyers whose jobs require them to have some knowledge of the law, such as claims adjusters.

In the context of insurance defense, Mass. R. Prof. C. 5.5(b), along with Mass. R. Prof. C. 5.4(a) and (b), is also an issue when insurance companies employ in-house counsel to defend insureds. Rule 5.5(c) of the Massachusetts Rules of Professional Conduct allows an out-of-state lawyer to assist local counsel. *See* Mass. R. Prof. C. 5.5 cmts. 12-14. Rule 5.5(d) allows out-of-state in-house counsel to provide legal services to the client. Mass. R. Prof. C. 5.5 cmts. 15-18. In general, courts that have considered the issue have found such representation to be permissible, *In re Allstate*, 722 S.W.2d 947 (Mo. 1987); *Kittay v. Allstate*, 397 N.E.2d 200, 202 (Ill. App. Ct. 1979), although at least one court determined that staff counsel's defense of an insured was in fact unauthorized practice. *Gardner v. N.C. State Bar*, 341 S.E.2d 517, 523 (N.C. 1986). Even if otherwise allowed, however, there may be issues as to the name of the firm. See § 5.10.14, below.

§ 5.10.14 Rules 7.1 and 7.5—Information About Legal Services

Rule 7.1 of the Massachusetts Rules of Professional Conduct governs communications concerning legal services generally while Mass. R. Prof. C. 7.5 concerns firm names and letterheads. Rule 7.1 generally prohibits false or misleading communications about the lawyer or the lawyer's services and, among other specifics, notes that a communication is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Rule 7.5 states that a firm name, a letterhead, or other professional designation shall not violate Mass. R. Prof. C. 7.1 and, in Subsection (d), that lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

The question then is whether staff counsel can use a designation such as "Law Offices of Able & Baker." The reason for this practice is not to disguise the insurance company affiliation but because insurance companies cannot practice law. But is it misleading? At least two courts that have considered the issue have said that the designation of the lawyers' practice in their own names was improper. *In re Weiss, Healey, & Rea*, 536 A.2d 266 (N.J. 1988); *In re Youngblood*, 895 S.W.2d 322, 331-32 (Tenn. 1995).

§ 5.11 CONCLUSION

Commentators on ethical problems faced by insurance defense counsel have suggested the following guidelines for dealings with insureds.

- Staff counsel should disclose at the earliest opportunity that they are an employee of the insurance company. Outside counsel should similarly disclose at the outset that they have been retained by the insurer.
- Staff counsel should consider whether the designation under which the practice is conducted is permissible.

- All counsel should make sure that the insured is notified, in writing, of all offers of settlement, but particularly when the claim exceeds policy limits.
- If the insurer declines an offer of settlement within policy limits, counsel should make sure that the insured knows of the offer, knows of the conflict, and knows of his or her right to retain independent counsel. *See* Mass. R. Prof. C. 1.4 cmt. 5. Such refusal to settle should be documented in writing.
- Counsel may not represent the insurer in a coverage dispute against an insured formerly or simultaneously represented by the lawyer.
- When the insurer is defending under a reservation of rights based on allegations of intentional conduct or other conduct by the insured outside the policy coverage, counsel should, again, notify the insured of the conflict and of the insured's right to obtain independent counsel, and obtain the insured's consent to continue the representation.
- Counsel may not disclose to the insurer information that is damaging to the insured, particularly information that is detrimental on the issue of coverage.

Leo J. Jordan & Hilde E. Kahn, "Ethical Issues Relating to Staff Counsel Representation of Insureds," 30 *Tort & Ins. L.J.* 25 (1994).

However strained the application, the Massachusetts Rules of Professional Conduct do apply to the conduct of insurance defense counsel. Whether the defense attorney is staff counsel or house counsel, these simple measures will help to eliminate or at least reduce the potential for ethical violations.

MCLE thanks Constance V. Vecchione, Esq., and the Hon. Daniel C. Crane for their earlier contributions to Sections 5.6 through 5.11.

PART III The Legal Framework [FNa2]

§ 5.12 INTRODUCTION

Once upon a time, the tripartite relationship was as invisible as it was successful. It allowed insureds to gain access to quality law firms; gave law firms a steady flow of business, as well as input from the insurer's claims specialists in that area of the law; and allowed insurers to maintain control over the manner in which legal services were rendered on behalf of their policyholders. Over the past several decades, however, the tripartite relationship has come under attack on many fronts. In many states, ethics committees have questioned the propriety of litigation guidelines and audit procedures that insurers have imposed on outside counsel. A few courts have also begun to question whether local attorneys may ethically comply with such guidelines. Policyholder firms have also taken their cue, filing consumer protection actions against insurers and auditors seeking damages on behalf of insureds.

Current challenges to the tripartite relationship have focused on two key questions:

- How many clients does defense counsel represent?
  - Does defense counsel represent just the policyholder, or is the insurer a client too?
- How is the insurer's right to defend reconciled with defense counsel's ethical duties?

How may the insurer's contractual right to defend its policyholder be reconciled with the ethical duties of defense counsel regarding litigation guidelines and the like?

§ 5.13 THE LEGAL FRAMEWORK OF CLAIMS-HANDLING DISPUTES

Present-day claims-handling disputes are emerging on the fault line between the law of insurance and the law of professional responsibility. Although these two areas of the law frequently overlap, sometimes with confusing consequences, it is worth keeping in mind that they are distinct sources of responsibility.

The law of insurance arises out of the insurance contract that a policyholder enters into with the insurer. Although the breach of that contract may have tort implications and is subject to various statutory and regulatory requirements that state legislatures and insurance departments have imposed on the insurer's contractual duties, the law of insurance is fundamentally a matter of contract.

The law of professional responsibility is based on various model rules and canons of ethics directing the obligations of lawyers to represent clients. It exists independently of any contract that an insured and an insurer may have entered into and is not limited by the terms of an insurance policy unless the lawyer's client knowingly consents to a limited representation in accordance with those contractual terms.

Part III addresses what happens when these two areas of the law come into conflict.

§ 5.13.1 The Law of Insurance

The right to select counsel and control the defense of a suit against a policyholder is generally set forth in the policy's insuring agreement. Thus, most policies state that "the company shall have the right and duty to defend any suit against an insured seeking [covered] damages."

No single feature of a liability insurance policy has a greater impact on an insurer's ultimate payment obligations than the duty to defend. An insurer's decision as to whether it has a duty to defend can have significant ramifications throughout the course of a claim. Questions may arise as to the insurer's immediate payment obligations, the course of conduct that a policyholder is likely to adopt in relation to the third-party tort claimant, and, in some jurisdictions, whether the insurer, if found to have a duty to defend, now owes attorney fees or consequential damages or may even be estopped from disputing whether it has an indemnity obligation.

This defense undertaking is not only a duty but also a right. The right to defend is a valuable tool that is bargained for by insurers in the creation of such policies. The right to defend gives an insurer control over the manner in which a case is defended and ultimately disposed of. This can have great significance as to the ultimate cost of defense and in ensuring that the case is resolved on its merits.

(a) *Determining the Duty to Defend*

In general, an insurer's duty to defend is triggered by the insured's request (tender) that it undertake the defense of a lawsuit that alleges facts that create the possibility of a judgment that would fall within the scope of the insurer's indemnity obligation. In Massachusetts, the Supreme Judicial Court has ruled that an insurer's duty to defend is not restricted to the facts actually alleged in the underlying suit but should also include facts actually known by the insurer or that are readily knowable. *Billings v. Commerce Ins. Co.*, 458 Mass. 194, 200-01 (2010).

(b) *Losing the Right to Defend*

The duty to defend is a valuable right. In consideration of the insurer's promise to defend, the insured has relinquished control over the defense of the case. As a consequence, the insurer has complete dominion over decisions with respect to how the case should be defended and how the case should be settled or tried. Yet this right is not inviolate. In particular, the Supreme Judicial Court has ruled that, while an insurer may defend under a reservation of rights where it has concerns with respect to its coverage obligations, a policyholder may insist on receiving a defense through independent counsel in such circumstances.

Independent counsel is one that is "chosen by the insured or with the approval of the insured, but whose fees are paid by the insurer." *Hartford Cas. Ins. Co. v. A&M Assocs., Ltd.*, 200 F. Supp. 2d 84, 90 (D.R.I. 2002) (applying Massachusetts law). Independent counsel, although paid by the insurer, must be loyal only to the insured, owing the insured "the full measure of the fiduciary duty of loyalty and independent judgment." *Hartford Cas. Ins. Co. v. A&M Assocs., Ltd.*, 200 F. Supp. 2d at 90. In *A&M*, the district court held that any reservation of rights triggered a conflict of interest warranting the right to independent counsel owing to the possibility that a conflict might arise even if no actual conflict ever appears.

There is surprisingly little law addressing these issues in Massachusetts. Many of the precedents that exist are now more than four decades old and fail to take into account the evolution of ethical and insurance law in other states. For now, at least, it seems that these precedents still hold sway in Massachusetts.

In *Herbert A. Sullivan, Inc. v. Utica Mutual Insurance Co.*, 439 Mass. 387, 406-07 (2003), the Supreme Judicial Court gave this background to the rules:

> In *Salonen v. Paanenen*, we concluded that an insurer's defense of its insured pursuant to reservation of rights did not estop the insurer from subsequently disclaiming liability because the insured had been put on notice of such possible disclaimer and could thus take necessary steps to protect its rights. At the same time, we also stated that the case should not be construed to mean that an insurer could reserve its rights to disclaim liability while also insisting on retaining control of the insured's defense. When an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs. That did not happen here.

In *Three Sons, Inc. v. Phoenix Insurance Co.*, 357 Mass. 271, 274 (1970), the Supreme Judicial Court declared as follows:

> Control of the case by the insurer, when it may later disclaim liability under the policy, means that the insured's rights may be adversely affected. He has no opportunity to control aspects of the case essential to determination of liability or settlement. If liability is established, or a settlement reached, and the insurer has a valid ground for disclaimer, the insured is left with a liability which, had he been able to defend or settle on other terms, might never have existed.

Three Sons, Inc. v. Phoenix Ins. Co., 357 Mass. at 276.

Contrary to the rule that applies in most states, therefore, it seems that, in Massachusetts, a reservation of rights on any coverage issues will generate a right to independent counsel, even if the issue in question has nothing to do with how defense counsel will handle the insured's defense.

Indeed, this "reject the defense" approach is at odds with the view of the law that has recently been adopted by the American Law Institute (ALI) in its Restatement of the Law, Liability Insurance (2018). In Section 17(1), the ALI declares that if "there are common facts at issue in the claim and the coverage defense such that the claim could be defended in a manner that would advantage the insurer at the expense of the insured," the insurer must agree to provide independent counsel. Independent counsel is not required merely because the underlying suit seeks damages in excess of the applicable limits.

The ALI approach is more or less the approach that was pioneered by the California Court of Appeals in *San Diego Federal Credit Union v. Cumis Insurance Society*, 162 Cal. App. 2d 358 (1984), which focuses on whether there is a conflict that could influence defense counsel's file handling to the detriment of the insured. It remains to be seen whether Massachusetts courts will ever revisit the *Three Sons* rule in light of the case law and scholarly authority that has since evolved criticizing the "reject the defense" approach.

Although the Supreme Judicial Court has yet to squarely consider the parameters of the "independent counsel" doctrine, several recent cases have fleshed out the circumstances in which a disqualifying conflict may be found to exist.

In *Mount Vernon Fire Ins. Co. v. VisionAid*, 825 F.3d 67 (1st Cir. 2016), the First Circuit asked the Supreme Judicial Court to tell it whether a dispute between a liability insurer and a policyholder as to whether the insurer's duty to defend extends to the prosecution of a counterclaim presents a conflict of interest requiring the insurer to pay for a "defense" through the insured's chosen counsel.

VisionAid was sued by a former employee, Gary Sullivan, for age discrimination. In its defense, VisionAid alleged that it had terminated Sullivan not because of his age but because it discovered that he had misappropriated several hundred thousand dollars of corporate funds. But VisionAid did not want to simply rely on this as a defense. It advised its insurer that it wanted to file a counterclaim against Sullivan for misappropriation in an attempt to recover those funds. Mount Vernon, which had accepted coverage for the defense of the age discrimination claim, refused to pay for the cost of prosecuting the misappropriation claim. Mount Vernon insisted that there was no conflict of interest between its appointed defense counsel and VisionAid such that it should be called on to pay for VisionAid's personal counsel. It claimed that settled Massachusetts law says that an insured was entitled to have its personal counsel handle the defense of a claim only when an insurer was defending under a reservation of rights, which Mount Vernon no longer was. Mount Vernon also disputed any suggestion that it had ever sought to weaken VisionAid's claims against Sullivan or that these claims created a strategic conflict with respect to the defense or settlement of Sullivan's suit against VisionAid.

In the ensuing coverage litigation, the U.S. District Court for the District of Massachusetts ruled that Mount Vernon's defense duty did not extend to the prosecution of affirmative claims. Although the First Circuit initially rejected the insured's request that these issues be certified to the Supreme Judicial Court, after hearing oral argument the First Circuit declared in June 2016 that it needed the court's advice as to whether the duty to defend encompassed affirmative counterclaims. The First Circuit certified this issue on the question of independent counsel:

> Assuming the existence of a duty to prosecute the insured's counterclaim(s), in the event it is determined that an insurer has an interest in devaluing or otherwise impairing such counterclaim(s), does a conflict of interest arise that entitles the insured to control and/or appoint independent counsel to control the entire proceeding, including both the defense of any covered claims and the prosecution of the subject counterclaim(s)?

In *Mount Vernon Fire Insurance Co. v. Visionaid, Inc.*, 477 Mass. 343 (2017), the Supreme Judicial Court eventually ruled that the duty to defend does not extend to the cost of prosecuting counterclaims on behalf of the insured. The court ruled that the plain meaning of "defend" was to "work to defeat a claim that would create liability against the individual being defended." As a result, it rejected the insured's contention that "defend" should also encompass "anything a reasonable defense attorney would

do to reduce the liability of the insured." Chief Justice Gants dissented, arguing that insurers must defend offensive claims if they are "inextricably intertwined" with the claims against the insured and any sums recovered by the insured would count against the amounts that the insurer would have to pay in indemnity. The majority rejected this proposal as being unworkable and not finding any support in the policy language at issue. The court also rejected VisionAid's contention that the Massachusetts "in for one, in for all" rule extended to the prosecution of claims, as distinguished from imposing a duty to defend all counts if any subset of them is covered. Having answered the First Circuit's first two certified questions in the negative, the court elected not to address a third question, which had asked whether the insurer's refusal to fund affirmative counterclaims created a conflict of interest allowing the insured to appoint counsel of its own choosing.

After the case was remanded back to the First Circuit from the Supreme Judicial Court, VisionAid argued that, even though Mount Vernon had no obligation to fund the prosecution of VisionAid's counterclaim, VisionAid was entitled to independent counsel at Mount Vernon's expense to handle the defense of the former employee's age discrimination claim, rather than panel counsel appointed by Mount Vernon. In particular, the First Circuit requested further briefing with respect to VisionAid's contention that the insurer's refusal to pay for the prosecution of the counterclaim created a conflict of interest that entitled the insured to insist on counsel of its own choosing for the entire case. Ultimately, the First Circuit ruled that the existence of the counterclaim did not create a conflict of interest that allowed the insured to substitute its own chosen defense counsel at the insurer's expense. In *Mount Vernon Fire Insurance Co. v. VisionAid, Inc.*, 875 F.3d 216 (1st Cir. 2017), the First Circuit affirmed the principle that defense counsel represents both the insured and the insurer but declared that, in this case, the parties had a shared interest in having the counterclaim succeed.

VisionAid had argued that Mount Vernon wanted to "devalue" the counterclaim because VisionAid refused the employee's proposal to settle the age discrimination claim and the counterclaim for an exchange of releases. The First Circuit found, however, that both Mount Vernon and VisionAid "want to crush [the employee's] suit." *See Mount Vernon Fire Ins. Co. v. VisionAid, Inc.*, 875 F.3d at 724. The First Circuit also recognized that "[a] muscular counterclaim will go a long way in making that happen. But a weak one certainly will not." *Mount Vernon Fire Ins. Co. v. VisionAid, Inc.*, 875 F.3d at 724. Further, the court ruled that it would not have been possible for the insurer to diminish the counterclaim. In the final analysis, the court declared that there was nothing "unworkable or schizophrenic" in having two lawyers handling the two different pieces of this case.

The First Circuit's decision in *VisionAid* was clearly influenced by an opinion of the Appeals Court that was handed down a few weeks before the case was decided. In *OneBeacon America Insurance Co. v. Celanese Corp.*, 92 Mass. App. Ct. 382 (2017), *review denied*, 479 Mass. 1107 (2018), a product manufacturer tendered the defense of mass asbestos litigation to its liability insurer. OneBeacon initially disputed coverage but subsequently offered to defend without any reservation of rights. Nevertheless, Celanese Corp. insisted on using its own lawyers and subsequently sued OneBeacon, claiming that it was entitled to be reimbursed for the $2.4 million that it had paid to defense counsel.

In rejecting Celanese's claim for reimbursement, the Appeals Court focused on four questions, which are set forth at *OneBeacon Am. Insurance Co. v. Celanese Corp.*, 92 Mass. App. Ct. at 386:

> (1) Does OneBeacon have the right to control Celanese's defense if OneBeacon has offered to defend without a reservation of rights?

The court ruled that OneBeacon did not lose the right to control the insured's defense because it had accepted coverage for the claims and was not defending under a reservation of rights.

> (2) Does Celanese have the right to refuse OneBeacon's control of the defense if a sufficient conflict of interest exists?

Despite the absence of a coverage reservation, the Appeals Court suggested that conflicting views with respect to the defense of the case might yet create a conflict allowing the insured to insist on its own defense counsel. The Appeals Court adopted the Texas Supreme Court's view in *Northern County Insurance Co. v. Davalos*, 140 S.W.3d 685, 689 (Tex. 2004), that a conflict of interest may arise even in the absence of a reservation of rights, including in cases where

> (1) ... the defense tendered "is not a complete defense under circumstances in which it should have been," (2) when "the attorney hired by the carrier acts unethically and, at the insurer's direction, advances the insurer's interests at the expense of the insured's," (3) when "the defense would not, under the governing law, satisfy the insurer's duty to defend," and (4) when, though the defense is otherwise proper, "the insurer attempts to obtain some type of concession from the insured before it will defend."
>
> (3) Does a sufficient conflict of interest exist [to require independent counsel]?

Despite having opened the door to finding a conflict, the Appeals Court concluded in this case that there were insufficient "extracontractual" considerations to support a right to independent counsel, rejecting the insured's argument that OneBeacon was interested only in paying its limits and would put its interests before those of the insured if permitted to take control of the asbestos litigation against Celanese. Further, the Appeals Court declared that Celanese had ample remedies under G.L. c. 93A to sue OneBeacon for bad faith if it acted inappropriately.

(4) Is OneBeacon liable for defense costs where Celanese has refused OneBeacon's control of the defense?

Having found that OneBeacon did not lose its right to control the defense of these cases, the Appeals Court ruled that Celanese could not now insist that its personal counsel be paid for the defense that it had spurned from OneBeacon.

Celanese rejected OneBeacon's offer to defend without a reservation of rights and conducted its own defense because it believed that its own attorney would provide a better defense. That was Celanese's right. However, absent a sufficient conflict of interest on the part of OneBeacon, Celanese lost its right to obtain reimbursement for defense costs when it refused to accept OneBeacon's defense, offered without a reservation of rights.

Notwithstanding these new opinions, several key issues remain to be clarified by Massachusetts courts, including

- whether, as existing law seems to suggest, any reservation of rights creates a per se conflict or whether the coverage issue must be one that actually affects the insured's defense;
- whether a dispute over strategy creates a conflict of interest; and
- whether insurers have an affirmative duty to alert their insureds to the right to independent counsel.

As discussed above, outside of Massachusetts, most states have ruled that an insurer loses the right to control its insured's defense only if it reserves rights on issues that have the potential to affect the manner in which the underlying case is defended. *See, e.g., San Diego Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App. 2d 358 (1984). Cases such as *Three Sons* seem to put Massachusetts in the minority camp of jurisdictions that declare that there is a per se conflict whenever an insurer reserves rights, without regard to the nature of the issue in dispute. At the same time, it should be noted that all these cases involved issues that did, in fact, present a conflict of interest under even a *Cumis* standard. It remains to be seen, therefore, whether the Supreme Judicial Court would similarly hold that insurers forfeit the right to control their insured's defense by reserving rights with respect to an issue (for example, late notice) that does not create any opportunity for appointed defense counsel to skew the insured's defense in a manner that would bar coverage.

(c) *Sources of Conflict*

Most of the cases in this area have focused on coverage-based conflicts arising out of reservation of rights letters wherein the insurer agrees to provide a full defense but states that its indemnity obligations may not apply to some of the claims presented against the policyholder. In recent years, however, insureds have sought to expand the scope of their right to independent counsel to also encompass other claimed sources of conflict. In particular, some insureds have argued that they should have a right to independent counsel, even in cases where the insurer has accepted coverage, if the parties disagree with respect to how the defense is conducted and that disagreement could result in uninsured damages, either because there could be a verdict in excess of policy limits or because the insurer's case-handling strategy could affect types of damages that are not insured under the policy (e.g., business reputation).

To date, courts have not recognized disagreements concerning litigation strategy as a valid basis for annulling the insurer's right to defend. For instance, the Texas Supreme Court ruled in *Northern County Insurance Co. v. Davalos*, 140 S.W.3d 685, 689 (Tex. 2004), that "[e]very disagreement about how the defense should be conducted cannot amount to a conflict of interest .... If it did, the insured, not the insurer, could control the defense by merely disagreeing with the insurer's actions." While outlining various types of coverage disputes or extracontractual demands that might give rise to such a conflict, the Texas Supreme Court declared in this instance that the insured's unwarranted rejection of the defense offered by his insurer precluded any right to reimbursement of his own defense costs. The court left open the possibility that independent counsel could be required in cases where

- the defense tendered "is not a complete defense under circumstances in which it should have been";
- "the attorney hired by the carrier acts unethically and, at the insurer's direction, advances the insurer's interests at the expense of the insured's";
- "the defense would not, under the governing law, satisfy the insurers duty to defend"; or
- "the insurer attempts to obtain some type of concession from the insured before it will defend."

N. Cty. Ins. Co. v. Davalos, 140 S.W.3d at 689 (quoting 1 Allan D. Windt, *Insurance Claims and Disputes* § 4.25, at 393 (4th ed. 2001)).

Earlier, the same court had suggested that the insured's right to reject defense counsel should be limited to cases where counsel was clearly inadequate to the task or was not vigorously defending the insured. *See Nat'l Union Fire Ins. Co. v. Circle, Inc.*, 915 F.2d 986, 991 (5th Cir. 1990) (Louisiana law) (holding that the insured could reject the counsel appointed by the insurer and compel payment of the fees for its own attorneys if the defense counsel provided by the insurer was obviously inadequate). In *Trinity Universal Insurance Co. v. Stevens Forestry Service, Inc.*, 335 F.3d 353 (5th Cir. 2003), the Fifth Circuit held that the fact that the underlying case was complicated did not warrant imposing an obligation on the insurer to also pay for the insured's own attorneys where there was no evidence that the appointed defense counsel was failing to vigorously and adequately defend the insured. Likewise, the mere fact that the insurer had written to its policyholder encouraging the policyholder to retain counsel of its own choosing and at its own expense in light of the fact that most of the claims were not covered under the policy did not, in the Fifth Circuit's opinion, warrant any additional obligation on the part of the insurer to also pay for independent counsel.

In light of the Appeals Court's ruling in *Celanese* and the First Circuit's decision in *VisionAid*, it is apparent that Massachusetts courts may find conflicts based on disagreements between the parties that are not restricted to insurance coverage issues.

As with *Celanese*, however, courts have not found that the insured's belief that the law firm assigned to defend it is inadequate to the task is a valid basis for requiring the insurer to pay for "shadow" counsel or for counsel of the insured's own choosing. In *Driggs Corp. v. Pennsylvania Manufacturers Ass'n Insurance Co.*, 181 F.3d 87 (4th Cir. 1999) (unpublished— full text available at 1999 U.S. App. LEXIS 9182), the U.S. Court of Appeals for the Fourth Circuit ruled in a Maryland environmental liability case that the insurers had not created a conflict entitling the insured to independent counsel where they had provided a defense while reserving rights as to the applicable trigger of coverage and whether the absolute pollution exclusion applied. The court noted that, whatever trigger was found to apply, one insurer or the other would pay, and that, as to the exclusion, the insured had conceded that it precluded any indemnity obligation. As a result, the Fourth Circuit held that the carriers had no obligation to reimburse the insured for attorney fees that Kirkpatrick & Lockhart had incurred in supplementing the work of the small insurance defense firm that the carriers had retained to defend Driggs.

The Arizona Court of Appeals ruled in *Lennar Corp. v. Transamerica Insurance Co.*, 256 P.3d 635 (Ariz. Ct. App. 2011) that, where an insured agreed to accept a defense pursuant to a reservation of rights but also insisted on its own counsel remaining involved in the case as co-defense counsel, the insurers had satisfied their defense obligation by appointing defense counsel and had no obligation to separately pay for the insured's independent counsel. While acknowledging that Arizona law requires insurers to pay for independent counsel selected by the insured in cases where a conflict of interest exists, and also permits the insured to reject a tender of defense from its insurers under certain circumstances, insureds are not permitted to accept, partially or fully, the insurer's choice of counsel and also insist on payment for their own choice of counsel.

In *State v. City of Rhinelander*, 638 N.W.2d 393 (Wis. Ct. App. 2001) (unpublished decision; text available at 2001 WL 1155667), District III of the Wisconsin Court of Appeals rejected an insured's argument that it was entitled to reimbursement for fees incurred by its personal counsel based on a claimed conflict with respect to the law firm that its insurer had assigned to the claim or questions concerning the qualifications of assigned defense counsel. The court found that "there is no breach of the duty to defend as a matter of law merely because the attorney hired by the City represented the insurance companies in other litigation." *State v. City of Rhinelander*, 2001 WL 1155667, at *1. Nor did the court accept the insured's argument that it was forced to continue to pay its own attorneys because it took several months to confirm the qualifications of the lawyer appointed by the insurer. The court held that an insurer has the right to appoint defense counsel without input from the insured and that to accept the city's argument "would allow an insured to select its own attorney at the insurer's expense." *State v. City of Rhinelander*, 2001 WL 1155667, at *2.

Similarly, in *Herbert A. Sullivan, Inc. v. Utica Mutual Insurance Co.*, 439 Mass. 837 (2003), the Supreme Judicial Court declared that, if an insured has already "acquiesced" in its insurer's selection of counsel, it may not later demand that the insurer also pay for shadow counsel that the insured selected to augment the defense being provided by the insurer's defense counsel. Of course, the insured may later have a cause of action against the insurer if it can show that the insurer was acting with an evil motive or if the law firm selected to defend the insured did so negligently.

§ 5.13.2 The Law of Professional Responsibility

While the foregoing legal rules govern the rights of insurers to appoint defense counsel, the contract entered into between insured and insurer does not govern the parameters of the ethical obligations of defense counsel in undertaking the representation of the insured. The rules governing the professional conduct of lawyers are set forth in the ABA Model Rules of Professional Responsibility. Additionally, courts considering the law of lawyering will often turn to the American Law Institute's Restatement of the Law Governing Lawyers.

Section 215 of the Restatement provides as follows:

> (1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in Section 202 [conflicts of interest], with knowledge of the circumstances and conditions of the payment.
>
> (2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:
>
> (a) The direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
>
> (b) The client consents to the direction under the limitations and conditions provided in Section 202.

The foregoing principles are also embodied in the Model Rules governing the professional conduct of attorneys, especially Rules 1.6(a), 1.7(b), 1.8(f), and 5.4(c).

(a) ***Protecting Client Confidences***

Model Rule 1.6(a), identical to its Massachusetts counterpart, prohibits a lawyer from revealing information relating to the representation of a client unless the client consents after consultation.

> (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).

Rule 1.6 has been held to extend to all information related to counsel's representation, not just items covered by the attorneyclient privilege. *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995). As noted in the comment to Rule 1.6, the rule protects "all information, whatever its source."

(b) ***Conflicting Client Responsibilities***

Rule 1.7(b) of the Model Rules provides as follows:

> (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.

Thus, Comment 13 to Rule 1.7 of the ABA's Model Rules of Professional Conduct notes that

> [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.

Rule 1.7(b) of the Massachusetts Rules of Professional Conduct follows the former version of the Model Rule.

> 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.

Comment 13 to Mass. R. Prof. C. 1.7 provides as follows:

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 .... 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.

(c) ***Role of Nonclient Payor***

Model Rule 1.8(f) provides as follows:

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.

Finally, Rule 5.4(c) of the Massachusetts Rules of Professional Conduct provides as follows:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

§ 5.14 WHO IS THE CLIENT OF DEFENSE COUNSEL?

§ 5.14.1 Rules Governing Client Relationships

Where an insurer retains counsel to represent the interests of its policyholder in fulfillment of its contractual obligations under a policy of liability insurance, does defense counsel have duties to

- the policyholder,
- the insurer, or
- both the policyholder and the insurer?

Defense counsel is not forbidden to represent the interests of both the insurer and the insured at the same time, as long as there is no conflict of interest between the two. As the ABA Standing Committee on Ethics and Professional Responsibility stated in ABA Formal Op. 96-403 (1996):

A lawyer hired by an insurer to represent an insured may represent the insured alone or, with appropriate disclosure and consultation, he may represent both the insurer and the insured with respect to all or some of the aspects of the matter. So long as the insured is a client, however, the Rules of Professional Conduct—and not the insurance contract—govern the lawyer's obligations to the insured. A lawyer hired to defend an insured pursuant to an insurance policy that authorizes the insurer to control the defense ... must communicate the limitations on his representation of the insured to the insured, preferably early in the representation.

Courts have been unanimous in declaring that counsel has an attorney-client relationship with the policyholder on whose behalf it is appearing. Defense counsel "is obligated to represent the insured with undivided fidelity regardless of the fact that his fee for legal services is being paid by another." *Feliberty v. Damon*, 72 N.Y.2d 112, 120 (1988) (paramount duty of defense counsel is to policyholder, not insurer).

The issue of counsel's relationship to the insurer is more problematic. Courts and commentators have failed to reach agreement with respect to whether the insurer is a coclient of defense counsel. *See* Charles Silver & Kent D. Syverud, "Professional Responsibilities of Insurance Defense Lawyers," 45 *Duke L.J.* 255 (1995) (arguing for coclient status).

In Massachusetts, both the insurance company and the policyholder are deemed to be coclients. In *McCourt Co. v. F.P.C. Properties, Inc.*, 386 Mass. 145 (1982), the Supreme Judicial Court declared that where a law firm is retained by an insurance company to represent its policyholder, "the law firm is attorney for the insured as well as the insurer."

Most states have taken a similar view, holding that, in the absence of a conflict of interest between the insured and the insurer, both are presumed to be clients. *See, e.g.,* *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999); Md. State Bar Ethics Op. 00-23 (Apr. 25, 2000); Or. State Bar Ass'n Legal Ethics Op. 1991-121. *But see* *L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298, 1304 (Ala. 1987); Nev. Formal Ethics Op. 26 (2001); N.Y. State Bar Ethics Op. 716 (1999). This issue has most commonly arisen in the context of efforts by insurers to sue defense counsel for malpractice, for example, where the attorney's negligence has prompted an excess verdict. In several of these cases, courts have ruled that the insurer is not a client of defense counsel. *See* *Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 108 (2d Cir. 1991) ("[i]t is clear beyond cavil that in the insurance context the attorney owes his allegiance, not to the insurance company that retained him but to the insured defendant"); *Point Pleasant Canoe Rental v. Tinicum Twp.*, 110 F.R.D. 166, 170 (E.D. Pa. 1986) ("[w]hen a liability insurer retains a lawyer to defend an insured, the insured is considered the lawyer's client"); *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669, 671 (Ark. 1990); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, 297 (Mich. 1991); *In re Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995).

Despite such rulings, most courts have declared that insurance defense counsel represents both the insured's and the insurer's interests. *See In re Proposed Addition to the Rules Governing Conduct of Attorneys in Fla.*, 220 So. 2d 6 (Fla. 1969). The lawyer's primary duty is to the policyholder, however, Fla. Ethics Op. 97-1 (attorney representing an insured could not follow the carrier's instruction to file a motion for summary judgment where said instruction would be contrary to the best interests of the policyholder); the insured is deemed to be the "primary client" whose protection is the lawyer's paramount concern, ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1476 (1981); *Rose Med. Ctr. v. State Farm Mut. Ins. Co.*, 903 P.2d 15, 17 (Colo. Ct. App. 1994). Accordingly, if a conflict arises, defense counsel must exclusively represent the interests of the insured or withdraw. As the North Carolina Bar Association stated in Formal Ethics Opinion 10 on July 16, 1998:

> When the lawyer represents two clients, there is a delicate balance of the rights and duties owed by the lawyer to each client. With respect to the payment of legal fees, the interest of the insurance company and insured are usually not the same. The insurance company usually has a paramount interest in controlling or reducing its defense costs, while the paramount interest of the insured is generally to receive the best possible defense particularly if the claim may exceed the policy limits available for insured's protection.

A few states have moved to amend their rules of professional conduct to expressly address the potential conflicts of interest arising out of the role of insurance defense counsel. In 2003, the Supreme Court of Florida issued an order amending the rules regulating professional conduct of the Florida bar. Rule 4-1.7 (Conflict of Interest) was amended to include a new Section (e) stating as follows:

> [U]pon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation.

In a comment, the court noted "establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer."

The Florida Supreme Court also added a new section to Rule 4-7.10 (Firm Names and Letterhead) acknowledging the role of staff counsel in providing a defense to policyholders. The new rule provides that staff counsel may operate under the name of an attorney in the office, but the firm's employment relationship with the insurer must be disclosed to policyholder clients at the outset of a representation. On the other hand, staff counsel need not disclose their relationship with the insurer during the trial or representation of the policyholder, as Florida courts have recognized the public policy of not disclosing the existence of insurance coverage to juries.

Meanwhile, in New Hampshire, the ethics committee of the state bar association has issued Advisory Opinion No. 2018-19/02, declaring that New Hampshire law is unsettled with respect to whether insurance companies are clients of appointed defense counsel and indicating that, until this issue is settled by the New Hampshire Supreme Court, law firms should be clear about whom they represent. Although an earlier ethics opinion from the committee had suggested that New Hampshire is a "dual client" state, the committee concludes in this opinion that the law is in fact unsettled and that its 1993 and 2002 opinions on tripartite issues needed to be harmonized. Furthermore, the court declared that, if New Hampshire is deemed to be a dual

client state, defense counsel might face ethical dilemmas with respect to whether they communicate facts to insurers that would be harmful to their policyholder clients. The committee recommended to law firms, therefore, that "[i]f they want to have a relationship only with the insured, something that will avoid possible future conflicts if the insured provides information [such as in the example set forth earlier in the opinion], they should make this clear to the insurance company." Conversely, the committee declared that

> [i]f the insurance company insists that it also have an attorney client relationship with the lawyer for privilege, malpractice, and communication purposes, then the potential conflicts under NH RPC Rule 1.7 described above may require the lawyer to withdraw in some situation. Such withdrawal could prove costly to the company, especially if the conflict arises late in the litigation, as the company will have to hire a new lawyer for the insured and, to protect its non-coverage claims, one for itself as well.

§ 5.14.2 Malpractice Actions Based on "Client" Status

Where insurers, insureds, and defense counsel once stood in a triangle of reciprocal duties and strengths, the triangle has now been turned inside out.

- Policyholders claim that insurer litigation guidelines so closely control the conduct of defense counsel as to make insurers vicariously liable for counsel's malpractice.
- Insurers have sued defense counsel, claiming that excess verdicts were the result of defense counsel's malpractice.
- Law firms have sued insurers, seeking defense costs that were cut by audits.

Faced with these challenges, some courts have thrown up their hands and complained that the "ethical dilemma thus imposed upon the carrier-employed defense attorney" by the relationship between the insurer, the client-insured, and the insurance-company-paid defense attorney is one that "would tax Socrates." *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255, 273 (Miss. 1988).

The key question in most of these cases is whether a client relationship exists between an insurance company and the lawyer that it retains to represent its policyholder. Ironically, as may be seen, insurers may sometimes wish to have an attorney-client relationship when the issue concerns control of the insured's defense or a right to pursue a malpractice claim against defense counsel, but an insurer may shun "client" status when an insured seeks to impose vicarious liability on an insurer based on defense counsel's negligent conduct.

(a) ***Is an Insurer Vicariously Liable for the Conduct of Defense Counsel?***

Traditionally, lawyers have been treated as independent contractors. As such, an insurer is not liable for lawyers' malpractice, as might otherwise be the case if the defense counsel were an agent or employee of the insurer.

The most important element in determining whether one is an agent or an independent contractor is the control the person is subject to. Comment b to Section 1 of the Restatement (Second) of Agency states that "[i]t is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements." The test for this factor has been stated as follows:

> The determinative right of control is not merely over what is to be done, but primarily over how it is to be done. Basically, it is the distinction between a person who is subject to orders as to how he does his work and one who agrees only to do the work in his own way.

Frankle v. Twedt, 47 N.W.2d 482, 487 (Minn. 1951). It is the right to control, not the actual exercise of that right, that determines agency. *Frankle v. Twedt*, 47 N.W.2d at 487.

Additionally, as discussed above, the Rules of Professional Conduct specifically prohibit a party who is paying for legal services for another to direct or regulate the attorney's professional judgment. Thus, an insurer that is paying for the defense of its insured is prohibited from controlling the defense attorney's actions. As such, it cannot be held vicariously liable for the actions of an independent contractor.

For the most part, courts have held that an insurer may not be held vicariously liable for the litigation negligence or misconduct of defense counsel. *See, e.g.*, *Merritt v. Reserve Ins. Co.*, 34 Cal. App. 3d 858, 880-82 (1973); *Marlin v. State Farm Mut. Auto. Ins. Co.*, 761 So. 2d 380, 381 (Fla. Dist. Ct. App. 2000); *Brocato v. Prairie State Farmers Ins. Ass'n*, 520 N.E.2d

1200, 1203 (Ill. App. Ct. 1998); *Mirville v. Allstate Indem. Co.*, 87 F. Supp. 2d 1184, 1191 (D. Kan. 2000); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 410 (2003); *Feliberty v. Damon*, 531 N.Y.S.2d 778, 782 (1988); *Mentor Chiropractic Ctr., Inc. v. State Farm Fire & Cas. Co.*, 744 N.E.2d 207, 211 (Ohio Ct. App. 2000); *IngersollRand Equip. Corp. v. Transp. Ins. Co.*, 963 F. Supp. 452, 454-55 (M.D. Pa. 1997); *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 628-29 (Tex. 1998).

Nevertheless, a growing number of courts have held that an insurer can be held liable for the misconduct of defense counsel during the defense of an insured. *See, e.g.*, *Boyd Bros. Transp. Co., Inc. v. Fireman's Fund Ins. Cos.*, 729 F.2d 1407 (11th Cir. 1984); *Nat'l Farmers Union Prop. & Cas. Co. v. O'Daniel*, 329 F.2d 60 (9th Cir. 1964); *Smoot v. State Farm Mut. Auto. Ins. Co.*, 299 F.2d 525 (5th Cir. 1962); *Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 240 F. 573 (1st Cir. 1917); *Cont'l Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281 (Alaska 1980); *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159 (Haw. 1999); *United Farm Bureau Mut. Ins. Co. v. Groen*, 486 N.E.2d 571 (Ind. Ct. App. 1985); *Safeco Ins. Co. v. Ellinghouse*, 725 P.2d 217 (Mont. 1986); *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002); *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472 (Wis. 1997).

However, these jurisdictions are not uniform as to the requisite showing that must be made to hold an insurer vicariously liable. That is, most of the jurisdictions do not require that the insurer have actual knowledge of the misconduct of defense counsel. In those jurisdictions, actual knowledge is imputed. A few jurisdictions do not impute knowledge to the insurer. These jurisdictions require establishing that the insurer had knowledge of the misconduct.

A majority of courts recognizing a cause of action against an insurer for defense counsel's misconduct do not require actual knowledge of the misconduct by the insurer. *See, e.g.*, *Boyd Bros. Transp. Co. v. Fireman's Fund Ins. Co.*, 729 F.2d 1407, 1410-11 (11th Cir. 1984); *Nat'l Farmers Union Prop. & Cas. Co. v. O'Daniel*, 329 F.2d 60, 65 (9th Cir. 1964); *Smoot v. State Farm Mut. Auto. Ins. Co.*, 299 F.2d 525, 530 (5th Cir. 1962); *Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 240 F. 573, 581 (1st Cir. 1917); *Cont'l Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 294 (Alaska 1980); *Safeco Ins. Co. v. Ellinghouse*, 725 P.2d 217, 225 (Mont. 1986); *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472, 477 (Wis. 1997). A minority of courts that permit a cause of action against an insurer for defense counsel's misconduct require actual knowledge of the misconduct by the insurer. *See* *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159, 1175 (Haw. 1999); *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 393-96 (Tenn. 2002).

Notwithstanding this emerging trend, the rule in Massachusetts remains that defense counsel will generally be viewed as an independent contractor and that an insurer cannot therefore be vicariously liable for counsel's negligent acts. *See* *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387 (2003). In *Herbert A. Sullivan, Inc.*, the Supreme Judicial Court held as follows:

> "Since an insurer is not permitted to practice law, it must rely on independent counsel for conduct of litigation, and in doing so it does not assume a nondelegable duty to present an adequate defense. Since the conduct of the litigation is the responsibility of trial counsel, the insurer is not vicariously liable for the negligence of the attorneys who conduct the defense for the insured." 7C J.A. Appleman, *Insurance Law and Practice* § 4687, at 192-193 (rev. ed. 1979). Rule 5.4 (c) of the Massachusetts Rules of Professional Conduct, as appearing in 430 Mass. 1303 (1999), states: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." As such, a lawyer hired by an insurer to represent an insured owes an unqualified duty of loyalty to the insured and must act at all times to protect the insured's interests. *Cf.* *McCourt Co. v. FPC Props., Inc.*, 386 Mass. 145, 146 (1982) (lawyer owes duty of undivided loyalty to client). It is the lawyer who controls the strategy, conduct, and daily details of the defense. To the extent that the lawyer is not permitted to act as he or she thinks best, the lawyer properly can withdraw from the case. See Restatement (Second) of Agency § 385 comment a, at 193 (1958). In these circumstances, an insurer cannot be vicariously liable for the lawyer's negligence.

Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. at 408-09.

In *Sandman v. Quincy Mutual Fire Insurance Co.*, 81 Mass. App. Ct. 188, 961 (2012), the Appeals Court ruled that a property insurer was not vicariously liable for the claimed failure of its lawyers to include the insured's personal claims in a subrogation suit. The Appeals Court took note of the fact that subrogation counsel had made numerous representations to the insured over a period of five years that might have led her to believe that he was representing her interests and would pursue her claims as part of the subrogation suit brought on behalf of Quincy Mutual, thus causing her not to bring an action of her own until after the statute of limitations had already expired, but that the insurer could not be vicariously liable for representations of professional negligence on the part of counsel since counsel was an independent contractor with separate and distinct obligations to the client. As there was no evidence of any direct contact between representatives of Quincy Mutual and the insured representing that counsel would represent her interests or that Quincy Mutual had directed, commanded, or knowingly authorized counsel to do so, nor were there allegations that Quincy Mutual was negligent in hiring counsel or should have known that he was not competent, there was no basis to impose direct liability upon the insurer. Writing in dissent, Judge Brown argued that the Supreme Judicial Court's opinion in *Sullivan v. Utica Mutual* was not on point, as the lawyer in *Sullivan* had been hired by the insured, whereas here defense counsel had a direct agency relationship with the insurance company. Judge Brown argued that the matter should not have been resolved on the basis of a Rule 12(b)(6) motion as further discovery might have lent substance to the insured's claim, including documents found in Quincy Mutual's claim file indicating that it was aware of counsel's promise to pursue her uninsured claims.

In *St. Paul Fire & Marine Insurance Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 379 F. Supp. 2d 183 (D. Mass. 2005), Magistrate Robert Collings ruled that staff counsel are also presumed to be independent contractors. Even so, the court allowed the insurer to pursue claims against the insured's chosen counsel based on an assignment of rights from the policyholder. The court found that St. Paul was subrogated to the malpractice claims of its policyholder against a lawyer whose erroneous advice caused the insured to be sued for trade libel and the defense counsel in Florida who failed to plead advice of counsel as a defense. In denying the attorneys' motions for summary judgment, the magistrate noted that Massachusetts is among a minority of states that allow such claims to be assigned and saw no reason to conclude that an insurer could not therefore be subrogated to such claims if it had to pay to settle a claim due to counsel's negligence. The magistrate refused to find that the negligence of defense counsel should be imputed to St. Paul through its assignment of staff counsel to associate in the defense of the Florida suit. Not only had defense counsel made the decision to not plead advice of counsel without consulting St. Paul or staff counsel but the court also found that, under Massachusetts law, all defense counsel, including staff counsel, are presumed to be independent contractors whose negligence cannot be vicariously imputed to the insurer that retains them to represent a policyholder.

This is not to say that an insurer cannot be sued for its own actions. Further, it may arguably be sued in cases where the claims handler interferes with the lawyer's independent exercise of ethical responsibilities so as to avoid the *Sullivan* court's conclusion that the defense counsel is an independent contractor.

While recognizing that a lawyer ordinarily stands in the position of an independent contractor, the Tennessee Supreme Court ruled in *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002), that an insurance company and the policyholder client may both be vicariously liable for defense counsel's abusive litigation tactics if the attorney's misconduct was "directed, commanded, or knowingly authorized by the insurer or by the insured." *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d at 390. The *Givens* court ruled that, although the relationship between an insurance company and defense counsel is ordinarily that of principal to independent contractor, this general rule is subject to exceptions and may result in the imposition of vicarious liability in cases where defense counsel subject themselves to the insurer's direction. "Accordingly, we hold that an insurer can be held vicariously liable for the acts or omissions of an attorney hired to represent an insured when those acts or omissions were directed, commanded, or knowingly authorized by the insurer." *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d at 395. Also, while reaffirming its *Youngblood* ruling that the policyholder is defense counsel's sole client, the Tennessee Supreme Court declared that the presumption that counsel acts with the authority of the client should not apply to insurance defense cases absent specific evidence that the insured client actually directed or knowingly authorized those actions. *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d at 396-97.

Likewise, the West Virginia Supreme Court ruled in *Rose ex rel. Rose v. St. Paul Fire & Marine Insurance Co.*, 215 W. Va. 250 (2004), that a defense attorney employed by an insurance company to represent an insured in a liability matter was not

a person who is "in the business of insurance." The defense attorney is therefore not directly subject to the provisions of the West Virginia Unfair Trade Practices Act, W. Va. Code §§ 33-11-1-11-10. However, a claimant can establish a violation of the act by showing that an insurance company, through its own actions, breached its duties under the act by knowingly encouraging, directing, participating in, relying on, or ratifying wrongful litigation conduct of a defense attorney hired by the insurance company to represent an insured.

Issues of control may likewise prove problematic for staff counsel operations. Thus, a court in New York ruled that, despite the general rule that insurers are not legally responsible for the malpractice of defense counsel, liability may nonetheless arise where counsel was an employee of the insurer and failed to use independent judgment. In *Young v. Nationwide Mutual Insurance Co.*, 801 N.Y.S.2d 827 (App. Div. 2005), the Second Department ruled that the trial court's dismissal of the plaintiff's suit against Nationwide was premature, as the general rule that defense counsel are independent contractors for whose torts a liability insurer is not responsible would not apply if, as the plaintiff claimed here, her attorneys were full-time employees of Nationwide and did not exercise independent judgment on her behalf in the course of defending the policyholder in the underlying action.

This issue proved problematic in the 2016-2018 American Law Institute debate concerning draft provisions of the Restatement of Law, Liability Insurance with respect to circumstances in which an insurer might be liable for the acts of counsel. During the "Principles" phase of the project, this section declared that insurers should always be vicariously liable for the misconduct of defense counsel, in the apparent belief that imposing liability would cause insurers to more vigorously police the conduct of appointed defense counsel. In light of the absence of any common law support for this sweeping proposition, however, the reporters abandoned this approach after 2014 but continued to impose liability for the negligent selection of counsel, as by failing to ensure that the firm had adequate malpractice coverage. Insurers could also still be liable for the acts of their employees, such as staff counsel.

Numerous ALI advisers and outside bar associations, notably DRI, noted the impracticability of determining whether counsel had "adequate" errors and omissions (E&O) coverage as well as the lack of any case support for this proposition. In light of this criticism, this language was softened in the Revised Proposed Final Draft released by the reporters on September 7, 2018. As revised, comment c now merely states that a court "could find" that an insurer was negligent for failing to ensure that defense counsel did not have adequate insurance but that the restatement would not take a position on this topic owing to the lack of any case law to support this contention.

Concerns were expressed during the floor debate on Section 12 that the illustrations used by the reporters, many of which involved an insurer's knowledge of substance abuse or other personal problems, were problematic or would place insurers in the position of intruding into the privacy of defense counsel. A motion to delete Subsection (1) by Brackett Denniston of Goodwin Procter LLP and Harold Kim of the Chamber of Commerce was defeated. Nevertheless, the references to "substance abuse" were eliminated in the Revised Proposed Final Draft released by the reporters on September 7, 2018.

To date, only two courts have considered whether to follow the approach of the Restatement of Law, Liability Insurance. In *Sapienza v. Liberty Mutual Fire Insurance Co.*, No. 18-3015 (D.S.D. May 17, 2019), a federal district court predicted that the South Dakota Supreme Court would adopt Section 12's rule that a liability insurer may be sued for providing an inadequate defense. The plaintiff had argued that Liberty Mutual breached the duty to defend by taking over the defense of the lawsuit, countermanding the independent judgment of defense counsel, failing to retain necessary experts, and refusing to pay for certain defense activities. Despite having ruled that a cause of action for inadequate defense might be claimed, the court dismissed the insured's breach of contract claim, declaring that the factual allegations in this count were mere "naked assertions devoid of further factual enhancement" and therefore fell afoul of the *Twombly* standard for motions to dismiss.

In *Progressive Northwestern Insurance Co. v. Gant*, 957 F.3d 1144 (10th Cir. 2020) (Kansas law), the U.S. Court of Appeals for the Tenth Circuit adopted Section 12(1)'s "negligent hiring" analysis but declared that the insured had presented no credible evidence that appointed defense counsel was inadequate or that any such deficiencies had caused or contributed to the excess verdict.

(b) ***May an Insurer Sue Defense Counsel for Malpractice?***

Alternatively, in cases where a policyholder brings an action against an insurance company for failing to settle the claims against it within policy limits, may the insurer pursue a claim for malpractice against defense counsel?

As discussed above, the answer to this question depends in part on whether a client relationship is found to exist between the insurer and defense counsel. In several recent cases, however, an equitable right of action has been found, even in the absence of a formal attorney-client relationship.

In *Paradigm Insurance Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Ariz. 2001), the Arizona Supreme Court found that, although an insurer's retention of defense counsel does not necessarily give rise to an inherent conflict of interest in every case, neither does an insurer always enjoy ""client" status. The Arizona Supreme Court agreed with defense counsel that "the potential for conflict between insurer and insured exists in every case; but we note the interests of insurer and insured frequently coincide." *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d at 598. Accordingly, the court found that it was possible, absent a conflict of interest, for defense counsel to represent both insurer and insured "but in the unique situation in which the lawyer actually represents two clients, he must give primary allegiance to one (the insured) to whom the other (the insurer) owes a duty of providing not only protection, but of doing so fairly and in good faith." *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d at 598. In any event, even if the insurer is not the lawyer's client, but merely an agent of the insured, it is entitled to the same protection as the insured enjoys with respect to the confidentiality of client communications. The court concluded that "when an insurer assigns an attorney to represent an insured, the lawyer has a duty to the insurer arising from the understanding that the lawyer's services are ordinarily intended to benefit both insurer and insured when their interests coincide. This duty exists even if the insurer is a non-client." *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d at 602.

Likewise, the Minnesota Supreme Court overturned an intermediate appellate opinion that had found that defense counsel could never have two clients. On the other hand, while refusing to find that defense counsel can never represent both the insured and the insurer, the Minnesota Supreme Court declared in *Pine Island Farmers Cooperative v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 452 (Minn. 2002), that, owing to the potential conflict of interest in such cases and the risk that defense counsel will side with the insurer as being the source of future lucrative business, a dual representation will be found to exist only if defense counsel or another attorney first consults with the insured, explaining the implications of dual representation and the advantages and risks involved, with the result that the insured gives its express consent to the dual representation. Having found that such events had not occurred in this case, the court refused to find that defense counsel had a client relationship with the insurer and, furthermore, refused to permit the insurer to pursue an action for equitable subrogation to pursue rights accrued from the insured as, in this case, the insured itself had already sued defense counsel for malpractice. *Pine Island Farmers Coop. v. Erstad & Riemer, P.A.*, 649 N.W.2d at 452-53. Two dissenting judges contended that, under traditional principles of contract and tort law, an attorney-client relationship existed between defense counsel and the insurer as "when an individual is licensed as a lawyer, looks like a lawyer, sounds like a lawyer, acts like a lawyer, gives advice like a lawyer, bills like a lawyer, and the client believes he is being represented by a lawyer, the client is being represented by a lawyer." *Pine Island Farmers Coop. v. Erstad & Riemer, P.A.*, 649 N.W.2d at 453.

The Florida Supreme Court ruled in *Arch Insurance Co. v. Kubicki Draper, LLC*, 714 S.E.2d 350 (Fla. 2021), that a professional liability insurer could bring a malpractice claim against appointed defense counsel based on the subrogation clause in its policy. As had the courts below, the Florida Supreme Court ruled that the insurer was not in privity with the law firm, nor was it an intended third-party beneficiary of the relationship between the law firm and the insured. However, whereas the lower courts had therefore ruled that the insurer lacked standing to pursue a malpractice claim against the firm, the Florida Supreme Court declared that Arch could bring an action based on the subrogation clause in its professional liability insurance policy. Inasmuch as Arch was contractually subrogated to the rights of its insured law firm, which included claims for legal malpractice against counsel retained by the defendant, the court held that the insurer was likewise entitled to bring such an action. Whereas the law firm had argued that the court had generally prohibited assignment of legal malpractice claims on the grounds of public policy, the court declared that there are exceptions when public policy is inapplicable, including this one, and that Florida public policy does not support shielding a law firm from accountability for its professional malpractice. The court observed that subrogation exists to hold the premium rates down by allowing insurers to recover indemnification payments from the tortfeasor who caused the injury, and that allowing an insurer to recoup payments from a law firm that created liability by missing a statute of limitations defense to the detriment of the insured was actually consistent with Florida public policy.

Issues have also arisen with respect to whether an insurer that did not hire defense counsel may pursue claims in cases where counsel's acts or omissions may have resulted in an excess verdict. For instance, the U.S. Court of Appeals for the Fifth Circuit has ruled in a Texas case that an insured's personal counsel was immune from an excess insurer's claim that the firm was liable for negligent misrepresentation in withholding information concerning the value of a case that went to trial and resulted in a large excess verdict. *Ironshore Eur. DAC v. Schiff Hardin, LLP*, 912 F.3d 759 (5th Cir. 2019). The court ruled that the attorney immunity doctrine under Texas law shields an attorney from claims made by a nonclient based on negligent misrepresentations made in the course of the attorney's representation. Whereas the U.S. District Court ruled that Schiff Hardin could not be liable for statements actually made in reports that were provided to the excess insurer but might be liable for *omissions* in its reporting, the Fifth Circuit ruled that both types of conduct were within the scope of the lawyer's representation and therefore were immune from suit under the theory of negligent misrepresentation set forth in Section 552 of the Restatement (Second) of Torts.

§ 5.15 ETHICAL ISSUES CONFRONTING THE INSURER'S RIGHT TO DEFEND

The duty to defend is not only an obligation set forth in the insuring agreement of most liability insurance policies but also an important right from the insurer's standpoint, a right that is essential to the insurer's ability to manage the litigation against its insured. Subject to *Cumis* principles and other rules pertaining to conflicts of interest, the insurer has absolute control over the manner in which cases are defended and disposed of. Nevertheless, "not every limitation or restriction imposed by an insurer on the defense of a case is consistent with a lawyer's duty under the Rules of Professional Conduct." Wis. Bar Ass'n Formal Op. E-99-1 (June 15, 1999).

§ 5.15.1 Insurer Litigation Management Guidelines

Since the 1990s, insurers have imposed increasingly strict and detailed guidelines setting forth the manner in which they expect outside counsel to conduct the defense of their policyholders. While such guidelines can take many different forms, they often imposed limitations on certain types of tasks, such as legal research, and require that certain tasks, such as arranging depositions or reviewing documents, be reimbursed at the agreed-on rate for secretaries or paralegals. Counsel were not permitted to vary from these guidelines without first obtaining prior approval from the insurer. In the wake of significant criticism and court challenges, however, insurers have since relaxed many of these original guidelines. While litigation management remains a major goal for insurers, these efforts now attempt to take into account the professional and ethical obligations of defense counsel. If insurers do not have an attorney-client relationship with appointed defense counsel, Rule 1.8(f) prohibits defense counsel from allowing insurers to interfere with "the lawyer's independence of professional judgment or with the clientlawyer relationship." In such circumstances, may defense counsel comply with such guidelines without compromising his or her ethical duties to the insured client?

To date, this dispute has proceeded through three phases.

During the 1990s, as insurers sought to implement litigation guidelines, a number of courts sounded a cautionary note without expressly holding that such guidelines could interfere with defense counsel's professional responsibilities. *See* *Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 61 Cal. App. 4th 999 (1998); *In re Youngblood*, 895 S.W.2d 322, 328-29 (Tenn. 1995); *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998). In these cases, the court concluded that an insurer's interest in cutting costs by using in-house counsel could not override the obligations imposed by the Code of Professional Responsibility. As the Tennessee Supreme Court declared:

> The loyalty and independent judgment required by the Code are absolute. They are essential to the integrity and accountability of the profession and the legal system. If the cost of legal representation is burdensome, as suggested by petitioners, the profession must look to reforms which do not threaten the foundation of the profession and the system of justice.

In re Youngblood, 895 S.W.2d at 329.

A similarly cautionary tone was adopted by the Kentucky Supreme Court in *American Insurance Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996). Discussing the chilling influence that flat fee agreements might have on outside counsel's representation of policyholders, the court declared as follows:

> [T]he pressures exerted by the insurer through the set fee interferes [[sic] with the exercise of the attorney's independent professional judgment, in contravention of Rule 1.8(f)(2). The set fee arrangement also clashes with Rule 1.7(b) in that

> it creates a situation whereby the attorney has an interest in the outcome of the action which conflicts with the duties owed to the client: quite simply, in easy cases, counsel will take a financial windfall; in difficult cases, counsel will take a financial loss.

Am. Ins. Ass'n v. Ky. Bar Ass'n, 917 S.W.2d at 572.

At the same time, litigation guidelines were severely criticized in a series of ethics opinions issued by the American Bar Association and state bar associations. For the most part, these ethics opinions concluded that, while guidelines present a potential for ethical conflicts, the guidelines themselves are not per se unethical. Indeed, most of the opinions recognize that insurers have a legitimate interest in controlling the costs of litigation. *See* Ariz. State Bar Op. 99-08; Ind. Op. 3 (1998); Ky. Bar Ass'n Ethics Comm. Op. 00-416. Whether the insurer is a client or merely a third-party payor, the American Bar Association stated in ABA Formal Op. 01-421 as follows:

> [A]lthough defense lawyers must be sensitive to the economic interests of the insurance companies that employ them and cognizant of the fact that costs of litigation ultimately are borne by insureds through premiums, they must not allow their professional judgment or the quality of their legal services to be compromised materially by the insurer.

The ABA Formal Opinion concluded as follows:

> In representing an insured, a lawyer must not permit compliance with "guidelines" or other insurer directives relating to the lawyer's services to impair materially the lawyer's independent professional judgment. There may be rare instances when the lawyer reasonably believes some limitation imposed by the insurer's directives is materially compromising the lawyer's ability to provide competent representation to both the insured and the insurer. In such situations, if the lawyer is unable to persuade the insurer to withdraw the limitation, the resulting conflict between the insurer's directives and the insured's interest requires the lawyer to protect the immediate interests of the insured while preparing to withdraw from representing both the insured and the insurer.

While ABA Formal Op. 01-421 and earlier opinions from numerous state ethics committees generally concluded that guidelines do not invariably create a conflict of interest for defense counsel, they all conclude that some guidelines create a potential for such conflicts that may arise in particular cases. In particular, the following four areas have most commonly been the subject of ethical scrutiny:

- guidelines that dictate how work is to be allocated among defense team members by designating what tasks are to be performed by a paralegal, an associate, or a senior attorney, or that state that such tasks will be reimbursed only at the rate of the support staff deemed appropriate to perform them;
- guidelines that restrict or require prior approval before performing computerized or other legal research;
- guidelines that require approval before conducting discovery, taking a deposition, or consulting with an expert witness; and
- guidelines that require an insurer's approval before filing a motion or other pleading.

Whereas opinions such as *Dynamic Concepts* and *Traver* addressed these concerns in a hypothetical context, the ethical implications of litigation guidelines were made concrete in *In re Rules of Prof'l Conduct & Insurer-Imposed Billing Rules & Procedures*, 2 P.3d 806 (Mont. 2000). The case was presented to the Montana Supreme Court by two defense firms (later joined by ten more), who asked the court to address, under its plenary power to set the rules governing the conduct of attorneys practicing law in Montana, the following question:

> May an attorney licensed to practice law in Montana, or admitted pro hac vice, agree to abide by an insurer's billing and practice rules which impose conditions limiting or directing the scope and extent of the representation of his or her client, the insured?

In re Rules of Prof'l Conduct & Insurer-Imposed Billing Rules & Procedures, 2 P.3d at 807.

The Montana Supreme Court ruled on April 28, 2000, as follows:

- the Rules of Professional Conduct mandate that insurance defense counsel represent only the policyholder; the insurer is not a client;
- because the insurer has absolute control over the defense of the suit, defense counsel must always be free to follow its independent judgment;
- the Rules of Professional Conduct are not superseded by the terms of an insurance policy, nor do they apply only in cases where a conflict of interest is apparent from the outset; and

• a mere requirement that counsel must consult with an insurer with respect to certain tasks may be indistinguishable, in its interference with defense counsel's exercise of independent judgment and ability to provide competent representation, from a requirement that counsel may not undertake such work without prior approval.

The Montana Supreme Court concluded that

> the requirement of prior approval fundamentally interferes with defense counsels' exercise of their *independent* judgment, as required by Rule 1.8(f), M.R. Prof. Conduct. Further, prior approval creates a substantial appearance of impropriety in its suggestion that it is insurers rather than defense counsel who control the day to day details of a defense .... We hold that defense counsel in Montana who submit to the requirement of prior approval violate their duties under the Rules of Professional Conduct to exercise their independent judgment and to give their undivided loyalty to insureds.

In re Rules of Prof'l Conduct & Insurer-Imposed Billing Rules & Procedures, 2 P.3d at 815, 817 (emphasis added). The court also suggested that even a requirement of consultation might prove problematic in certain cases: "Without reaching the issue here, moreover, we caution further that a mere *requirement* of consultation may be indistinguishable, in its interference with a defense counsel's exercise of independent judgment and ability to provide competent representation, from a requirement of prior approval." *In re Rules of Prof'l Conduct & Insurer-Imposed Billing Rules & Procedures*, 2 P.3d at 814-15 (emphasis added). Following the Montana Supreme Court's opinion, insurers reconsidered their policies and largely eliminated requirements of prior consent and other problematic provisions. These revised guidelines emphasize the importance of defense counsel acting in partnership with the insurer for the benefit of the insured. As a result, this controversy has largely died away in recent years.

§ 5.15.2 Insurer Use of Staff Counsel

A second area of controversy with respect to insurers' exercise of their right to defend has arisen in conjunction with the growing use of "staff counsel." "Staff counsel" are lawyers who are employed directly by insurers but who operate independently of the conventional claims function to defend policyholders. "Staff counsel" are to be distinguished from "panel counsel," which are law firms that have agreements with insurers to defend their policyholders.

For the most part, state ethics boards and courts have approved the use of staff counsel so long as they operate independently and otherwise comply with the professional and ethical obligation of attorneys. *See* *Am. Home Assurance Co. v. Unauthorized Practice of Law Comm.*, 261 S.W.3d 24 (Tex. 2008). To date, only three states (Arkansas, Kentucky, and North Carolina) have prohibited the employment of staff counsel to defend policyholders.

In *Brown v. Kelton*, 2011 WL 729057 (Ark. Mar. 3, 2011), the Arkansas Supreme Court affirmed a lower court's declaration that staff counsel employed by Farmers Insurance Exchange engaged in the unauthorized practice of law when he appeared on behalf of certain Farmers' policyholders. The Supreme Court held that counsel's representation was barred by Section 16-22-211, which precludes corporations from practicing or appearing before any court or judicial body or tendering or furnishing legal services or advice or agreeing to furnish attorneys or counsel in actions or proceedings of any nature. Three concurring justices added that

> [i]f an attorney is an employee of the insurance carrier responsible for paying the legal fees, costs and any settlement or judgment of an insured in a lawsuit, then that attorney may not represent the insured in that lawsuit. The reason is simple. Such an attorney's loyalties are divided between the insured, who does not pay the attorney, and the insurance carrier employer, which does. This conflict is inherent in every case where a company lawyer attempts to represent the legal interests of his or her employer's clients or customers.

Brown v. Kelton, 2011 WL 729057, at *10.

§ 5.15.3 Fee Disputes

Where defense counsel do not have a preexisting fee agreement with insurers, as is commonly the case with insuredappointed "independent" counsel, disputes frequently arise with respect to what hourly rate must be paid by the insurer.

Under the law of Massachusetts, an insurer's duty to pay defense costs extends only to "reasonable" defense work, as regards hourly charges, the number of attorneys working on a file, and the tasks performed. *Liberty Mut. Ins. Co. v. Cont'l Cas. Co.*, 771 F.2d 579, 588 (1st Cir. 1983); *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677, 685 (1964).

Massachusetts courts have yet to give any clear indication of what ""reasonable" means, however. At least one appellate ruling has recently declared that the rates that an insurer pays do not establish the insurer's obligations with respect to the fees of independent counsel.

In *Northern Security Insurance Co. v. R.H. Realty Trust*, 78 Mass. App. Ct. 691 (2011), the Appeals Court affirmed a trial court's declaration that a liability insurer acted in bad faith in seeking to impose a panel counsel's rate on defense counsel and in delaying its payment of even the lower rate. The court ruled that a well-known Boston lawyer, William J. Dailey, Jr., of Sloane and Walsh, LLP, who had agreed to defend a friend's mold case for a reduced rate of $225 an hour, was entitled to recover that amount and that the liability insurer could not force him to accept $150 an hour merely because that was what it paid panel counsel to defend similar cases. The Appeals Court agreed with the trial court that panel rates might be lower because of the insurance company's superior position to negotiate lower rates in return for increased business. Further, the court agreed that Northern Security had violated Chapter 93A. Despite the insurer's contention that it had a reasonable basis for its position, the Appeals Court ruled that the insurer's delay of fourteen months in issuing payment even at the $150 an hour rate, its failure to pay for court reporters and experts while the case was ongoing, and its refusal to negotiate on the issue justified a finding of unfair and deceptive acts. The Appeals Court ruled, however, that Sloane & Walsh was entitled to recover only the difference between $150 an hour and what Dailey had agreed to work for ($225), rejecting the Superior Court's finding that an hourly rate of $350 would have been reasonable for Attorney Dailey.

In *Liberty Mutual Insurance Co. v. Black & Decker Corp.*, 383 F. Supp. 2d 200, 209 (D. Mass. 2004), Judge Woodlock observed that the insured's right to defense costs was contractual and that, as an element of the insurer's "right" to defend, it was entitled to impose certain limitations:

> It seems clear that, if an insurer receives timely notice of a claim and accepts the duty to defend, it can insist that the insured's counsel comply with (reasonable) billing and practice management policies devised by the insurer or a company it retains, such as Legalgard. Presumably, if the insured counsel's bills do not comply with the insurer's requirements, the insurer can instruct counsel to change its billing and litigation management practices so as to come into compliance. This is a key element of the insurer's "right" to assume the insured's defense.

Judge Woodlock ruled, therefore, that Black & Decker was not entitled to recover the full amount of its prenotice fees, even to the extent that they might be justified under *Berman v. Linnane*, 434 Mass. 301 (2001), and its progeny. Rather, the court concluded that Liberty Mutual was entitled to deduct the portion of the fees that were contrary to the billing and practice guidelines that it would have applied to the defense had it received timely notice. On the other hand, the court declared that Liberty Mutual was not entitled to impose these restrictions on defense costs that were incurred after it received notice.

A federal district court ruled in *Vicor Corp. v. Vigilant Insurance Co.*, 07-10517, 2012 WL 4469084 (D. Mass. Sept. 28, 2012), that it is the insured that has the burden of proof in establishing that the rate proposed by an insurer is unreasonable. In *Vicor*, the insurer had agreed to reimburse the insured's local and national counsel at a fixed rate of $250 an hour, which more or less approximated the average of what the Worcester lawyers who handled most of the case (Mirick O'Connell) had charged. Judge Stearns rejected the insured's argument that the insurers should separately reimburse national counsel from California at twice that rate, explaining as follows:

> Vicor ... contends that the amount of the legal fees reimbursed by Vigilant and Federal was unreasonable because the insurer's choice of " "blended" hourly rates was arbitrary and did not fully recognize the complexity of the case. This argument mistakenly inverts the burden of proof: "[i]t is obvious that the party claiming [attorneys' fees] has the burden of proving them, including the burden of proving whether the fees were in fact reasonable." Defendants do not have to prove that their reimbursement rate was reasonable; rather, Vicor has the burden of proving that its attorneys' rates were reasonable and appropriate.

Vicor Corp. v. Vigilant Ins. Co., 2012 WL 4469084, at *2 (citation omitted).

A case to watch on the issue of what fees an insurer may owe is *Lionbridge Technologies, LLC v. Valley Forge Insurance Co.*, No. 20-10014 (D. Mass. Aug. 5, 2021), in which Judge Patti B. Saris ruled that allegations that the insured improperly manipulated the bidding and auction process for the forced sale of a litigation support company to gain inappropriate trade secret information failed to trigger coverage under a commercial general liability (CGL) policy. In rejecting the insured's argument that these claims involved commercial disparagement triggering Coverage B, the District Court held that neither general statements about a business or statements of opinion are sufficient to give rise to a claim of commercial disparagement. The court also declined to find coverage on the theory that the claims against the insured arose from the use of another's advertising idea, rejecting the insured's argument that allegations in the underlying complaint that it had changed its website to emphasize the industry that made up a larger share of plaintiff's business potentially set forth a covered claim. The court agreed with Valley Forge that

these allegations suggested that there was an effort to use another's business model and trade secrets, not its advertising ideas. The court also rejected the insured's argument that Valley Forge, by its agreement to defend these claims under a reservation of rights, was not judicially or equitably estopped to dispute coverage. Having found that Valley Forge did not have a duty to defend, the court did not reach the issue of whether it was obligated to reimburse the insured for the difference between the rates charged by Kirkland & Eilis partners ($1000-$1400) and the reduced $400 hourly rate that it had agreed to pay under a reservation of rights. The insured had argued that it was entitled to recover 100 percent of all bills charged.

In late 2022, however, the First Circuit reversed Judge Saris, ruling in *Lionbridge Technologies v. Valley Forge Insurance Co.*, No. 21-1689 (1st Cir. Nov. 21, 2022), that allegations that the insured had deliberately spread misrepresentations about its competitors potentially set forth a claim for defamation under Coverage B and was not otherwise excluded. In light of this ruling, the case was remanded to the District Court to resolve issues about whether Valley Forge had acted reasonably in refusing to pay the rates charged by Kirkland & Ellis or in the manner in which it allocated fees between covered and noncovered claims.

EXHIBIT 5A—Sample Reservation of Rights Letter

Certified Mail—Return Receipt Requested

Dear Insured:

[Date]

We have received the complaints filed against you by Executrix of the Estate of Driver J and Executor of the Estate of Driver L. Both complaints relate to an accident that occurred on or about March 17, 1991, in Lawrence, Massachusetts. We regret to advise you that the policy issued to you by Insurer may not apply to these claims.

The complaints allege that you were a passenger in a vehicle operated by John Imbibe. They further allege that you observed John Imbibe consume sufficient alcohol to become intoxicated. They allege that you "knew that Defendant, John Imbibe, would be operating a motor vehicle and knew or should have known that Imbibe's conduct constituted a breach of duty to the traveling public." (Complaints, ¶ 13). The complaints also allege that you "gave substantial assistance and/or encouragement to Defendant, John Imbibe, in his consumption of alcohol and reckless manner of operating his motor vehicle." The complaint filed by Executor includes counts against you for wrongful death of Driver L (Count III) and conscious suffering (Count IV). The complaint filed by Executrix includes counts for the wrongful death of Driver J (Count II) and conscious suffering (Count III).

The policy issued to you by Insurer provides in part that:

PART A—LIABILITY COVERAGE

INSURING AGREEMENT

A. We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the insured. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy.

B. "Insured" as used in this Part means:

1. You or any family member for the ownership, maintenance or use of any auto or trailer.

PART E—DUTIES AFTER AN ACCIDENT OR LOSS

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

B. A person seeking any coverage must:

1. cooperate with us in the investigation, settlement or defense of any claim or suit.
2. promptly send us copies of any notices or legal papers received in connection with the accident or loss.

For several reasons, it appears that the Insurer policy may not provide coverage to you for claims arising out of the March 17, 1991, accident.

1. The policy provides coverage only for claims arising out of the use of a motor vehicle. There will be no coverage to the extent that your liability arises out of conduct that occurred before you entered the vehicle involved in the accident.
2. The policy does not provide coverage because you did not notify Insurer promptly that the accident occurred. Insurer was prejudiced by your failure to comply with the notice provision of the policy, which required prompt notice.
3. The policy does not provide coverage because you did not promptly send Insurer a copy of the summons and complaint served on you. Insurer was prejudiced by your failure to comply with the provision of the policy, which requires you to promptly forward copies of legal notices that you receive.
4. The policy also will not provide coverage if you do not cooperate with us in the investigation, settlement or defense of these suits.

Although it appears that the policy may not provide coverage in this case, Insurer is willing to defend this matter, subject to a reservation of rights. Insurer has retained [Law firm] to represent you.

Insurer reserves its right to refuse to indemnify you against any judgment not covered by the policy. Insurer reserves its right to terminate its defense of this matter if, for example, a court determines that Insurer does not have a duty to defend.

No action on the part of counsel or any representative of Insurer in the handling of this suit should be construed as a waiver of any rights or defenses Insurer may have under this policy, whether or not those rights or defenses are discussed in this letter.

If you have any questions or any information that you believe should cause Insurer to change its decision concerning this matter, please contact us as soon as possible.

Sincerely yours,

EXHIBIT 5B—Sample Nonwaiver Agreement

Certified Mail—Return Receipt Requested

[Date]

Dear Insured:

Please be advised that Insurer has received the Summons and Complaint from the above-entitled case. We regret to advise you that the optional coverage in the policy issued by Insurer may not provide coverage in this case, and the Insurer will be handling this matter under a Nonwaiver Agreement.

The Policy Coverage Agreement, Definitions and Exclusions quoted in this letter can be found in Policy No. C9876543-21 for the policy period October 15, 1991, to October 15, 1992.

As you know, Plaintiff was injured on October 31, 1991, when she was struck by a vehicle operated by Defendant. At the time of the accident, your son was operating an Insurer company car that the Insurer allowed you to drive. The Complaint alleges that your son's negligence was a cause of the accident. The Complaint further alleges that you were negligent “in allowing and/or entrusting, and/or permitting” your son to operate the vehicle. The Complaint seeks damages for Plaintiff and her husband. Apparently, the plaintiffs are asserting that your son was at fault in the accident because he failed to yield to Plaintiff as she was crossing the street. They are also asserting that you negligently entrusted the vehicle to your son.

Insurer issued a policy that covered the vehicle that your son was operating at the time of the accident. The optional coverage of that policy would apply only if you had permission to allow him to use the car. In fact, Insurer has a strict policy that permits only the employee and his spouse to use company cars. Consequently, you did not have permission to allow your son to use the car. Accordingly, it appears that the optional coverage in the Insurer policy would not apply to the claims asserted against you by Plaintiff and her husband. Nevertheless, Insurer is willing to provide you with a defense in this matter under this Nonwaiver Agreement.

Insurer reserves the right to refuse to pay any judgment or settlement against you that is not covered by the terms of the policy. In fact, it appears that the optional coverage of the policy would not cover the claims against you arising out of your son's use of the vehicle because you did not have permission to allow him to use the car. No action on the part of Insurer or the counsel it has retained in connection with this case shall waive any rights or defenses that Insurer may have, whether or not those rights or defenses are discussed in this letter.

Should you have any information that you believe requires Insurer to change its position on the coverage provided in this case, please contact us immediately.

Insurer has designated [Law firm] to defend you in this case. They will contact you shortly.

Please sign this Nonwaiver Agreement and return it to my attention.

Sincerely yours,

It is hereby agreed by and between Insurer and Insured that no action heretofore or hereafter taken by the Insurer shall be construed as a waiver of any of its rights and defenses under automobile policy of Insurance No. C9876543-21 with respect to any claim or suit arising out of or in connection with an accident that occurred on October 31, 1991.

It is further understood or agreed that by the execution of this Agreement, Insured (or party executing Agreement) does not waive any rights which he may have under the said policy.

Signed this day of _____ 1991.

_____

Insurer

Signed this _____ day of _____ 1991.

_____

Insured

EXHIBIT 5C—Sample Complaint for Declaratory Judgment

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT CIVIL ACTION NO.

_____

INSURER, Plaintiff

v.

INSURED,

Defendant

COMPLAINT FOR DECLARATORY JUDGMENT

1. The plaintiff, Insurer, is a Massachusetts corporation with a principal place of business in Boston, Massachusetts.

2. The defendant, Insured, is a resident of Cambridge, Middlesex County, Massachusetts.

3. Insurer issued an automobile policy of insurance (No. M123456), which had policy limits of $100,000 per person/$300,000 per accident for uninsured coverage for the policy period of March 15, 1988, to March 15, 1989. The policy, a copy of which is attached as Exhibit A, did not provide for underinsured coverage.

4. Insured has now claimed underinsured benefits under this policy with Insurer. Insured alleges that she was injured on November 1, 1988, when a vehicle hit her while she was crossing at or near 123 Main Street, Cambridge, Massachusetts.

5. The policy provides in part that

"Uninsured automobile" means a land motor vehicle or trailer of any type:

(a) to which there is no bodily injury liability bond or policy applicable at the time of the accident or to which there is, in at least the amounts by the financial responsibility law of the state in which the insured resides, no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any personal organization legally responsible for the use of such automobile, or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies coverage thereunder or is or becomes insolvent;

(b) which is a hit-and-run vehicle whose owner or operator cannot be identified and which hits (1) the named insured or any other individual named in the Declarations or in the Schedule; (2) an automobile which the named insured or any other individual named in the Declarations or in the Schedule is occupying; or (3) the owned automobile.

This policy is inapplicable to Insured's present claim. The vehicle that struck Insured (a) was covered by a bodily injury liability policy at the time of the alleged accident, the benefits of which have been tendered to Insured, and (b) was not a hit-and-run vehicle whose owner or operator could not be identified.

6. An actual and justifiable controversy exists between the plaintiff and defendant involving the rights and liabilities under the policy within the meaning of G.L. c. 231A.

WHEREFORE, the plaintiff, Insurer, demands:

1. A judgment declaring that there is no underinsured coverage available under Insured's automobile policy with Insurer for her claim arising out of the accident of November 1, 1988.
2. That the plaintiff be awarded its costs and such other relief as this Court may deem appropriate.
By its attorneys,

EXHIBIT 5D—Sample Excess Judgment Letter

Certified Mail—Return Receipt Requested

[Date]
Dear Insured:
With this letter we acknowledge receipt of the summons and complaint that was recently served upon you or your agent for service in the above-captioned matter. We have retained [Law firm] to appear for and defend you in this action. It will not be necessary for you to appear in court at this time unless so advised by this firm of attorneys or by this office.
The complaint alleging wrongful death filed by plaintiff provides no stated amount of damages. This means that in the event that the plaintiff is successful in the lawsuit against you, there is no limit to the award that a jury may give to the plaintiff at trial. At the time of the alleged accident, the policy of insurance in effect between you and this company contained limits of $100,000 per person and $300,000 per accident. Therefore, it is our duty to advise you that in the event that this case is tried to a conclusion and a jury renders a verdict against you in excess of $100,000, that amount in excess of $100,000 will be your personal responsibility. Please understand that we are not saying that this series of events will take place. We are merely taking this opportunity to advise you that the possibility of a verdict in excess of your policy limits does exist so that you can make your own independent decision as to whether your personal counsel need be involved in the case. In view of your possible personal exposure, you may wish to retain your own attorney, at your own expense, to protect your personal interests. If you do retain your own attorney, you can be assured that [Law firm designated] will cooperate with your personal attorney.
If you have any questions, please feel free to contact us.
Sincerely yours,

EXHIBIT 5E—MBA Ethics Opinion No. 1991-5

Massachusetts Bar Association
Committee on Professional Ethics
20 West Street, Boston, MA 02111-1218
Opinion No. 91-5
Summary: Once an attorney hired by an insurance carrier to represent an insured makes a good faith determination that there is a potential for an award in excess of the policy limits, the attorney may not provide the carrier with the attorney's opinion as to the merits of the claim or its value for settlement purposes if the attorney knows or has strong reason to believe that the case can be settled within the policy limits. The insurer must retain separate counsel for such purposes.
Facts: An attorney is assigned by an insurance carrier to defend its insured in a negligence lawsuit against the insured in a case where the amount of the claim exceeds the policy limits. The lawyer is appointed and paid by the insurer pursuant to its duty to defend claims covered by the policy. The lawyer learns that the plaintiff will settle within the policy limits. The insurance carrier requests an opinion from the attorney as to the insured's liability, and as to the value of the claim for settlement purposes. May the attorney provide such an opinion to the carrier?
Discussion: DR 5-105(A) provides:

> A lawyer shall decline proffered employment if the exercise of his professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

DR 5-105(C) provides:

> In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation or the exercise of his independent professional judgment on behalf of each.

In Opinion No. 77-16 we stated that “[w]hen an attorney is retained by a casualty insurance company to represent an insured, the attorney is in fact representing not only the insurance company's interest in defeating the plaintiff's litigation, but also is

representing the insured." When a claim is made that is within the policy limits, the interests of the insurer and the insured will in most cases be similar, and it seems obvious that the attorney can represent both interests adequately. In most cases, the insured does not care whether the company litigates or settles the case against him because either way there will be little or no adverse financial effect on the insured. Assuming that the insured is covered by the policy, and that the insurer is not defending under a reservation of rights, normally no conflict will exist and the lawyer may properly render an opinion of the type in question here. (We do not address those special cases where the insured may have reasons for settling or not settling apart from his immediate financial exposure.)

However, where the claim is in excess of the policy limits, or where the insurer is otherwise defending its insured under a reservation of rights, the interests of the insured and insurer are clearly adverse. The Supreme Judicial Court has indicated that, because the interests of the insured and insurer in such cases are adverse, the insurer is under a duty to "disclose to its insured its adverse interest with respect to the extent of its liability under the policy," which the insured satisfied in *Murach* by advising the insured "of the possibility of a verdict in excess of the policy limit and suggesting that they retain personal counsel." *Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. 184, 189 (1959).

The rationale of *Murach* applies with equal force to the present question. Where the claim exceeds the policy limits, and where the attorney knows or has strong reason to believe that the case can be settled within the policy limits, the insured's interest normally lies in convincing the insurer to settle for any amount up to the policy limit, and the insured will want its counsel to advocate that position as aggressively and persuasively as possible. The insurer's interest, however, is in paying the least amount possible, and in minimizing the adverse, precedential effect of the lawsuit. The insured, by contrast, normally will have no similar concerns. When the attorney is requested by the carrier to provide a professional opinion as to the merits of the claim or its value for settlement purposes, the attorney cannot even begin to consider the matter objectively without adversely affecting the attorney's obligation to the insured to settle the case for any amount up to the policy limit. DR 5-105(A) thus prohibits the dual representation. For an exhaustive discussion of this issue, see *Hartford Accident & Indemnity Co. v. Foster*, 528 So. 2d 255 (Miss. 1988).

DR 5-105(C) does not permit the dual representation in this situation. Because the conflict is inherent and serious, and because the situations in which the conflict is likely to arise are complicated and multifarious, we do not believe that it is obvious that the attorney can represent both parties' interests adequately and effectively, even if we were to assume, which seems doubtful, that the attorney can obtain an effective consent, particularly from the insured.

Thus, to summarize, where the claim is indisputably for an amount within the policy limits, the interests of the insured and insurer are normally the same, and the lawyer may render an opinion as to the liability of the insured and the appropriateness of settlement to the insurer. Where, however, there is a potential for an award in excess of the policy limits, or where the insurer is otherwise defending under a reservation of rights, the interests of the insurer and the insured are adverse, and the insurer should retain the services of a separate lawyer to advise it on the questions of liability and settlement. Our opinion is limited to cases where the attorney knows or has strong reason to believe that the claim can be settled within the policy limits, and we express no opinion as to whether an impermissible conflict would exist in other circumstances where the claim exceeds the policy limits.

We recognize that frivolous lawsuits may be filed where there is technically the potential for an award in excess of the policy limits, but where any recovery in excess of the policy limits is highly improbable. A conflict does not necessarily arise in such cases until the attorney determines that the claim for damages in excess of the policy limits is not frivolous. However, once the attorney forms a good faith belief that the claim for damages in excess of the policy limits is not frivolous, he may not render an opinion to the insurer concerning the merits of the claim or its value for settlement purposes.

As stated in the Rules of the Committee on Professional Ethics, this advice is that of a Committee without official governmental status.

Approved by the Board of Delegates

June 7, 1991

EXHIBIT 5F—Preliminary Statement of Office of Bar Counsel

OFFICE OF THE BAR COUNSEL
BOARD OF BAR OVERSEERS OF THE SUPREME JUDICIAL COURT
75 FEDERAL STREET
BOSTON, MASSACHUSETTS 02110

617/357-1860
Fax: 617/357-1872
BAR COUNSEL
Arnold R. Rosenfeld
ASSISTANT BAR COUNSEL
Constance V. Vecchione, *First Assistant Bar Counsel*
Terence M. Troyer, *First Assistant Bar Counsel*
Anne S. J. Kaufman
Nancy E. Kaufman
Susan Strauss Weisberg
Alice L. Haceman
Roger Geller
Bruce T. Eisenhut
Cathleen C. Cavell
Ellen M. Meagher
Robert I. Warner
John H. Cross
Jane R. Rabe

PRELIMINARY STATEMENT OF OFFICE OF BAR COUNSEL

MBA Ethics Opinion No. 1991-5 discusses conflicts of interest that arise for counsel retained by the insurer to defend the insured when a claimant seeks damages that exceed the liability policy limits. In passing, it also touches on conflicts where the insurer is defending the insured under a reservation of rights. The opinion states that Disciplinary Rule 5-105(A) prohibits counsel from rendering an opinion to the insurer on the merits of the claim or its value for settlement purposes once the attorney forms a good faith belief that the claim for damages in excess of the policy limits is not frivolous.

The whole matter of actual and potential conflicts of interest for insurance defense counsel in these circumstances has been the subject of continuing discussion, in the case law and commentary. Some courts and commentators assume that any conflict is potential and avoidable if counsel makes full disclosure and receives informed consent or if counsel limits her representation at the outset or if counsel gives preference to the interests of the insured or if counsel represents neither in an offer of settlement and refrains from any recommendation. A recent concurrence in a Michigan Supreme Court case states unequivocally "no attorney-client relationship exists between a defense counsel and an insurer. The attorneyclient relationship is with the insured only."

Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 524, 475 N.W.2d 294, 299 (1991) (Boyle, J., concurring).

MBA Ethics Opinion No. 1991-5 attempts to set out a rigid prohibition. Bar Counsel is not convinced that such rigidity is required or desirable. In light of the different interpretations of counsel's duty in these circumstances, it is preferable to interpret the conflict of interest rules flexibly and according to the particular facts of each case.

EXHIBIT 5G—Sample Letter Concerning Noninvolvement in Coverage Disputes

[Date]

Dear Insured and Insurer:

As you know, we have been asked by Insurer to represent Insured in the above-captioned action. We received a copy of Insurer's letter dated February 2, 1994, directed to Insured in which it is stated that the Insurer is acting in this matter under a reservation of rights "by reason of the late notice of accident or for any other reason which may become apparent during the investigation or trial of this case." Under such circumstances, it is advisable that our role in this case be clear to both of you from the outset. We are employed in this case to defend the Insured on the merits of the claim asserted against it in the pending litigation. We do not represent either of you with respect to any dispute that you may now or hereafter have as to possible late notice or any other claim grounds that might create a dispute as to insurance coverage for this claim.

In handling the defense of the pending action, it is our intention to communicate fully with both of you as to all significant facts learned by us in the course of these proceedings without regard to what effect such facts might have on any existing or potential coverage dispute between you. However, should Insured wish us to hold in confidence from Insurer any matters that it feels

would prejudice it with respect to coverage, we will honor that request. With respect to any dispute as to coverage, each of you must hire separate counsel to represent your own interest in that regard.

If either of you has any objections to our proceeding as set forth above, please let us know immediately so that this may be resolved as soon as possible. While we would appreciate your written confirmation that this is satisfactory to both of you, if we do not hear from you within two weeks from the date of this letter, we will assume that it is satisfactory and we will proceed accordingly.

Sincerely yours,

Designated Counsel

FNa. MICHAEL F. AYLWARD is a senior partner at Morrison Mahoney LLP in Boston, where he chairs the firm's complex insurance coverage practice group. For the past four decades, Mr. Aylward has specialized in insurance coverage disputes involving the availability of liability insurance for intellectual property claims, environmental and mass tort disputes, and bad faith claims. Additionally, he has served as an expert in numerous coverage cases and reinsurance controversies. Mr. Aylward is an active member of the insurance bar and is the most-recent president of the American College of Coverage Counsel. He has also chaired the insurance committees of DRI, the International Association of Defense Counsel (IADC), the Federation of Defense & Corporate Counsel (FDCC), and the Massachusetts Defense Lawyers Association. Since 2014, he has been a member of the American Law Institute and served as an appointed adviser on the ALI's Restatement of the Law, Liability Insurance. Mr. Aylward is a graduate of Dartmouth College and Boston College Law School.

FNb. PAUL M. MORETTI is managing partner of the Boston law firm of Curtin, Murphy & O'Reilly, PC, where he concentrates in the areas of appellate and civil trial litigation and insurance law. He was an adjunct member of the faculty at New England School of Law. Mr. Moretti holds a B.S. and an M.B.A. from the University of Rhode Island. He is a magna cum laude graduate of New England School of Law and a former editor-in-chief of its law review.

FNc. JEFFREY D. WOOLF is an assistant general counsel with the Massachusetts Board of Bar Overseers Office of the General Counsel in Boston. Previously, he was with the Board of Bar Overseers Office of the Bar Counsel and in private practice, where he concentrated in personal injury, products liability, medical malpractice, toxic torts, and corporate litigation. He is a graduate of Boston University School of Law and Yale University.

FNa1. Part I of this chapter was updated for the 2023 Edition by MCLE.

FNa2. Chapter 5, Part III is adapted from *Insurers, Insureds and Their Lawyers* (2060154PMA) (MCLE, Inc. 2006) and was updated for the 2023 Edition by Michael F. Aylward, Esq. The views expressed in Part III of this chapter are those of the author alone and do not necessarily reflect those of his law firm or clients. Copyright 2023: Michael F. Aylward (All Rights Reserved).

End of Document

43 A.L.R.7th Art. 6 (Originally published in 2019)

American Law Reports | The ALR databases are made current by the weekly addition of relevant new cases.

ALR7th
George L. Blum, J.D.

Insured-Insurer Communications as Privileged—Generally

Although there is no recognized separate privilege accorded communications between an insured and its liability insurer, these communications can fall within other privileges, most often the attorney-client privilege. There are two general approaches to this issue: the broader view is that an insured's communication to its liability or indemnity insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the attorney-client privilege, while other courts espouse the view that such communications are only within the attorney-client privilege if actually made for the purpose of obtaining legal advice. This article collects and discusses the cases that have generally addressed insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice.

For cases on this issue after the date of this article, use this query: privilege! /5 communicat! /10 insurer insured adjuster adjustor & da(aft 5/16/2019)

Suggestions for A.L.R.? Email an A.L.R. Attorney Editor.

TABLE OF CONTENTS

Article Outline
Research References
Table of Cases, Laws, and Rules

ARTICLE OUTLINE

I Preliminary Matters
§ 1 Scope
§ 2 Background and summary
§ 3 Practice pointers
II General Considerations
A Preliminary Matters
§ 4 Fact-specific or other determination as to whether privilege applicable under theory other than "broad" or "narrow" view; generally—Held communication or documentation protected, or privilege otherwise applicable

§ 5 Fact-specific or other determination as to whether privilege applicable under theory other than "broad" or "narrow" view; generally—Held communication or documentation not protected, or privilege not applicable
§ 6 Public policy considerations
§ 7 Fiduciary nature of insured-insurer relationship
§ 8 Privilege with respect to insurer-retained attorney and attorney's client
§ 9 Narrow construction of privilege
§ 10 Expectation of privacy
§ 11 Fraud as overcoming privilege
§ 12 Crime fraud exception
§ 13 Common interest or community of interest doctrine—Held communication or documentation protected, or privilege otherwise applicable
§ 14 Common interest or community of interest doctrine—Held communication or documentation not protected, or privilege not applicable
§ 15 Common interest or community of interest doctrine—Privilege log in support of implementing doctrine
§ 16 Conflict of interest implications—Insured entitled to select own attorney
§ 17 Conflict of interest implications—Propriety of attorney to represent both insured's and insurer's interests
§ 18 Joint client or joint representation doctrine
B Basic Coverage Matters
§ 19 Burden to establish privilege
§ 20 Reservation of rights—Held communication or documentation protected, or privilege otherwise applicable
§ 21 Reservation of rights—Held communication or documentation not protected, or privilege not applicable
§ 22 Communications regarding potential intervention
§ 23 Letter of outside counsel to insurer
III Communications of Particular Parties
A Insured Communications; Generally
§ 24 Statement of insured to insurer's employee; Generally
§ 25 Statement of insured to claims adjuster
§ 26 Statement of insured given during initial investigation of matter
§ 27 Statement of insured to non-attorney employee of insurer
§ 28 Statement of insured prior to retention of counsel
§ 29 Post-conveyance communications
§ 30 Accident report or communications regarding incident or accident under inquiry—Held communication or documentation protected, or privilege otherwise applicable
§ 31 Accident report or communications regarding incident or accident under inquiry—Held communication or documentation not protected, or privilege not applicable
B Employee Communications
§ 32 Statement of employee to insurer-retained counsel
§ 33 Statement of employee to insurer's claim representative
C Other Communications
§ 34 Invocation of Fifth Amendment right as privileged communication
§ 35 Ex parte communications concerning health of insured
§ 36 Material and communications between date of loss and date of claim
§ 37 Privilege as applicable to statement of noninsured or non-client—Held communication or documentation protected, or privilege otherwise applicable

§ 38 Privilege as applicable to statement of noninsured or non-client—Held communication or documentation not protected, or privilege not applicable
§ 39 Privilege as applicable to communications to or by "representative" of client
§ 40 Privilege as applicable to statements, or communications, between coverage counsel and adjuster for purposes of providing legal services to insured
§ 41 Voluntary disclosure of information—Determination whether communication protected, or whether privilege otherwise applicable
§ 42 Voluntary disclosure of information—Held issue of fact as to whether communication protected, or whether privilege otherwise applicable
§ 43 Notification to insured of inadvertent disclosure of communications
§ 44 Necessity of consent of insured as to disclosure of communications
§ 45 Conduct of insured in assisting or refusing to assist as privileged communication
IV Types of Material Sought
§ 46 Insurance company Claim Committee Report
§ 47 Claims file; Generally—Held communication or documentation protected, or privilege otherwise applicable
§ 48 Claims file; Generally—Held communication or documentation not protected, or privilege not applicable
§ 49 Claims file; Generally—Effect of privilege in light of signed release of insured's claims file
§ 50 Insurer's list of policyholders—Held communication or documentation protected, or privilege otherwise applicable
§ 51 Insurer's list of policyholders—Held communication or documentation not protected, or privilege not applicable
§ 52 Settlement agreement or discussions—Held communication or documentation protected, or privilege otherwise applicable
§ 53 Settlement agreement or discussions—Held communication or documentation not protected, or privilege not applicable
§ 54 Documents prepared by claims adjuster for insurer
§ 55 Document prepared as part of company's regular operating procedure
§ 56 Documents submitted to Insurance Commissioner
§ 57 Transmittal documentation
V Particular Disputes
§ 58 Coverage dispute—Held communication or documentation protected, or privilege otherwise applicable
§ 59 Coverage dispute—Held communication or documentation not protected, or privilege otherwise not applicable
§ 60 Suit between insurer and insured—Held communication or documentation protected, or privilege otherwise applicable
§ 61 Suit between insurer and insured—Held communication or documentation not protected, or privilege not applicable
§ 62 Defamation considerations—Determination whether communication protected, or whether privilege otherwise applicable
§ 63 Defamation considerations—Held issue of fact as to whether communication protected, or whether privilege otherwise applicable
§ 64 Uninsured motorist insurance implications
§ 65 Underinsured motorist insurance implications
§ 66 Bankruptcy implications
§ 67 Excess insurance implications—Held communication or documentation protected, or privilege otherwise applicable
§ 68 Excess insurance implications—Held communication or documentation not protected, or privilege not applicable
§ 69 Tortious interference with contract implications

§ 70 Claim for fees and expenses
VI Additional Considerations
§ 71 Notice of attorney retention as triggering privilege
§ 72 Effect of cooperation clause
§ 73 Determination as to whether insurer's in-house or retained attorney acted as claims adjuster—Held communication or documentation protected, or privilege otherwise applicable
§ 74 Determination as to whether insurer's in-house or retained attorney acted as claims adjuster—Held communication or documentation not protected, or privilege not applicable
§ 75 Determination as to whether insurer's in-house or retained attorney acted as claims adjuster—Further submissions of proof required
§ 76 In camera review of documents under inquiry
§ 77 Identification of documents subject to privilege by proponent of privilege
§ 78 Privilege log implications—Determination whether log must be filed
§ 79 Privilege log implications—Log as determinative of documents to be produced
§ 80 Privilege log implications—Impact of party's failure to submit privilege log
§ 81 Sealing of privileged material
§ 82 Act of insured aiding insurer-provided attorney in preparing legal case
§ 83 Sanctions for failure of insured to comply with discovery requests
§ 84 Trade secret assertion
§ 85 Nonpublic information held by insurers—Determination whether communication protected, or whether privilege otherwise applicable
§ 86 Nonpublic information held by insurers—Balancing of interests
§ 87 Where defense, but not indemnification, provided by insurer
§ 88 Statements made at time of rescission of policy
§ 89 Discoverability of facsimile cover sheets

I. Preliminary Matters

§ 1. Scope

While there is no recognized separate privilege accorded communications between an insured and its liability insurer, these communications can fall within other privileges, most often the attorney-client privilege. There are two general approaches to this issue: the broader view is that an insured's communication to its liability or indemnity insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the attorney-client privilege, while other courts espouse the view that such communications are only within the attorney-client privilege if actually made for the purpose of obtaining legal advice. [1] This article [2] collects and discusses the cases that have generally addressed insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice.

Note

Some opinions discussed in this article may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this article. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed.

§ 2. Background and summary

Application of the attorney-client and work product privileges in insurance cases has caused considerable disagreement among courts, in large part because insurance claims handling is inherently litigious and often the prelude to litigation. [3]

While there is no recognized separate privilege accorded communications between an insured and its liability insurer, these communications can fall within other privileges, most often the attorney-client privilege for materials prepared in anticipation of litigation. Obviously, not every communication between an insured and insurer or its agents will fall within this privilege. [4]

There are two general approaches to this issue: the broader view is that an insured's communication to its liability or indemnity insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the attorney-client privilege, [5] while other courts espouse the view that such communications are only within the attorney-client privilege if actually made for the purpose of obtaining legal advice. [6]

Neither of the views applies without some analysis of the actual circumstances. It may be necessary to examine at least some of the following factors: whether the communication took place at a time when there was any appreciable chance of litigation; the content of the communication, particularly whether it contained information which could logically be viewed as confidential in nature; whether the communication did, in fact, relate to the claim which was ultimately filed against the insured; and, the status and authority of the specific person to whom the insured made the communication. [7]

What appears to be a majority view is that the attorney-client privilege applies to communications between an insured and its liability or indemnity insurer as to an incident possibly giving rise to liability covered by the policy, generally based on recognition of the fact that communications of this nature are predominantly intended to be transmitted to the insurer's attorney, or one assigned by it, to defend the ultimate claim against the insured flowing from the incident to which the communication related, since the insurer is contractually bound to defend the insured, and the insured is contractually bound to cooperate in that defense. This is especially so when the insurer's representative to whom the insured conveys claim information is, in fact, an attorney retained by the insurer to provide a defense in a potential suit. The privileged nature of the communication is not prevented by the fact that the bulk of communications made in these circumstances are made by the insured to a layman and are made in connection with cases in which no lawyer will actually be retained for the purpose of defending the insured. [8]

Under this broad view, the privilege extends to communications made during a period when the insurer and insured were actually adversaries in the sense of the insurer contesting whether the policy would cover the third party's claim, as well as to cases in which the communication was made in regard to a case on which the insurer did, in fact, deny coverage, and is not precluded by a lengthy delay between the transmittal of the information and the insurer's hiring of an attorney, or the actual filing of suit against the insured. [9]

Under the narrower view, no per se attorney-client privilege is accorded to insured-insurer communications; the applicability of the attorney-client privilege depends on whether the communication was actually made both for the dominant purpose of the insured's defense by an insurer-appointed attorney, and under circumstances in which the insured has a reasonable expectation of confidentiality. In establishing the privilege, it is important to establish what the insurer actually did with the information the insured imparted. [10]

Alternatively stated, a statement by the insured to the insurance company, through a claims adjuster or an insurance company's investigator, is protected by the attorney-client privilege. The test to determine whether the attorney-client privilege applies to a communication between an insured and the insured's liability or indemnity insurer is whether the dominant purpose of the communication was for the insured's defense and whether the insured had a reasonable expectation of confidentiality. However,

a client's privilege is not applicable where the issue to which the communications relate is directly in controversy between the client and the attorney, or between the client and one for whom the attorney is, with the knowledge of the client, also acting, and his or her statements may be used to support a disclaimer of liability by the company on its undertaking to indemnify. [11]

The courts in a number of cases have generally addressed insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice.

In a number of cases, for example, the courts held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court generally adopting a "fact-specific" or similar determination as to whether the privilege was applicable under a theory other than the "broad" or "narrow" views (§ 4), though other courts, given the particular circumstances presented, ruled to the contrary (§ 5). In other such cases, the courts adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court: referencing public policy considerations (§ 6); referencing the fiduciary nature of the insured-insurer relationship (§ 7); referencing the applicability of the privilege with respect to an insurer-retained attorney and the attorney's client (§ 8); referencing a narrow construction of the privilege (§ 9); discussing the pertinence or impact of a party's expectation of privacy (§ 10); discussing whether the privilege had been overcome by fraud (§ 11); referencing the applicability of the crime fraud exception (§ 12); referencing whether the contents of an applicable privilege log was supportive of a holding implementing the "common interest" or community of interest doctrine (§ 15); referencing in a case involving conflict of interest implications an insured's entitlement to select its own attorney (§ 16); referencing in a case involving conflict of interest implications the propriety of an attorney's representation of both the insured's and insurer's interests (§ 17); referencing the "joint client" or "joint representation" doctrine (§ 18); referencing a party's burden to establish the privilege (§ 19); referencing communications regarding a party's potential intervention (§ 22); and, referencing a letter of outside counsel to an insurer (§ 23).

In additional cases, the courts held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing the "common interest" or community of interest doctrine (§ 13), and referencing the impact or propriety of an insurer's reservation of rights (§ 20), though other courts, given the particular circumstances presented, ruled to the contrary (§§ 14, 21).

In several cases, the courts adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court: generally referencing a statement of the insured to an insurer's employee (§ 24); referencing the statement of an insured to an insurance carrier's claims adjuster (§ 25); referencing the statement of an insured given during an initial investigation of the matter under inquiry (§ 26); referencing the statement of an insured to a non-attorney employee of the insurer (§ 27); referencing a statement of the insured prior to the party's retention of counsel (§ 28); referencing post-conveyance communications (§ 29); referencing a statement of an employee to insurer-retained counsel (§ 32); referencing a statement of an employee to an insurer's claim representative (§ 33); referencing the propriety or impact of a party's invocation of the Fifth Amendment right as to the privileged communication under inquiry (§ 34); referencing ex parte communications concerning the health of the insured (§ 35); referencing material and communications created or occurring between the party's date of loss and the date of the claim at issue (§ 36); referencing the applicability of the privilege as to communications to or by a "representative" of the client (§ 39); referencing the applicability of the privilege to statements, or communications, between coverage counsel and adjuster for purposes of providing legal services to insured (§ 40); referencing the impact of a party's voluntary disclosure of information (§ 41); referencing the impact or propriety of notification to the insured of an inadvertent disclosure of communications (§ 43); referencing the necessity of an insured's consent as to the disclosure of communications (§ 44); and, discussing whether an insured's conduct in assisting or refusing to assist constituted privileged communication (§ 45).

In other cases, the courts held that an issue of fact had been presented as to whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the impact of a party's voluntary disclosure of information (§ 42). Other courts, in such cases, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing an accident report or communications regard the incident or accident under inquiry (§ 30), and referencing the applicability of the privilege as to the statement of a noninsured or non-client (§ 37), though other courts, given the particular circumstances presented, ruled to the contrary (§§ 31, 38).

In a number of cases, the courts adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court: referencing the discoverability of an insurance company Claim Committee Report (§ 46); discussing the

effect of the privilege in light of a signed release of an insured's claims file (§ 49); referencing the discoverability of documents prepared by a claims adjuster for an insurer (§ 54); referencing the discoverability of a document prepared as part of a company's regular operating procedure (§ 55); referencing the discoverability of documents submitted to an Insurance Commissioner (§ 56); and, referencing the discoverability of transmittal documentation (§ 57). In other such cases, the courts held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing the general discoverability of an insurer's claims file (§ 47), the discoverability of an insurer's list of policyholders (§ 50), and the discoverability of a settlement agreement or discussions (§ 52), though other courts, given the particular circumstances presented, ruled to the contrary (§§ 48, 51, 53).

In additional cases, the courts held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing a coverage dispute (§ 58), a suit between the insurer and insured (§ 60), and, excess insurance implications (§ 67), though other courts, given the particular circumstances presented, ruled to the contrary (§§ 59, 61, 68).

In several cases, the courts adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing: defamation considerations (§ 62); uninsured motorist insurance considerations (§ 64); underinsured motorist insurance implications (§ 65); bankruptcy implications (§ 66); tortious interference with contract implications (§ 69); and, a party's claim for fees and expenses (§ 70). In other such cases, the courts held that an issue of fact had been presented as to whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing defamation considerations (§ 63).

In other cases, the courts adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court: referencing whether the provision of notice of the retention of an attorney triggered a party's privilege (§ 71); referencing the effect upon the proceedings of a policy's "cooperation" clause (§ 72); discussing whether an in camera review of the communications by the court would be required or allowed (§ 76); referencing the necessity of the identification of documents subject to privilege by the proponent of the privilege (§ 77); discussing whether a party was required to submit a privilege log (§ 78); considering whether a privilege log was determinative as to the documents to be produced by the parties (§ 79); considering the impact of a party's failure to submit a privilege log (§ 80); referencing the propriety or impact of sealing privileged material (§ 81); referencing the act of an insured in aiding an insurer-provided attorney in preparing the legal case at issue (§ 82); discussing the propriety of sanctions due to the failure of an insured to comply with discovery requests (§ 83); referencing a trade secret assertion (§ 84); referencing nonpublic information in the possession of insurers (§ 85); referencing the balancing of interests to be performed prior to the release of nonpublic information in the possession of insurers (§ 86); referencing the situation where defense, but not indemnification, is provided to the insured by the insurer (§ 87); referencing statements made at the time of the parties' rescission of the policy at issue (§ 88); and, considering the discoverability of facsimile cover sheets (§ 89).

In a number of cases, the courts held that the parties would be required to submit proof as to the time and extent of the attorney's efforts in the attorney's purported dual role of claims adjuster/investigator and attorney (§ 75). In other such cases, the courts held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court discussing the impact or propriety of a determination as to whether an insurer's in-house or retained attorney acted as a claims adjuster (§ 73), though other courts, given the particular circumstances presented, ruled to the contrary (§ 74).

§ 3. Practice pointers

Exceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications. [12]

Excluding expert witness testimony in a common law insurance action was a proper sanction for a plaintiff's noncompliance with a court order granting an insurer's motion to compel the production of all documents on which the expert relied in preparing an expert report. [13]

As a general rule, the attorney-client privilege extends only to communications between an attorney and a client. There are specific exceptions, however, which permit communications involving third parties to receive the same protection. [14]

In a discovery dispute over whether certain documents are exempt from disclosure under the work-product doctrine, where an insurer involved in a lawsuit has a separate and independent contractual duty to investigate a claim, the insurer, in order to claim that the document was prepared in anticipation of litigation, to satisfy the elements of the work-product exception to protect a document from discovery, must show why each document was prepared and how it was used. [15]

II. General Considerations

A. Preliminary Matters

§ 4. Fact-specific or other determination as to whether privilege applicable under theory other than "broad" or "narrow" view; generally—Held communication or documentation protected, or privilege otherwise applicable

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court generally adopting a "fact-specific" or similar determination as to whether the privilege was applicable under a theory other than the "broad" or "narrow" views.

West Virginia

State ex rel. Montpelier U.S. Ins. Co. v. Bloom, 233 W. Va. 258, 757 S.E.2d 788 (2014) In a case in which insureds, who initially were denied coverage regarding the action of neighbors alleging property damage caused by the insureds, brought a bad faith action against the liability insurer and law firm that represented the insurer, the lower tribunal required the insurer and law firm to disclose the documents, the insurer and law firm filed a petition for writ of prohibition, and the court, on review, granted the petition as modified, the court holding, inter alia, that the third-party disclosure exception to the attorney-client privilege did not apply to coverage opinion letters, and that seminar and training materials were protected from disclosure by the attorney-client privilege. In so ruling, the court pointed out that in order to assert an attorney-client privilege, inter alia, both parties must contemplate that the attorney-client relationship does or will exist, and the communication between the attorney and client must be intended to be confidential. Confidential communications made by a client or an attorney to one another are protected by the attorney-client privilege, the court indicated, and the privilege historically belongs to the client.

State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 213 W. Va. 457, 583 S.E.2d 80 (2003) A patient's estate brought a medical malpractice action against a doctor after the patient died within a few hours of her release from the hospital following surgery, the lower tribunal entered judgment on a jury verdict for the estate, but reduced the damages award as required by the medical malpractice cap, the estate appealed, the lower tribunal granted the estate's motion to compel production of the insurer's complete investigative and claims files in connection with the underlying action, the insurer petitioned for writ of prohibition, and the court, on review, granted the writ, the court ruling that statements made by the doctor to the law firm remained privileged after the law firm repeated them to the insurer, and that a balancing test would not be used to determine whether the estate was entitled to privileged information in the insurer's file. The court rejected the assertion of the respondent that the court should consider adopting a balancing test, whereby the respondent might obtain privileged documents upon a showing of compelling need.

The respondent contended that a balancing test was necessary because a claim file is a unique, contemporaneously prepared history of its handling of a claim that cannot be discovered by other means but that is absolutely necessary to prove the elements of a bad faith cause of action, the court explained, and according to the respondent, the compelled production of otherwise privileged material will not have a chilling effect on attorney-client communications because every attorney involved in these types of cases knows that opinions are likely to be disclosed. Declining to create the exception to the attorney-client privilege urged on the court by the respondent, the court explained that a balancing test governing the discovery of privileged communications is inconsistent with W. Va. R. Civ. P. 26(b)(1), which states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Thus, there is provision under the Rules of Civil Procedure for the discovery of privileged material, the court elaborated, the court adding that using a balancing test

to govern the discoverability of privileged communications is unknown to the common law. Moreover, the court related, there is no precedent for using a balancing test to determine the discoverability of privileged material in third-party bad faith claims.

§ 5. Fact-specific or other determination as to whether privilege applicable under theory other than "broad" or "narrow" view; generally—Held communication or documentation not protected, or privilege not applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was otherwise not applicable, the court generally adopting a "fact-specific" or similar determination as to whether the privilege was applicable under a theory other than the "broad" or "narrow" views.

Maryland

Cutchin v. State, 143 Md. App. 81, 792 A.2d 359 (2002) The court held that the test to determine whether the attorney-client privilege applies to a communication between an insured and his liability or indemnity insurer is whether the dominant purpose of the communication was for the insured's defense and whether the insured had a reasonable expectation of confidentiality (Md. Code Ann., Cts. & Jud. Proc. § 9-108), and here, the statements of the defendant, as an insured, to an adjuster employed by a liability insurer were not protected by the attorney-client privilege, in a prosecution for manslaughter by a motor vehicle. In so ruling, the court pointed out that statements were made at the adjuster's request, the adjuster was not a lawyer and he was not acting as an agent in regard to the defendant, his counsel, or any other identified counsel, and the communication was not requested by defense counsel and was not for counsel's use, such that the defendant's statements were not protected by the attorney-client privilege.

§ 6. Public policy considerations

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing public policy considerations.

South Carolina

ContraVest Inc. v. Mt. Hawley Insurance Company, 273 F. Supp. 3d 607 (D.S.C. 2017) (applying South Carolina law) Under South Carolina law, the purpose of the attorney-client privilege is to preclude the discovery of otherwise relevant information in an effort to promote a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained, the court held, and the public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice. When an attorney is involved in the insurer's decision to deny coverage, much of the information relevant to a plaintiff's bad faith claim may fall under the scope of the privilege, the court related. The fact that the attorney-client privilege covers relevant information is, in and of itself, no reason to abrogate the privilege, the court stressed. The entire purpose of the privilege is to preclude discovery of otherwise relevant information in an effort to promote "a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained," the court observed. However, not every communication that falls within the ordinary scope of the privilege is entitled to protection, the court cautioned. That is, the court related, the "public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice." These policy concerns have led some courts to restrict the availability of the privilege in bad faith cases, the court continued, and, in fact, some states have determined that the privilege is simply inapplicable in bad faith cases.

§ 7. Fiduciary nature of insured-insurer relationship

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the fiduciary nature of the insured-insurer relationship.

South Dakota

Bertelsen v. Allstate Ins. Co., 2011 SD 13, 796 N.W.2d 685 (S.D. 2011) In a third-party coverage situation, the relationship of an insurer to its insured is like that of a fiduciary, because the insurer must give as much consideration to its insured's interests as it does its own, and in a subsequent third-party bad faith suit, the insurer may not invoke the attorney-client privilege to prevent its insured from obtaining communications with the attorney it hired to represent their joint interests, the court held.

§ 8. Privilege with respect to insurer-retained attorney and attorney's client

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the applicability of the privilege with respect to an insurer-retained attorney and the attorney's client.

South Carolina

Sentry Select Insurance Company v. Maybank Law Firm, LLC, 826 S.E.2d 270 (S.C. 2019) An insurer may not intrude upon the privilege between the attorney it hires to defend its insured and the attorney's client, the insured, the court held. An automobile insurer brought action against an attorney for legal malpractice in connection with the attorney's representation of its insured in an automobile accident case, and the court, on review, held that the insurer could bring a direct malpractice action against counsel hired to represent its insured. In so ruling, the court stated that it was confident that the courts of South Carolina "are well-equipped to protect the attorney-client privilege according to law if any dispute over it arises."

§ 9. Narrow construction of privilege

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing a narrow construction of the privilege.

North Carolina

Phillips v. Dallas Carriers Corp., 133 F.R.D. 475 (M.D. N.C. 1990) (applying North Carolina law) The court held that under North Carolina law, the attorney-client privilege applies if the attorney-client relationship existed at the time of the communications, the communication to an insurance adjuster was made in confidence, and the communication related to a

matter concerning which the attorney is employed or is being professionally consulted, the court adding that the privilege is narrowly construed and does not extend to declarations made before the formation of the attorney-client relationship.

§ 10. Expectation of privacy

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court discussing the pertinence or impact of a party's expectation of privacy.

Connecticut

Grodovich v. Immediate Medical Care Center Inc., 12 Conn. L. Rptr. 234, 1994 WL 421464 (Conn. Super. Ct. 1994) In a medical malpractice action in which the plaintiff sought damages from the defendant medical care center and a physician for the physician's alleged failure to diagnose and treat injuries the plaintiff sustained after a sledge hammer fell on his hand, the plaintiff moved to compel the doctor to disclose the matters he discussed with his insurance representative in the presence of his attorney, the defendants objected to that motion on the basis of attorney-client privileges, and the court, framing the dispositive issue as whether the presence of a non-attorney third-party insurance representative vitiates the attorney-client privilege and opens those conversations to the plaintiff's discovery, sustained the objection to the motion to compel disclose, the court reasoning that the expectation of privacy continued despite the presence of the insurance representative. The insurer has a direct economic interest in the disposition of the lawsuit and there is no divergence of interests between the insurer and the insured, the court explained. The legal and economic interests of the defendants and the insurance company are so thoroughly intertwined, that the mere presence of the insurance agent does not cause the privilege to be waived, but the privilege continues to protect the confidentiality of the communications, the court declared. Since the presence of the insurance agent was necessary, or at least convenient, for the consultation and there remained a reasonable expectation of confidentiality, the court concluded that his assistance and presence at a conference between the defendant and his attorney did not vitiate the attorney-client privilege.

§ 11. Fraud as overcoming privilege

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court discussing whether the privilege had been overcome by fraud.

Virginia

Petter v. Acevedo, 31 Va. Cir. 7, 1993 WL 945900 (1993) In a case in which before the court was a motion of the insurer to quash a subpoena duces tecum served upon it, said subpoena demanding production of "all correspondence, memoranda, or other documentation by [the insurer]" regarding the lawsuit at issue, the court held that the plaintiffs made, for purposes of the motion, a prima facie showing of fraud necessary to overcome the privilege, as a result of which communication between the insured, his counsel, and the insurer would not be privileged, as a result of which those documents would have to be produced.

§ 12. Crime fraud exception

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident

possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the applicability of the crime fraud exception.

Tennessee

Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 505 (W.D. Tenn. 1999) (applying Tennessee law) Under Tennessee law, as predicted by the district court, the crime fraud exception to the attorney-client privilege did not require the disclosure of an insured's employee's notes of a conversation with the insured's outside counsel regarding the wording of specific policy exclusions in policies of the insurer's other than a products liability insurer that alleged fraud in the procurement of a products liability policy, absent an indication of a relationship between the conversation and alleged fraud in the procurement of the products liability policy, the court held. The crime fraud exception, the court explained, also did not require disclosure of the insured's employee's notes of a conversation with the insured's in-house counsel concerning the status and legal analysis of an ongoing dispute with another insurer, and of notes of a conversation between the insured's employee and in-house counsel concerning the placement of coverage, where the insured was alleged to have omitted a number of new claims received and to have fraudulently misrepresented the level of current and future legal expenses and magnitude of new claims, and where the document was in furtherance of both objectives. The crime fraud exception to the privilege, the court explained, did not require disclosure of notes of discussion between the insured's and insured's outside counsel concerning obtaining contribution from insurance carriers, nor the disclosure of notes of a discussion between the insured's and insured's outside counsel concerning an appropriate strategy to pursue in seeking payments from the insured's policies and a contribution from a third party, absent an indication of a relationship between the conversation and alleged fraud in the procurement of the products liability policy. Lastly, the court commented, the crime fraud exception did not require the disclosure of notes of a discussion between an insured's in-house counsel and insured's outside counsel concerning the impact of a recent decision on bone screw litigation.

§ 13. Common interest or community of interest doctrine—Held communication or documentation protected, or privilege otherwise applicable

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing the "common interest" or community of interest doctrine.

Connecticut

Hutchinson v. Farm Family Cas. Ins. Co., 273 Conn. 33, 867 A.2d 1 (2005) The relationship between the insureds and their insurance company was adversarial at the time that the insureds made a claim for underinsured motorist benefits following the death of their daughter in a traffic accident, the court held, and, thus, the principle that the attorney-client privilege does not bar disclosure by a fiduciary to its principal of privileged materials relating to their common interests did not apply to the insureds' request for the discovery of materials allegedly protected by the attorney-client privilege, where the insurance company did not undertake any actions on behalf of the insureds, and they had no interests in common.

Metropolitan Life Ins. Co. v. Aetna Cas. and Sur. Co., 249 Conn. 36, 730 A.2d 51 (1999) The common interest exception to the attorney-client privilege did not apply to an insured's claim of privilege in documents sought by excess liability insurers after they refused to defend the insured and after it settled the tort cases and sought reimbursement, the court held, where any attorneys hired by the insurers would owe allegiance only to the insured, and since the insured retained its own attorneys, it lacked a common interest with the insurers. It is true that an insured and an insurer would have a common interest in defeating or minimizing claims against the insured if the insurer were to agree to cover the insured's claims, the court pointed out. However, the court continued, the courts have long held that even when an insurer retains an attorney in order to defend a suit against an insured, the attorney's only allegiance is to the client, the insured. Such a rule recognizes that the insured's and the insurer's

interests are not all common, the court explained, and furthermore, in a case such as the present one, where the insured retained its own attorneys and acted independently of its insurers in settling the underlying cases, the insured and insurer have even less commonality of interests. In either scenario, they do not share common interests in the characterization of the claims or in the settlement of such claims, the court stressed. Moreover, an insured's and insurer's interests immediately become conflicted as soon as the insurer declines to cover the claims, the court declared. Thus, many courts have rejected the theory proposed by the defendants, for in the present case, where the claims involved allegations of intentional torts that the insurance contracts did not cover and the defendants had not yet agreed to defend the claims, it was reasonable for the plaintiff to have expected confidentiality when handling those claims, the court concluded.

Montana

Redding v. Prosight Specialty Management Company, Inc., 2013 WL 12316880 (D. Mont. 2013) (applying Montana law) The court, noting that according to the Montana Supreme Court, "under the Rules of Professional Conduct, the insured is the sole client of defense counsel," pointed out that this is not quite the same thing as holding that the attorney-client privilege does not attach to three-way communications between the insured (the client), insurer-appointed counsel (the attorney), and the insurer. In fact, the court explained, the insured, insurer-appointed counsel, and the insurer stand within a "magic circle" or community of interests protected by the attorney-client privilege, and the attorney-client privilege extends to communications between insurers, insureds, and defense counsel.

South Carolina

Muhler Company, Inc. v. State Farm Fire & Casualty Co., 2018 WL 4599587 (D.S.C. 2018) (applying South Carolina law) While South Carolina law does not appear to recognize attorney-client privilege between an insurance company and the attorney it retains to represent the insured, there is still some lesser protection for their communication under the common interest doctrine, the court held. That is, the court indicated, the common interest doctrine is available under South Carolina law in a relationship between an insurer, an insured, and counsel retained for the insured by the insurer. The common interest doctrine, while "not a privilege itself," protects the transmission of data to which the attorney-client privilege or work product protection has attached when it is shared between parties with a common interest in a legal matter, the court indicated. However, the court related, because a common interest does not create an attorney-client relationship, this doctrine "protects a narrower range of communication between the insurer] and the counsel retained by the insurer for the insured than would be privileged if the insurer were the counsel]'s client." Therefore, the only privileged communication between the insurer and the insured's counsel is communication that is privileged as to the insured and its counsel, which is then disclosed by the counsel to the insurer, the court concluded.

§ 14. Common interest or community of interest doctrine—Held communication or documentation not protected, or privilege not applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was otherwise not applicable, the court referencing the "common interest" or community of interest doctrine.

Massachusetts

Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1 (1st Cir. 2012) (applying Massachusetts law) Under Massachusetts law, an insured's defense counsel in an action brought against it by a customer represented both the insured and its insurers, the court held, and thus, under the common-interest doctrine, the attorney-client privilege did not necessarily apply with respect to communications between the insured and its defense counsel in the customer's action, in the insured's action against the insurers seeking coverage under primary and excess-level general liability insurance policies for settlement payments it made to resolve the customer's damages claims, where the primary insurers paid the insured's defense counsel and partially funded the settlement with the

customer. The lower tribunal abused its discretion, in denying in its entirety the insurers' motion to compel production of documents withheld by the insured on grounds of attorney-client and work-product privileges in the insured's action against insurers seeking coverage under primary and excess-level general liability insurance policies for settlement payments it made to resolve claims for damages brought by its customer, the court indicated. The insured, the court stressed, could not rely on the attorney-client privilege to shield all communications between it and its defense counsel in the customer's action, as the insurers had provided a defense for the insured in the customer's action and thus, the insured's counsel in the customer's action was deemed under state law to have represented the insurers as well as the insured.

§ 15. Common interest or community of interest doctrine—Privilege log in support of implementing doctrine

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing whether the contents of an applicable privilege log was supportive of a holding implementing the "common interest" or community of interest doctrine.

South Carolina

State Farm Fire and Casualty Company v. Admiral Insurance Company, 225 F. Supp. 3d 474 (D.S.C. 2016) (applying South Carolina law) Under South Carolina law, as predicted by the district court, the "common interest" doctrine was available in a factual scenario involving a confidential relationship between an insurer, insured, and counsel retained by the insurer for the insured, the court held, and here, in an action arising from a fraternity hazing event hosted at the homeowner's house, the court stated that it could not resolve the issue of whether communications between the fraternity's liability insurer and counsel retained to defend the fraternity in the underlying action were protected from discovery under South Carolina's common interest doctrine, since the insurer's privilege log lacked sufficient detail.

§ 16. Conflict of interest implications—Insured entitled to select own attorney

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing in a case involving conflict of interest implications an insured's entitlement to select its own attorney.

Mississippi

Liberty Mut. Ins. Co. v. Tedford, 644 F. Supp. 2d 753 (N.D. Miss. 2009) (applying Mississippi law) Under Mississippi law, the court held, when a conflict of interest arises between an insured and the insurer, with respect to how such situation may affect the privilege of pertinent communications, particularly through defending under a reservation of rights or the situation in which some claims are clearly not covered by the insurance policy, the insurer is under an obligation to permit the insured to select his or her own individual counsel, with the fees and costs to be paid by the insurer.

§ 17. Conflict of interest implications—Propriety of attorney to represent both insured's and insurer's interests

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view

that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing in a case involving conflict of interest implications the propriety of an attorney's representation of both the insured's and insurer's interests.

Indiana

Valley Forge Insurance Company v. Hartford Iron & Metal, Inc., 148 F. Supp. 3d 743 (N.D. Ind. 2015) (applying Indiana law) Under Indiana law, an insurer created a conflict of interest that prevented it from controlling the defense by filing a breach of contract action against an insured that sought recovery of the same environmental remediation costs that the insured said the commercial general liability insurance policies covered, the court held, the court adding that an attorney could not represent both the insured's and insurer's interests consistent with the attorney's ethical obligations, and with respect to the effect upon the potential privileged communications between the parties, due to the risk of misaligned incentives as a result of the insured complaining that the insurer's selection of a remediation company contributed to further discharge issues, and as a result of the insurer maintaining that discharge issues were due to the insured's bad faith failure to cooperate (Ind. Code Ann. § 13-30-9-5). That is, the court explained, the insurer created a conflict of interest that prevented it from controlling environmental remediation by filing a breach of contract action against the insured that sought recovery of the same remediation costs, for while the policies prohibited voluntary payments, the insurer did not dispute coverage, defense and remediation activities were inextricably intertwined, and the insurer and insured blamed each other for further discharge issues which prevented the attorney from representing both the insured's and insurer's interests. The conflict of interest that the insurer created under Indiana law that prevented it from controlling the defense, the court continued, prevented the insurer from exercising its rights to control under the settlement agreement. The insurer effectively forfeited its control rights by not filing suit only for declaratory relief to clarify the parties' obligations, the court concluded.

§ 18. Joint client or joint representation doctrine

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the "joint client" or "joint representation" doctrine.

North Carolina

Nationwide Mut. Fire Ins. Co. v. Bourlon, 172 N.C. App. 595, 617 S.E.2d 40 (2005), aff'd without opinion, 360 N.C. 356, 625 S.E.2d 779 (2006) Application of the common interest or joint client doctrine does not lead to the conclusion that no communications are privileged between an insured and attorney hired by a liability insurer to defend the insured, the court held, where the attorney-client privilege still attaches to those communications unrelated to the defense of the underlying action, as well as those communications regarding issues adverse between the insurer and the insured. In North Carolina, the court noted at the outset, the courts have previously recognized the common interest or joint client doctrine, noting that "as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged inter sese." The privilege rule, the court continued, does not apply to communications between parties and to a joint attorney, and a communication made to counsel for two defendants is "not privileged from disclosure in a subsequent suit between the two." The rationale for the doctrine rests upon the nonconfidential nature of communications between the parties during the tripartite relationship, the court continued, and if it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential, or that they were made for the purpose of being conveyed by the attorney to others, communications are stripped of the idea of a confidential disclosure and are not privileged, the court related.

The court stated that it was persuaded that the common interest or joint client doctrine applies to the context of insurance litigation in North Carolina. Therefore, where, as here, an insurance company retains counsel for the benefit of its insured, those communications related to the representation and directed to the retained attorney by the insured are not privileged as between the insurer and the insured, the court indicated. However, the court stressed, the application of the common interest

or joint client doctrine does not lead to the conclusion that all of the communications between the defendant and the assigned attorney were unprivileged. Instead, the attorney-client privilege still attaches to those communications unrelated to the defense of the underlying action, as well as those communications regarding issues adverse between the insurer and the insured, the court indicated. Specifically, communications that relate to an issue of coverage are not discoverable because the interests of the insurer and its insured with respect to the issue of coverage are always adverse, the court concluded.

B. Basic Coverage Matters

§ 19. Burden to establish privilege

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing a party's burden to establish the privilege.

Connecticut

Niemtiz v. Town of Barkhamsted, 2007 WL 4571131 (Conn. Super. Ct. 2007) The court ruled that the defendants failed to meet their burden of demonstrating the existence of the attorney-client privilege as it related to the statements at issue, where there was no affidavit before the court to indicate that counsel directed an insurance adjuster to take the statements, and where, at reargument on the matter, counsel vacillated significantly on the issue. Based upon the argument and reargument before the court, the court stated that it actually appeared that the insurance adjuster, and not the attorney for the defendants, engendered the taking of the statements at issue. Reasoning thusly, the court sustained its order on the matter.

Indiana

Elwell v. First Baptist Church of Hammond, Indiana, Inc., 2017 WL 3262532 (N.D. Ind. 2017) (applying Indiana law) The court, denying the defendant's motion to quash a subpoena, or motion for protective order, pointed out that the defendant church merely asserted that all of the documents requested in the subpoenas were protected by Indiana's insured-insurer privilege, the court adding, however, that absent an articulation as to why the insured-insurer privilege applied to each of the documents sought, the moving party could not use it to avoid discovery. Therefore, the court concluded, the court was unable to determine that all the documents requested were protected by the insured-insurer privilege.

§ 20. Reservation of rights—Held communication or documentation protected, or privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing the impact or propriety of an insurer's reservation of rights.

Massachusetts

RFF Family Partnership, LP v. Burns & Levinson, LLP, 32 Mass. L. Rptr. 88, 2013 WL 7855976 (Mass. Super. Ct. 2013) Noting that no Massachusetts appellate case had addressed the issue of privilege presented in the instant case, the court held that it was plain that because the insurer is a client under Massachusetts law, the attorney-client privilege will normally attach to communications between the attorney and the insured, the defendant, or both, the court adding that even where an insurer

has questioned coverage, reserved its rights, but is still providing a defense, communications concerning the defense between defense counsel and either the insured or the insurer, or both, are accessible to both, but privileged from outside scrutiny. In such a case there is as yet no binding determination as to coverage, the court continued, and both the insurer and the insured are potentially at risk on the loss, and each may be expected to take an active interest in the litigation and to require the defense attorney to keep it informed, not only as to matters of public record but also concerning his mental impressions, strategy, and judgment on issues relating to liability, but not coverage. On liability issues, the interests of the two clients are and remain in full accord, the court concluded.

§ 21. Reservation of rights—Held communication or documentation not protected, or privilege not applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication was not protected, or that the privilege was not otherwise applicable, the court referencing the impact or propriety of an insurer's reservation of rights.

Virginia

Wood v. Campbell, 71 Va. Cir. 402, 2006 WL 2590479 (2006)Referencing Va. S. Ct. Rules, R. 4:1(b)(2), a rule specifically addressing the matter of discovery of Insurance Agreements, the court opined that the Rule does not preclude the disclosure of material, not privileged, concerning communications between the defendant and the insurer in a situation where the plaintiff might be materially affected by the weight it might independently ascribe to the reservation claim of an insurer. In general, discovery may be had of, "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identify and location of persons having knowledge of any discoverable matter," the court instructed. The information is, the court stressed, "relevant to the subject matter involved in the pending action."

§ 22. Communications regarding potential intervention

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing communications regarding a party's potential intervention.

Idaho

Vaught v. Dairyland Ins. Co., 131 Idaho 357, 956 P.2d 674 (1998) A refusal to allow an uninsured motorist (UM) insurer to depose an insured's attorney regarding his conversations with the insurer's attorney about the insurer's potential intervention in a tort suit was not an abuse of discretion, the court held, where there was no dispute as to the nature or content of conversations, and no claim that the attorney possessed information unavailable from another source, and where the deposition would have compromised the attorney's ability to represent the insureds. The cross-appellants argued that in order to determine if the insurer's decision not to intervene was taken in good faith the district court should have allowed them to question the insurer's attorney about his communications with the insurer regarding intervention, the court explained. The court noted that the UM insurer did not put privileged communications into evidence, so as to waive the attorney-client privilege attaching to its communications with counsel about whether to intervene in the insured's tort suit against the uninsured motorist, when counsel filed an affidavit indicating that the insureds made a request to counsel through their attorney that the insurer not intervene.

§ 23. Letter of outside counsel to insurer

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing a letter of outside counsel to an insurer.

Michigan

Patrick v. State Farm Fire & Casualty Company, 2016 WL 10519131 (E.D. Mich. 2016) (applying Michigan law) The court, denying the plaintiff's motion to compel the production of redacted documents, held that the letter of an outside counsel to an insurer was a confidential communication between the insurer's outside counsel and its claims personnel, containing counsel's legal opinions regarding the scope of potential liability, as a result of which the letter was protected by the attorney-client privilege and would not have to be produced.

III. Communications of Particular Parties

A. Insured Communications; Generally

§ 24. Statement of insured to insurer's employee; Generally

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court generally referencing a statement of the insured to an insurer's employee.

Connecticut

Jacobs v. Dickey, 21 Conn. L. Rptr. 392, 1998 WL 70601 (Conn. Super. Ct. 1998) In a case in which the plaintiff in a medical malpractice action sought to compel the production of certain notes taken by an employee of an insurance company, the defendant's medical malpractice insurance carrier, both the defendant doctor and the insurer opposed disclosure, citing the attorney-client privilege, and the court, on review, granted the motion to compel, the court ruling that communications by an insured to the insured's carrier are not, without more, privileged. Although such a communication may become privileged if the adjuster takes a statement from an insured while acting as the attorney's agent and at the attorney's instruction, this was not such a case, the court explained. While the documents in question suggested that the doctor was preparing a narrative of events for eventual submission to an attorney, the notes did not themselves reflect the substance of any conversations with an attorney or with a person acting as an attorney's representative or otherwise acting at the direction of an attorney, the court stressed. Given the particular circumstances presented, the court concluded that the subject communications were governed neither by the attorney-client privilege nor the work product doctrine.

§ 25. Statement of insured to claims adjuster

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated

whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the statement of an insured to an insurance carrier's claims adjuster.

Alabama

Ex parte Nationwide Mut. Fire Ins. Co., 898 So. 2d 720 (Ala. 2004) An insured's statement to an automobile insurer's claims adjuster was protected by the work-product privilege, and, thus, was not discoverable by a motorist in the motorist's personal injury action that was brought against the insured regarding the automobile accident, the court held. The affidavit of the adjuster, the court observed, identified a single witness interview, namely, that of the insurance carrier's insured driver. According to the adjuster's undisputed testimony, he interviewed the insured after concluding that an action by the motorist against the insured was likely to occur, the court pointed out. His conclusion was based upon information indicating to him that the insured was free from liability, that the motorist's vehicle had sustained little damage, and that the motorist had allegedly sustained a serious knee injury, the court explained. It was clear that the insured made an adequate showing that the statement of its insured was taken with an understanding that a suit would occur, the court concluded.

§ 26. Statement of insured given during initial investigation of matter

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the statement of an insured given during an initial investigation of the matter under inquiry.

Hawaii

DiCenzo v. Izawa, 68 Haw. 528, 723 P.2d 171 (1986) A statement given by an insured to an insurer during an initial investigation but before the commencement of litigation, and that was not requested by or taken under the guidance of counsel, was not within the attorney-client privilege, the court held. The trial court, the court pointed out, held that the statement sought by the plaintiff was within the attorney-client privilege as argued by counsel for the defendant because the unidentified claims investigator who recorded the defendant's statement presumably possessed "authority to obtain professional legal services … on [her] behalf" (Hawai'i Rules of Evidence, Rule 503(a)(2)). The statement was given in the course of an initial investigation by the insurance carrier before litigation commenced and was not requested by or taken under the guidance of counsel, the court emphasized, and the record manifested no judicial inquiry to establish the confidential character of the communication or the defendant's belief that its purpose was to facilitate "the rendition of professional legal services." The court stated that were it to uphold the privilege under such circumstances, any report or statement made by an insured person to an investigator or adjustor employed or retained by the insurer would be within the attorney-client privilege as a matter of law.

§ 27. Statement of insured to non-attorney employee of insurer

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the statement of an insured to a non-attorney employee of the insurer.

Massachusetts

Pasteris v. Robillard, 121 F.R.D. 18 (D. Mass. 1988) (applying Massachusetts law) An insured's statement to an insurer prior to the injured party's commencement of an action against the insured was not protected from discovery by the attorney-client

privilege under Massachusetts law, even though the insurer had an obligation to defend and the insured had a duty to cooperate, absent evidence that the person to whom the communication was made was a subordinate of an attorney, or that the person taking the statement on behalf of the insurer was acting as an attorney. That is, the court elaborated, the attorney-client privilege applies under Massachusetts law only if the person to whom the communication was made is a member of the bar of court, or its subordinate, and in connection with the communication is acting as a lawyer.

West Virginia

Kidwiler v. Progressive Paloverde Ins. Co., 192 F.R.D. 536 (N.D. W. Va. 2000) (applying West Virginia law) Under West Virginia law, a transcription of an insured motorist's telephone interview with an insurer's employee concerning an automobile accident was not protected by the attorney-client privilege in a bad faith settlement action brought against the insurer by the other party to the accident, where the insurer's employee was not an attorney, the court held. Reasoning thusly, the court concluded that the attorney-client privilege would not protect the insured's statements from disclosure.

§ 28. Statement of insured prior to retention of counsel

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing a statement of the insured prior to the party's retention of counsel.

First Circuit

Pasteris v. Robillard, 121 F.R.D. 18 (D. Mass. 1988) An insured's statement to an insurer, which was made after the insurer received notice of an injured party's demand for payment, was not privileged or protected from discovery as work product, the court held, where the statement was obtained by the insurer three months before the injured party secured counsel, more than one year before the insured's counsel corresponded with the injured party's attorney, and where nearly one and one-half years before commencement of the action.

§ 29. Post-conveyance communications

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing post-conveyance communications.

North Carolina

Lawyers Title Ins. Co. v. Golf Links Development Corp., 87 F. Supp. 2d 505 (W.D. N.C. 1999) (applying North Carolina law) Under North Carolina law, a title examiner's post-conveyance communication to a title insurer concerning a purchaser's intent to use a mistake in a deed to its advantage was not subject to the attorney-client privilege, the court held, where the purchaser had hired the examiner to perform a title examination, and where the examiner's legal conclusions concerning the title would of necessity be disclosed to the insurer, as a result of which no expectation of confidentiality ever arose (N.C. Gen. Stat. Ann. § 58-26.1(a)). The title insurer sought to reform a policy covering a golf course for mutual mistake, the insurer moved for summary judgment, the insured cross-moved for summary judgment, based on the attorney-client privilege and an assertion

that the mistake was unilateral, not mutual, and the court, on review, granted the plaintiff's motion and denied the defendant's motion, the court holding, inter alia, that the fraud exception to the attorney-client privilege applied to the title examiner's post-conveyance communication to the title insurer, assuming that the privilege was applicable, and that the attorney-client privilege was not applicable. The nature of the transaction, that is, the purchase of the property and the acquisition of title insurance, required that the communications not be confidential, the court stressed. Of necessity, the information had to be conveyed to others, the insurer, the court declared, and if the privilege attached, the defendant waived it by instructing its representative to obtain title insurance.

§ 30. Accident report or communications regarding incident or accident under inquiry—Held communication or documentation protected, or privilege otherwise applicable

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing an accident report or communications regard the incident or accident under inquiry.

Indiana

Richey v. Chappell, 594 N.E.2d 443 (Ind. 1992) A communication between an attorney and client is privileged and not discoverable, the court held, and the scope of the privilege includes communications between the attorney and client made through their agents or representatives (Ind. Code Ann. § 34-1-14-5), the court adding that where the policy of insurance requires the insurer to defend claims against the insured, statements from the insured to the insurer concerning the occurrence which may be made the basis of a claim by a third party are protected from disclosure. Here, the court pointed out, the documents ordered produced were: automobile loss notice, damage repair estimate, certain telephone messages and correspondence, a Statement of No Injury from a passenger, a state officer's Standard Accident Report, and photographs of the damaged vehicles.

Strack and Van Til, Inc. v. Carter, 803 N.E.2d 666 (Ind. Ct. App. 2004) A grocery store's accident investigation report to its liability insurer was privileged, in a customer's slip and fall negligence action, even though the report included conclusions by a store supervisor that were based on statements by a store employee, the court held. The customer brought a negligence action against a grocery store, alleging that she slipped and fell in an aisle, the lower tribunal entered judgment on the jury's verdict finding the store 90 percent at fault and awarding $504,000 in damages, the store appealed, and the court, on review, affirmed, the court holding, inter alia, that while the accident report was privileged, error in admitting the privileged accident investigation report to a liability insurer was not prejudicial. In so ruling, the court pointed out that the "Town and Country Accident Investigation Report" was part of a packet of materials provided by the insurer for the defendant store to use in communicating the pertinent facts of an occurrence to its liability insurer. The occurrence referred to in the report was the basis for the plaintiff's claim and was thus related to the insurer's duty to defend, the court explained. It is essential that an insured be allowed to make a full statement to its insurer pertaining to an occurrence without the fear that the statement will be used by a third party, the court indicated. The fact that this report contained conclusions by a store supervisor that were based on statements by a store employee was of "no moment," the court stressed. The privilege applies to communications between the insured and its agents to the insurer, the court concluded.

§ 31. Accident report or communications regarding incident or accident under inquiry—Held communication or documentation not protected, or privilege not applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was

otherwise not applicable, the court referencing an accident report or communications regard the incident or accident under inquiry.

North Carolina

Phillips v. Dallas Carriers Corp., 133 F.R.D. 475 (M.D. N.C. 1990) (applying North Carolina law) Under North Carolina law, the court held, a written statement taken from a tractor trailer driver by an insurance adjuster on the day of accident was not protected by the attorney-client privilege in a lawsuit arising out of the accident. In so ruling, the court pointed out that even if a written statement taken from the tractor trailer driver by the insurance adjuster on the day of the accident could be characterized as work product, the motorist was entitled to its production where the motorist had no direct memory of the collision, and where the truck driver pressed the defense of contributory negligence. In light of the passage of time since the accident occurred, there was no way to obtain the substantial equivalent of the truck driver's statement, which was a nearly contemporaneous account of the events at issue, the court declared.

B. Employee Communications

§ 32. Statement of employee to insurer-retained counsel

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing a statement of an employee to insurer-retained counsel.

Michigan

Co-Jo, Inc. v. Strand, 226 Mich. App. 108, 572 N.W.2d 251, 1998 O.S.H. Dec. (CCH) ¶ 31517 (1997) A statement of an employee to an attorney retained by an employer's insurer to provide a defense in a potential negligence suit was privileged in a subsequent suit as an attorney-client communication, even if the employee had little recollection of the meeting or what he had been told about the nature of the attorney's role, the court held. The attorney was retained by the liability insurer of the defendant plumbing contractor to represent the insured and an employee of the insured in any potential action arising out of the fire under inquiry, the court noted. The attorney clearly stated that he obtained the statement from the employee pursuant to his representation in order to prepare to defend against any possible claim, the court continued, and he also stated that he informed the employee that he was retained by the insurer as his attorney and that the statement was pursuant to that representation. The employee had little or no recollection of the meeting or the nature of the attorney's role, the court commented, and the employee testified that he thought he was instructed by the employer-insured to meet with the attorney regarding the fire and that he was probably told that the attorney was an attorney for the insurance company. The attorney's statements supported the trial court's conclusion that the employee's statement was intended as a confidential communication to the attorney for the purpose of rendering legal services in the future, the court declared. The employee's failure to recall any details of the meeting provided little evidence with respect to his understanding of his relationship with the attorney at the time of the statement, such that, while little evidence was presented from which the trial court made its determination, it could not be concluded that the trial court abused its discretion in finding that the statement was privileged as the product of an attorney-client relationship, the court concluded.

§ 33. Statement of employee to insurer's claim representative

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated

whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing a statement of an employee to an insurer's claim representative.

Indiana

Sowell v. Dominguez, 2011 WL 4496505 (N.D. Ind. 2011) (applying Indiana law) In a case in which the plaintiff, the personal representative and administrator of a decedent's estate, filed a motion to compel production of the statement of an employee of the insured, the employee and employer objected, arguing that the statement was privileged under Indiana's insured-insurer privilege and was attorney work product, the federal district court granted the plaintiff's motion, holding that the insured-insurer privilege was inapplicable in federal court, and that even if the insured-insurer privilege applied to federal question suits, the privilege would not apply to this specific investigation, the court adding that because the defendants failed to show that the investigation file was subject to either the attorney-client or work product privilege, the Motion to Compel Documents filed by the plaintiff would be granted and the defendants would be ordered to produce the documents contained in the investigation file prepared by the insurance adjusters.

DeMoss Rexall Drugs v. Dobson, 540 N.E.2d 655 (Ind. Ct. App. 1989) Statements made by representatives of an insured pharmacy to an insurer's claims representative concerning the misfilling of a prescription were not undiscoverable as privileged communications in an action brought by the customer who received the misfilled prescription, the court held. An appeal was taken from a discovery order of the lower tribunal entered in an action arising when the pharmacist misfilled a customer's prescription, and the court, on review, affirmed, the court holding, inter alia, that the statements made by the insured pharmacy's representatives to the insurer's claims representative were not undiscoverable as privileged communications, and that the statements were taken for the purpose of exploring the validity of the customer's claim and to enable the insurer to make an initial determination of its position with respect to the claim. Cognizant that evidentiary privileges frustrate the fact-finding process by foreclosing the consideration of relevant and material information, the courts of Indiana have repeatedly and consistently left to the legislature the determination of whether a particular interest is of sufficient importance to society to justify the protection afforded privileged communications and the scope of the protection to be accorded, the court related. All privileges are statutory in nature in Indiana and their creation is solely the prerogative of the legislature, the court reiterated. For that reason and notwithstanding obiter dictum that there may be policy considerations favoring an evidentiary exclusionary rule for communications between an insured and his insurer, the court declared, the court would be inclined to leave the determination of the state's public policy with respect to an insurer-insured privilege to the General Assembly.

C. Other Communications

§ 34. Invocation of Fifth Amendment right as privileged communication

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the propriety or impact of a party's invocation of the Fifth Amendment right as to the privileged communication under inquiry.

Indiana

Medical Assur. Co., Inc. v. Weinberger, 295 F.R.D. 176 (N.D. Ind. 2013) (applying Indiana law) Under Indiana law, information as to whether an insured physician ever pled his Fifth Amendment right to remain silent in his interactions with his medical malpractice insurer and their shared attorney in the course of medical malpractice litigation did not involve the substance of any communication between the physician and attorney, and thus was not protected by the attorney-client privilege in the insurer's action seeking declaratory judgment that it had no duty to defend or indemnify the physician or business entities he owned in underlying medical malpractice actions because of the physician's failure to cooperate (Ind. Code Ann. § 34-46-3-1).

§ 35. Ex parte communications concerning health of insured

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing ex parte communications concerning the health of the insured.

Montana

Simms v. Schabacker, 2014 MT 328, 377 Mont. 278, 339 P.3d 832 (2014) Even if a physician suspected that a fraud investigation had commenced against his Workers' Compensation patient, the physician's correspondence with a State Fund, in which he provided medical observations about the disparity between a patient's diagnosis and functionality as seen in videos sent to the physician by the Fund, was protected by a notice of privacy policy, signed by the patient, when read in conjunction with disclosure statutes applicable to Workers' Compensation cases, and thus did not violate the physician-patient privilege, the court held, where the notice informed the patient that the rehabilitation center for which the physician worked "may disclose any information we collect … (which) may include … disclosures related to … fraud investigations," and where governing statutes allowed ex parte communications between a claimant's physician and a workers' compensation insurer (Mont. Code Ann. §§ 39-71-604(2), 50-16-527, 50-16-805(1)).

§ 36. Material and communications between date of loss and date of claim

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing material and communications created or occurring between the party's date of loss and the date of the claim at issue.

Seventh Circuit

Stout v. Illinois Farmers Ins. Co., 150 F.R.D. 594 (S.D. Ind. 1993), order aff'd on other grounds, 852 F. Supp. 704 (S.D. Ind. 1994) Documents prepared by an insurer between the date of a fire loss and the date the fire claim was denied were not entitled to work product protection, in the absence of an identifiable resolve on the part of the insured during that period to litigate over the claim, the court held, and, although the insured did threaten to sue, the threat was directed solely at the insurer's choice of claims adjusters, not its claims decision, the court adding that assuming that the documents produced had concurrent litigation and nonlitigation purposes, the insurer would have undertaken investigations generating documents to evaluate the fire claim regardless of its intention to use them to prepare for litigation (Fed. R. Civ. P. 26(b)(3)). If a document was preexisting or otherwise not produced for the purpose of obtaining or communicating legal guidance, it does not become privileged merely because it was passed onto, or through, an attorney in the course of representation, the court indicated. Here, the court continued, a preprinted form with filled blanks addressed to an investigative firm from an insurer requesting the investigation of a fire claim was not privileged as an attorney-client communication, despite the insurer's conclusory statement that the document represented the results of such communications regarding investigation of the claim. The form was not sent to or from counsel or counsel's agents, the court explained, and it was not sent to or from the insurer's employees or agents in order to transmit information from, or information to, counsel, and it was not sent for the purposes of seeking or transmitting legal guidance.

§ 37. Privilege as applicable to statement of noninsured or non-client—Held communication or documentation protected, or privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing the applicability of the privilege as to the statement of a noninsured or non-client.

Indiana

Madison v. Hawkins, 644 N.E.2d 184 (Ind. Ct. App. 1994) Statements made by a driver, who was insured as a permissive user of an insured vehicle, to the owner's insurer concerning an accident involving a pedestrian were protected or privileged from discovery in the pedestrian's suit, the court held, even though the driver, a permissive user, was not a named insured under the policy and was not in privity of contract with the insurer. In so ruling, the court pointed out that there was no requirement of privity of contract between the insured and insurer to protect such information from disclosure. A pedestrian brought suit against the driver and insured owner for injuries suffered in the accident, the lower tribunal granted the pedestrian's motion to compel discovery of statements given by the driver to the insurer and to the Indiana state police, but certified a discovery order for interlocutory appeal, and the court, on review, reversed, the court holding, inter alia, that any statements of the driver made to the insurer concerning the accident involving the pedestrian were protected from disclosure, regardless of whether the driver was in privity of contract with the insurer.

§ 38. Privilege as applicable to statement of noninsured or non-client—Held communication or documentation not protected, or privilege not applicable

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was otherwise not applicable, the court referencing the applicability of the privilege as to the statement of a noninsured or non-client.

Indiana

Crisp v. I/N Tek, L.P., 2008 WL 222287 (N.D. Ind. 2008) (applying Indiana law) In a case in which the plaintiffs argued that the tape recording of one plaintiff's statement should be stricken under the insured-insurer privilege, the plaintiffs specifically asserting that the insured-insurer privilege bars the defendants' reliance on the tape-recorded statement in support of their request for summary judgment, the court, on review, held that while the insurer-insured privilege applies to communications an insured makes to its own insurer, the subject plaintiff was not insured by the insurer, as a result of which the insured-insurer privilege did not protect his statements. The court pointed out that Fed. R. Evid. 501 provides that in a civil action governed by state law, the privilege of a person is determined in accordance with state law. Indiana law, which thus governed this dispute, provides that when a policy of insurance "requires the insurer to defend claims against the insured, statements from the insured to the insurer concerning an occurrence which may be made on the basis of a claim by a third party are protected from disclosure," the court instructed. The plaintiff's statement, however, would not fall within that protection, because the subject insurer did not insure the plaintiff, the court concluded.

South Dakota

Roy v. D.J.L. Homes, Inc., 2007 WL 8030880 (D.S.D. 2007) (applying South Dakota law) In a case in which, approximately nine months before the instant lawsuit was filed and about one month after the accident occurred, the defendants' insurance company, through an employee of the insurer, took recorded statements made by the plaintiff, the defendant, and an accident witness, the court granted the plaintiff's motion to compel the defendants to produce the transcribed statements of the statements of the defendant and accident witness, the court stressing that at the time the defendant made the statement at issue, he was not a person who had legal representation or who was seeking legal representation, but was rather a motorist who had been in an accident and who gave a statement to a claims representative from his insurance company. The court, in so ruling, reasoned

that at the time the defendant gave his statement to insurer, he was not a "client," which is defined by S.D. Codified Laws § 19-13-2(1) as a "person … who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him."

§ 39. Privilege as applicable to communications to or by "representative" of client

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the applicability of the privilege as to communications to or by a "representative" of the client.

Nevada

OOIDA Risk Retention Group, Inc. v. Bordeaux, 2016 WL 427066 (D. Nev. 2016) (applying Nevada law) In a motor vehicle accident case involving the implementation of insurance coverage, Nevada's attorney-client privilege permits a client to prevent the disclosure of confidential communications between the client or client's representative and the lawyer or lawyer's representative, or between the lawyer and the lawyer's representative, where such communications are "made for the purpose of facilitating the rendition of professional legal services" (Nev. Rev. Stat. Ann. § 49.095), the court held, the court adding that a "representative of a client" is "a person having authority to obtain professional legal services," or to act on the guidance or services rendered by the attorney, "on behalf of the client."

§ 40. Privilege as applicable to statements, or communications, between coverage counsel and adjuster for purposes of providing legal services to insured

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the applicability of the privilege to statements, or communications, between coverage counsel and adjuster for purposes of providing legal services to insured.

Nevada

Residential Constructors, LLC v. Ace Property and Cas. Ins. Co., 2006 WL 3149362 (D. Nev. 2006) (applying Nevada law) The court, finding no rational distinction between applying the attorney-client privilege to confidential communications between the insurer's counsel and its claims employee, but refusing to apply the privilege to counsel's confidential communications with an independent insurance adjuster who performs the same functions as an "in-house" claims employee, held that confidential communications between the subject defendant's coverage counsel and the defendant's adjuster for purposes of providing legal services or to obtain information in order to render legal services to the defendant, were entitled to protection under the attorney-client privilege.

§ 41. Voluntary disclosure of information—Determination whether communication protected, or whether privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view

that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the impact of a party's voluntary disclosure of information.

Mississippi

Liberty Mut. Ins. Co. v. Tedford, 644 F. Supp. 2d 753 (N.D. Miss. 2009) (applying Mississippi law) The court held that under Mississippi law, by voluntarily injecting into a litigated case a material issue which requires ultimate disclosure by the attorney of information ordinarily protected by the attorney-client privilege, the client, this case a purportedly insured individual, makes the information discoverable (Miss. R. Evid. 502(b)), the court held.

§ 42. Voluntary disclosure of information—Held issue of fact as to whether communication protected, or whether privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that an issue of fact had been presented as to whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the impact of a party's voluntary disclosure of information.

Montana

American Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court, 2012 MT 61, 364 Mont. 299, 280 P.3d 240 (2012) The court held that it would accept review of a workers' compensation insurer's contentions in an insurer's petition for a writ of supervisory control, where the trial court in the claimant's unfair settlement practices action against an insurer and adjuster ordered the employer to produce a letter sent by the insurer's attorney to the claims adjuster and copied to the employer, the court reasoning that the issue raised by the insurer, whether an attorney's communication to its client insurer was privileged when the client voluntarily disclosed the communication to the non-client employer, was one of first impression. Moreover, the court related, the issue raised a question of law, and normal channels of appeal would prove inadequate.

§ 43. Notification to insured of inadvertent disclosure of communications

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the impact or propriety of notification to the insured of an inadvertent disclosure of communications.

West Virginia

Mt. Hawley Ins. Co. v. Felman Production, Inc., 271 F.R.D. 125 (S.D. W. Va. 2010) (applying West Virginia law) A defendant insurer was not required to notify a plaintiff insured of the insured's inadvertent disclosure of an attorney-client privileged e-mail prior to using the e-mail, the court held. To assert an attorney-client privilege under West Virginia law, the court instructed, both parties, inter alia, must contemplate that the attorney-client relationship does or will exist, the communication between the attorney and client must be intended to be confidential, and there must be no evidence that the client intentionally waived the privilege.

§ 44. Necessity of consent of insured as to disclosure of communications

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the necessity of an insured's consent as to the disclosure of communications.

Montana

In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2000 MT 110, 299 Mont. 321, 2 P.3d 806 (2000) Third-party auditors retained by insurers to evaluate compliance, by defense counsel appointed by the insurers to represent the insureds, with the insurers' litigation management guidelines were not within the "magic circle" or community of interest with the insureds, but instead were potential adversaries of the insureds, the court held, and thus, to preserve client confidentiality, defense counsel could not disclose detailed descriptions of professional services to third-party auditors without first obtaining the contemporaneous, fully informed consent of the insureds. The court, in so ruling, specifically rejected the respondents' argument that the insureds' consent by contract to the disclosure of detailed professional billing statements comported with Mont. R. Prof. Cond. 1.6. An insured executing a liability policy with an insurer cannot know at the time the insured enters the contract what kind of claim will be brought against him, what the issues will be, or what kinds of services will be undertaken by the insured's defense attorney, the court remarked, nor can an insured know, at the time the insured contracts for insurance, the legal consequences that may result from the disclosure of billing information to a third-party auditor. Depending on the facts and circumstances, such disclosure may waive a specific privilege, and, as such, under Mont. R. Prof. Cond. 1.6, for an insured to make a fully informed consent to the disclosure of detailed professional billing statements, the consent must be contemporaneous with the facts and circumstances of which the insured should be aware, the court concluded.

§ 45. Conduct of insured in assisting or refusing to assist as privileged communication

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court discussing whether an insured's conduct in assisting or refusing to assist constituted privileged communication.

Indiana

Medical Assur. Co., Inc. v. Weinberger, 295 F.R.D. 176 (N.D. Ind. 2013) (applying Indiana law) Pursuant to Indiana law, an insured physician's conduct in assisting or refusing to assist his medical malpractice insurer's attorney in underlying malpractice actions was not "communication," and thus was not protected by the attorney-client privilege from disclosure in the insurer's action seeking declaratory judgment that it had no duty to defend or indemnify the physician or business entities he owned in underlying medical malpractice actions because of his failure to cooperate (Ind. Code Ann. § 34-46-3-1), the court held. The question as to whether the insured physician was motivated to assist in his defense in medical malpractice actions did not necessitate revealing the substance of any confidential communications between the physician or insurer and their shared attorney, the court explained, and, thus, the insurer could not refuse to answer the question on the basis of the attorney-client privilege in the insurer's action seeking declaratory judgment that it had no duty to defend or indemnify the physician or business entities he owned in the underlying medical malpractice actions because of the physician's failure to cooperate.

IV. Types of Material Sought

§ 46. Insurance company Claim Committee Report

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the discoverability of an insurance company Claim Committee Report.

Michigan

Patrick v. State Farm Fire & Casualty Company, 2016 WL 10519131 (E.D. Mich. 2016) (applying Michigan law) Denying the plaintiff's motion to compel the production of redacted documents, the court, upon its in camera review of the document, held that an insurer's Claim Committee Report was protected from disclosure. The insurer had argued that the Claim Committee Report was protected from disclosure by the work product privilege because it represented a "sifting and synthesis of the key relevant evidence and opinions gathered during [the insurer's] investigation; witness statements and testimony; expert investigations and opinions; legal analysis, legal authorities and strategy from outside defense counsel; and the overall strategy for defending the recommended decision to deny coverage." The court agreed with the insurer that the document was, in fact, protected by the work product privilege.

§ 47. Claims file; Generally—Held communication or documentation protected, or privilege otherwise applicable

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing the general discoverability of an insurer's claims file.

Indiana

Steinrock Roofing & Sheet Metal, Inc. v. McCulloch, 965 N.E.2d 744 (Ind. Ct. App. 2012) Claims file information from a homeowner's insurance carrier, which determined that the homeowner's roof required replacement as a result of a windstorm, and made payments for work performed by a contractor, was privileged, in the contractor's suit to recover an unpaid balance on a contract for roof replacement, as the claims file would have included statements between the homeowner and the insurer, the court held. Here, the court related, the subject insurer was the homeowner's insurance carrier, and not the plaintiff roofing company's. Thus, the claims file contained information and communications between the homeowner and the insurance company, the court stressed. With respect to the scope of privileged communications between an insured and the insurer in regards to third-party claims, the court instructed that uncertainty about whether the insured statements are discoverable gives rise to a conflict about whether a statement should be given at all, and undermines what should be a cooperative relationship amount the insured, insurer, and attorney. An insured's relationship to the insurance company requires full disclosure by the insurer without fear that the statement may be later obtained by the claimant, the court declared. The homeowner, the court stressed, sought to obtain a claims file that contained communications that obviously would have included statements between the homeowner and his insurance carrier. Those materials, the court declared, were inadmissible.

Maryland

North River Ins. Co. v. Mayor and City Council of Baltimore, 343 Md. 34, 680 A.2d 480 (1996) Garnishee liability insurers could not be ordered to assemble, and perhaps to produce for garnishor claimant's inspection, documents from underwriting and claims files pertaining to insureds other than the judgment debtor, without the trial court first making a determination as to the confidentiality of the documents (Md. Rule 2-401(b)), the court held. In the injured claimant's garnishment proceeding

against the judgment debtor's liability insurers, discovery disputes culminated in sanctions orders by the lower tribunal that entered default judgment against insurers and ordered them to pay claimant's counsel fees, the insurers appealed, and the court, on review, vacated and remanded, the court holding, inter alia, that the insurers could not be ordered to produce for inspection claims file material pertaining to the insureds other than the judgment debtor.

West Virginia

Smith v. Scottsdale Ins. Co., 40 F. Supp. 3d 704 (N.D. W. Va. 2014), order aff'd on other grounds, 2014 WL 4199207 (N.D. W. Va. 2014) and aff'd on other grounds, 621 Fed. Appx. 743 (4th Cir. 2015) (applying West Virginia law) Administrators of an estate of an individual fatally shot by a police officer stood in relation to the city's insurer as third-party claimants, and not first-party claimants, in their suit alleging that the insurer violated the West Virginia Human Rights Act (WVHRA) by discriminating against them based upon their race, during their negotiations to settle the underlying suit against the city and the officer, the court held, and thus, the attorney-client privilege and work product protection could attach to the underlying claim file, where administrators never asserted a right to payment under an insurance policy, were not the insured in the underlying action, and they never directly contracted with the insurer to provide insurance coverage. Under West Virginia law, the court held, in order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the guidance must be sought by the client from that attorney in the attorney's capacity as an attorney; and (3) the communication between the attorney and client must be identified to be confidential. Importantly, the attorney-client privilege protects the substance of the communications, and, therefore, "it extends beyond the attorney to others who, at the attorney's direction, are aware of confidential information," the court indicated. Accordingly, privileged communications between an insured and the insured's attorney remain privileged even if they are repeated to the insurer.

§ 48. Claims file; Generally—Held communication or documentation not protected, or privilege not applicable

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was otherwise not applicable, the court referencing the general discoverability of an insurer's claims file.

Connecticut

EDO Corp. v. Newark Ins. Co., 145 F.R.D. 18 (D. Conn. 1992) (applying Connecticut law) An insured did not expect that discussions with its attorneys regarding an underlying environmental contamination action would remain confidential as to the insurers from which it sought indemnification and, thus, the attorney-client privilege did not bar the insurers' discovery of the insured's underlying claims file under Connecticut law, the court held. Under Connecticut law, the attorney-client privilege does not foreclose discovery by an insurer of the underlying claims file of the insured, who was seeking indemnity respecting the claim, the court indicated. For purposes of the privilege, the court continued, the insurer's denial of insurance coverage regarding the insured's underlying action did not in and of itself affect the reasonableness of the insured's expectation of confidentiality respecting the insured's communications with its counsel that were made in connection with the underlying action. The burden fell upon the insured, as the party claiming the attorney-client privilege respecting documents in its file regarding the underlying claim for which it sought indemnification, to demonstrate that at the time the communications concerning the underlying action were exchanged between the insured and its counsel, the insured entertained a reasonable belief that those communications were to remain confidential as to the insurers, the court concluded.

Indiana

Kimbrough v. Anderson, 55 N.E.3d 325 (Ind. Ct. App. 2016) A prior home insurance claim file regarding water damage in the lower level of a landowner's home was not privileged, in a negligence action against an adjacent landowner alleging that her habits of watering her yard caused mass amounts of water to flow from her yard into the lower level of landowner's home,

the court held, where the landowner sued the adjacent landowner on an entirely unrelated incident, and where the claim file was related to prior water damage in the basement of the landowner's residence. The landowner brought action against his neighbor, an adjacent landowner, for negligence, alleging that the neighbor's habits of watering her yard caused mass amounts of water to flow from her yard into the lower level of his home, the lower tribunal entered judgment in favor of the neighbor, the landowner appealed, and the court, on review, affirmed, the court holding, inter alia, that the landowner's prior home insurance claim regarding water damage, and, presumably, the underlying documentation of such, was not privileged.

Virginia

Chevalier-Seawell v. Mangum, 90 Va. Cir. 420, 2015 WL 10521527 (2015) All information in an underinsured motorist insurer's claim file relating to an insured, other than that protected by the attorney-client privilege, was subject to disclosure on an insured's claim against an insurer for bad faith arising out of the insurer's failure to attempt a settlement of claims until right before trial in the insured's action against a defendant driver on the issue of damages after the driver admitted liability, the court held. The insured needed the documents in the claims file to determine why the insurer handled her claim in the way that it did, and there were no opportunities for the insured to obtain a substantial equivalent of the information by other means, the court concluded.

§ 49. Claims file; Generally—Effect of privilege in light of signed release of insured's claims file

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court discussing the effect of the privilege in light of a signed release of an insured's claims file.

West Virginia

Horkulic v. Galloway, 222 W. Va. 450, 665 S.E.2d 284 (2008) An insurer may assert a quasi attorney-client privilege to communications in the insured's file in a third-party bad faith action even where an insured has signed a release of his claim file, the court held, as all communications in an insured's claim file generated on and after the filing date of a third-party's complaint against an insured are presumptively quasi attorney-client privilege communications, and the quasi attorney-client privilege belongs to the insurer, not the insured, and may be waived only by the insurer. Former clients brought a legal malpractice action against an attorney, and amended the complaint to assert a third-party bad faith claim against the attorney's legal malpractice insurer, the lower tribunal granted the former clients' motion to compel enforcement of the settlement agreement, and awarded the former clients attorney's fees incurred in connection with the motion, the insurer appealed and petitioned for a writ of prohibition, and the court, on review, affirmed, the court holding, inter alia, that an insurer may assert quasi attorney-client privilege to communications in the insured's file in a third-party bad faith action even where an insured has signed a release of the claim file. All communications in an insured's claim file generated on and after the filing date of a third-party's complaint against an insured, are presumptively quasi attorney-client privilege communications, the court elaborated, and the quasi attorney-client privilege belongs to the insurer, not the insured, the court concluded.

§ 50. Insurer's list of policyholders—Held communication or documentation protected, or privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that

the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing the discoverability of an insurer's list of policyholders.

Alabama

Ex parte National Security Ins. Co., Inc., 773 So. 2d 461 (Ala. 2000) An insurance company's lists of policyholders are confidential, proprietary information to which a litigant has no right except through court-ordered discovery, the court held, though the litigant could discover a list of lawsuits against the insurer for fraud within a set timeframe. The first step in determining whether the court has abused its discretion is to determine the particularized need for discovery, in light of the nature of the claim, the court noted at the outset. Here, the court related, as the insured's son alleged fraud, he was "accorded a considerably wider latitude in the discovery process so that he w[ould] be able to meet the heavy burden of proof placed [on one alleging fraud]." Evidence of prior similar acts is admissible to show fraud, scheme, motive, or intent, the court continued, such that, when the discovery request of a plaintiff alleging fraud is closely tailored to the nature of the fraud alleged, the discovery should be allowed in full, as long as the party opposing discovery does not show that the requested discovery is oppressive or overly burdensome. In the instant case, the court declared, the life insurance policy beneficiary who alleged fraud by the insurer in persuading the insured to allow policies to lapse and to purchase a policy without a death benefit if the insured died within two years could obtain the discovery of a list of all lawsuits filed in the state within five years for fraud, deceit, misrepresentation, suppression, and/or violations of insurance regulations or statutes. The discovery of past fraud actions could lead to the discovery of admissible evidence tending to suggest a pattern or practice of intentional wrongful conduct on the part of the insurer's agents, the court concluded.

§ 51. Insurer's list of policyholders—Held communication or documentation not protected, or privilege not applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was not otherwise applicable, the court referencing the discoverability of an insurer's list of policyholders.

Alabama

Ex parte John Alden Life Ins. Co., 999 So. 2d 476 (Ala. 2008) A trial court's order compelling a response to an insured's request for the discovery of the names and addresses of individuals covered by the same or similar type of health insurance did not violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA) privacy rule, although other policyholders had not authorized the disclosure of individually identifiable health information, the court held, where the privacy rule provides that the insurer was permitted to comply with the order so long as the insurer disclosed only the information expressly authorized by the order, and where, although not required to do so, the court entered an order that met the standards of a "qualified protective order" as defined by the HIPAA privacy rule. The HIPAA privacy rule generally forbids a covered entity, including a group-health-plan or health-insurance issuer, from using an individual's "protected health information" except as provided by the rule (45 C.F.R. § 164.502(a)), the court indicated. Disclosure is mandated when an individual seeks his or her own health information from a covered entity and when the Secretary of the Department of Health and Human Services asks for such information from a covered entity in order to enforce HIPAA, the court indicated, the court adding that the rule permits disclosure in other circumstances.

§ 52. Settlement agreement or discussions—Held communication or documentation protected, or privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view

that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing the discoverability of a settlement agreement or discussions.

Kentucky

Brewer v. Maynard, 2006 WL 7131975 (S.D. W. Va. 2006) (applying Kentucky law) Noting that the individual defendants and the insurer were indeed co-defendants, and the Settlement Agreement under inquiry was a matter of common interest between them, the court held that pursuant to Ky. R. Evid. 503(b)(3), communications between the insurer and an insurer-related attorney regarding the Settlement Agreement were privileged.

§ 53. Settlement agreement or discussions—Held communication or documentation not protected, or privilege not applicable

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was otherwise not applicable, the court referencing the discoverability of a settlement agreement or discussions.

Alabama

Gulf States Conference Association of Seventh Day Adventists, Inc. v. Saint Paul United Methodist Church, 2016 WL 9753774 (M.D. Ala. 2016) (applying Alabama law) Noting that as the question of attorney-client privilege is substantive in nature, Alabama law would determine the applicability of the attorney-client privilege, the court held that the insurance-based settlement agreement at issue, while confidential, was not privileged. The burden of demonstrating that a privilege applies to a particular communication is on the proponent of the privilege, the court noted at the outset, and under the law of Alabama, the basic elements of attorney-client privilege are: (1) where legal services of any kind are sought (2) from a professional legal advisor in the person's 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 the person or by the legal advisor, (8) except the protection may be waived. Moreover, the term "communication" imports not only words uttered, but information conveyed by other means, the court explained. The party who asserts the attorney-client privilege, the court related, must establish: (1) the presence of an attorney-client relationship, (2) the facts demonstrating the communications were within the privilege, and (3) the prejudicial effect to the client that would result from any disclosure of the privileged information. The settlement agreement under inquiry, the court elaborated, met the threshold for relevance and was discoverable. However, the liberal rules of discovery do not automatically signify liberal dissemination of acquired discovery, the court related. In order to preserve the confidentiality of sensitive materials, a district court may regulate access to the information by issuing a protective order, the court explained, such that, while the full/unredacted settlement agreement was subject to discovery, it should be subject to a protective order.

Comment

The court explained that, within one week, counsel would be required to confer to discuss an agreed protective order and provide a draft to the court. Should the parties be unable to reach an agreement for a protective order, they would be required to notify the court by close of business of the deadline, and each side would then file their draft protective order and the court would craft an appropriate order based upon those drafts, the court elaborated.

South Dakota

Lamar Advertising of S.D., Inc. v. Kay, 267 F.R.D. 568, 76 Fed. R. Serv. 3d 824 (D.S.D. 2010) (applying South Dakota law) Under South Dakota law, the attorney-client privilege did not apply to protect an insurer's claims file from disclosure in an action challenging a settlement agreement arising out of an automobile-motorcycle accident involving an insured, the court held. In so ruling, the court noted that at the time the claims file was initially assembled, there was no "client," the suit had not been filed, the insured had not retained counsel to defend its interests, and there were no confidential communications made with the purpose of facilitating legal services (S.D. Codified Laws § 19-13-2(5)).

§ 54. Documents prepared by claims adjuster for insurer

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the discoverability of documents prepared by a claims adjuster for an insurer.

Massachusetts

Sanchez v. Witham, 2003 Mass. App. Div. 48, 2003 WL 1880131 (2003) The discovery, by a plaintiff motorist, of all documents, prepared by a claims adjuster for a self-insured corporation which had rented a vehicle to the defendant motorist, which were prepared after the plaintiff filed her insurance claim, of some documents prepared after the plaintiff sent a demand letter stating that the adjuster's settlement offer was unfair, and no documents prepared after the plaintiff commenced her action alleging the defendant motorist's common law negligence and alleging that the corporation and adjuster committed unfair settlement practices in violation of the state consumer protection act, was warranted, the court held. In so ruling, the court pointed out that the corporation and adjuster presented merely theoretical concerns regarding the revelation of work product involving mental impressions, conclusions, evaluations, and opinions on the merits of the plaintiff's insurance claim.

§ 55. Document prepared as part of company's regular operating procedure

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the discoverability of a document prepared as part of a company's regular operating procedure.

Indiana

Medical Assur. Co., Inc. v. Weinberger, 295 F.R.D. 176 (N.D. Ind. 2013) (applying Indiana law) A document generated or obtained by an insurer is entitled to protection from discovery pursuant to the work product doctrine if the document can fairly be said to have been prepared or obtained because of the prospect of litigation and not, even though the litigation already may be prospect, because it was generated as part of the company's regular operating procedure, the court held. Claim file documents, the court elaborated, materials that are part of a factual evaluation or investigation into an insured's claim, if created prior to a

final coverage decision, are presumed to have been prepared in the ordinary and routine course of the insurer's business and not for litigation, and thus they are not protected by work product privilege, the court concluded.

Virginia

Chevalier-Seawell v. Mangum, 90 Va. Cir. 420, 2015 WL 10521527 (2015) The attorney-client privilege did not apply to documents referencing underinsured motorist insurer's communications with attorneys that did not involve a request for or expression of legal advice, but which were related to the insurer's business of valuing and the payment of settlement claims, the court held, for purposes of the insured's claim that the insurer acted in bad faith in failing to make any settlement attempts in the context of the insured's suit against a defendant driver on the issue of damages after the driver admitted liability.

§ 56. Documents submitted to Insurance Commissioner

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the discoverability of documents submitted to an Insurance Commissioner.

Montana

Amtrust North America, Inc. v. Safebuilt Insurance Services, Inc., 186 F. Supp. 3d 278 (S.D. N.Y. 2016) (applying Montana law) Under Montana law, as predicted by the district court, documents submitted to an insurance commissioner in connection with the examination of a captive reinsurance company's books and records were not protected by statutory privilege from disclosure, the court held, where the purpose of the statute was to require that the commissioner maintain the confidentiality of documents, where the statute did not use the word "privilege," and where the commissioner did not resist production (Mont. Code Ann. § 33-28-108(3)). The application of principles of statutory interpretation did not support a privilege, the court stressed, the court adding that courts in other jurisdictions have largely declined to recognize an insurance-examination privilege, like the one the defendants effectively sought here, when interpreting similarly worded statutes. Moreover, the conduct of the Commissioner of Securities and Insurance, in agreeing to a deposition and not objecting to any of the questions posed, was further evidence that no privilege was implicated here, the court declared.

§ 57. Transmittal documentation

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the discoverability of transmittal documentation.

South Carolina

Hege v. Aegon USA, LLC, 2011 WL 1791883 (D.S.C. 2011) (applying South Carolina law) In a case in which before the court was the plaintiffs' Motion to Compel and Omnibus Motion to Compel Production of Documents, and the defendant insurer's Motion for Protective Order, pursuant to which the plaintiffs sought the production of documents the insurer claimed were protected by the attorney-client privilege and the work product doctrine, and pursuant to which the insurer sought to prevent plaintiffs' counsel from eliciting certain testimony from one of its actuaries, the court, on review, granted the plaintiffs' motion and denied in part the insurer's motion for protective order, the court noting that two disputed documents were nothing more

than transmittal papers. For example, one e-mail transmitted a document from an in-house attorney to certain employees, the court pointed out. Correspondence that merely transmit documents to or from an attorney, even at the attorney's request for purposes of rendering legal services to a client, are neither privileged nor attorney work product, the court declared.

V. Particular Disputes

§ 58. Coverage dispute—Held communication or documentation protected, or privilege otherwise applicable

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing a coverage dispute.

Indiana

Community Bank v. Progressive Casualty Insurance Company, 2009 WL 10689431 (S.D. Ind. 2009) (applying Indiana law) In an insurance coverage dispute, the plaintiff bank asked the defendant insurer to defend and indemnify it in connection with claims arising from a failed construction project, the insurer denied those claims, the plaintiff later settled those claims and subsequently sought to recover from the insurer the defense and indemnification costs that the plaintiff bank contended the insurer should have provided at the outset, together with any other damages occasioned by alleged wrongful denial of coverage, a motion to compel was filed regarding the discoverability of the insurer's reserve for the plaintiff bank's insurance claim and of certain redactions in three claims-file documents, the insurer challenged the relevancy of its reserves, in addition to claiming that attorney-client privilege and work-product immunity apply to that information, and the court, on review, found, upon in camera review, that the redacted material under inquiry was privileged. That is, the court opined, all of the redactions at issue, except those relating to reserve information, which the court did not consider, involved communications for the purposes of providing legal guidance and were, therefore, privileged. In the document predating the claims denial, for example, the insurer redacted a lengthy discussion of how case law applied to a particular issue, and the other redactions similarly involved counsel's professional legal opinion about various issues, the court remarked. None of those activities constituted claims-adjustment functions, or other mere business activities, but rather implicated a lawyer acting as such, the court concluded.

Michigan

AMI Stamping LLC v. ACE American Insurance Company, 2015 WL 12990251 (E.D. Mich. 2015) (applying Michigan law) Noting that in this case, coverage was an issue early on, and that two different attorneys were hired in this regard, attorneys that were not hired to "adjust" the claim, and where, even if they were involved in evaluating and providing guidance regarding valuation, that did not change their guidance into mere facts that must be disclosed, the court held that while cases cited by the insurer stood for the proposition that if an attorney is acting as a claims investigator, the attorney-client privilege does not apply, here, there was no evidence beyond the insurer's rank speculation that these attorneys acted in a such a role. The court stressed that it was evident to the court, from the in camera review conducted, that counsel were hired to provide legal assistance regarding coverage. Stressing that Michigan law applied to the privilege issue in this diversity case, the court pointed out that the insurer did not claim any work product protection, which would be governed by federal law, and held that under Michigan law, the "purpose of the attorney-client privilege is to permit a client to confide in the client's counselor, knowing that such communications are safe from disclosure…. The scope of the privilege is narrow: it attaches only to confidential communications by the client to its advisor." The communication were direct communications between attorney and client and were therefore privileged and need not be produced, the court concluded.

Mississippi

Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 19 Fed. R. Serv. 3d 242 (5th Cir. 1991) (applying Mississippi law) Under Mississippi law, the attorney-client privilege extended to all communications between an insurer and the attorneys it retained for the purpose of ascertaining its legal obligations to the insureds, whose home had been destroyed in a fire (Miss. R. Evid. 502), the court held. As state law provides the rule of decision, Mississippi law was determinative of the attorney-client privilege, the court noted at the outset. Pursuant to Miss. R. Evid. 502, the court instructed, a client has the privilege of refusing to disclose any confidential communications made "for the purpose of facilitating the rendition of professional legal services to the client." The Mississippi Supreme Court has described the privilege as "relat[ing] to and cover[ing] all information regarding the client received by the attorney in his professional capacity and in the course of his representation of the client," the court observed. The privilege does not require the communication to contain purely legal analysis or advice to be privileged, the court declared, but, instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged. In the instant case, the court explained, the attorney-client privilege protected the documents sought by the plaintiff. The privilege, the court elaborated, would extend to all communications between the insurer and the attorneys it retained for the purpose of ascertaining its legal obligations to the insureds.

South Carolina

State Farm Fire and Casualty Company v. Admiral Insurance Company, 225 F. Supp. 3d 474 (D.S.C. 2016) (applying South Carolina law) A fraternity's liability insurer's communications with its coverage counsel were protected from discovery, in an action arising from a fraternity hazing event hosted at a homeowner's house, by the attorney-client privilege, since the insurer did not assert any good-faith affirmative defense that would place those communications at issue.

§ 59. Coverage dispute—Held communication or documentation not protected, or privilege otherwise not applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was otherwise not applicable, the court referencing a coverage dispute.

Tennessee

Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 505 (W.D. Tenn. 1999) (applying Tennessee law) Pursuant to Tennessee law, the attorney-client privilege did not attach to documents prepared by an insured's employee regarding business meetings and conversations relating to the procurement of insurance coverage, even if the insured had contacted the attorney about the matter, if the attorney was not involved in meetings and conversations, the court held. The fact that attorneys were present at the business meetings did not protect the notes of meetings under the attorney-client privilege, where the attorneys were functioning at the meetings as businesspeople, and not as attorneys providing legal services to clients, the court concluded.

§ 60. Suit between insurer and insured—Held communication or documentation protected, or privilege otherwise applicable

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing a suit between the insurer and insured.

Alabama

Ex parte Alfa Insurance Corporation, 2019 WL 1499324 (Ala. 2019) The trial court exceeded its discretion, and mandamus relief was warranted, when it denied an errors-and-omissions insurer's motion for a protective order and ordered the insurer to produce a coverage letter and other attorney-client communications for in camera inspection or for discovery in the insureds' action against the insurer for breach of contract, bad faith, and other claims, the court held. In so ruling, the court pointed out that the insurer filed a privilege log describing the privileged nature of the pertinent materials and the basis for withholding the materials, that the insureds did not argue that the insurer had waived the attorney-client privilege, and that the insureds did not establish that the materials at issue might not have been attorney-client communications as asserted in the privilege log (Ala. R. Civ. P. 26(b)(1); Ala. R. Evid. 502).

Indiana

Bartlett v. State Farm Mut. Auto. Ins., 206 F.R.D. 623 (S.D. Ind. 2002) (applying Indiana law) Pursuant to Indiana law, the attorney-client privilege protected an automobile liability insurer's correspondences with its attorney, which were generated in preparation for the insured's state court lawsuit for underinsured motorist (UIM) benefits, from discovery in the insured's subsequent bad faith insurance action, the court held. In so ruling, the court pointed out that the attorney served as the insurer's trial counsel, not as its adjustor or agent providing routine business advice. Moreover, the court related, the insurer believed its communications with its attorney were protected by the attorney-client privilege, and the insured could obtain similar information through less intrusive means (Ind. Code Ann. § 34-46-3-1).

Montana

Dion v. Nationwide Mut. Ins. Co., 185 F.R.D. 288 (D. Mont. 1998) (applying Montana law) An insured sued her automobile insurer, alleging that the insurer's handling and denial of her claim for underinsured motorist (UIM) benefits was in bad faith and violated the Montana Unfair Trade Practices Act, the insured moved to compel the discovery of the insurer's claims file, and the court, on review, ruled that under Montana law, the attorney-client privilege extends to written communications from an attorney to the client (Mont. Code Ann. § 26-1-803), and that the privilege applies with equal force in "bad faith" insurance litigation as in all other civil litigation. Moreover, the court explained, the privilege protects communications in first-party bad faith insurance cases when the insurer's attorney did not represent the interests of the insured in the underlying case.

Palmer by Diacon v. Farmers Ins. Exchange, 261 Mont. 91, 861 P.2d 895 (1993) The attorney-client privilege applied to an insured's first-party bad faith action against an automobile insurer, where the insurer's attorney did not represent the insured's interests in the underlying uninsured motorist case, the court held. The attorney-client privilege protects communications in first-party bad faith cases when the insurer's attorney did not represent the interest of the insured in the underlying case, the court noted at the outset. The present case was a distinct type of first-party action, the court continued, and in this type of action, the claimant and the insurer are in adverse positions from the outset of the underlying case. The defendant insurer stepped into the shoes of the unidentified third-party motorist when it denied the plaintiff coverage under his uninsured motorist policy, the court pointed out. The attorneys who represented the insurer the uninsured motorist case had not represented the plaintiff, therefore the dual representation reasoning would not apply in this case, the court remarked. The nature of the relationship, not the nature of the cause of action, controls whether communications between attorney and client can be discovered, the court explained. The attorney-client privilege protects communications in first-party bad faith cases when the insurer's attorney did not represent the interests of the insured in the underlying case, the court concluded, and that was the nature of the relationship here, as a result of which the attorney-client privilege applied.

Puerto Rico

CH Properties, Inc. v. First American Title Ins. Co., 48 F. Supp. 3d 143 (D.P.R. 2014) (applying Puerto Rico law) Documents which included annotations by a title insurer's outside counsel in the margins as he redacted or reviewed their contents were covered by the attorney work product privilege under Puerto Rico law, in the insured's action alleging against the insurer breach

of title insurance policy, since they contained counsel's mental impressions and legal analysis, the court held. The insured commenced action against the insurer in the Puerto Rico Court of First Instance, alleging breach of a title insurance policy when the insurer denied reimbursement of legal fees incurred by the insured prior to tendering its request for legal defense in actions over insured property, and claiming damages resulting from the continued disruption of its possession of insured property, and the court, on review, denied the insured's motion for reconsideration, the court holding, inter alia, that documents between the insurer's in-house and outside counsel were privileged attorney-client communications, that annotations by the insurer's outside counsel were protected attorney-work product, and a draft letter by the insurer's outside counsel was protected attorney-work product.

South Dakota

Bertelsen v. Allstate Ins. Co., 2011 SD 13, 796 N.W.2d 685 (S.D. 2011) Upon a first-party bad faith claim by the insured against an insurer, the insurer may retain outside counsel and the attorney-client privilege protects the insurer's communications with counsel in the same manner as any other client seeking legal services from an attorney.

West Virginia

Mordesovitch v. Westfield Ins. Co., 244 F. Supp. 2d 636 (S.D. W. Va. 2003) (applying West Virginia law) A letter from a law firm to an insurer that was a confidential communication regarding the insured's first-party bad faith action against the insurer was protected by the attorney-client privilege under West Virginia law, the court held. The insured sued his underinsured motorist (UIM) insurer after reaching settlements with the insurer and a bar in his prior state-court action against the insurer, the underinsured motorist who killed his son, and the bar, which had served alcohol to the motorist, alleging that the insurer engaged in unfair trade practices by improperly seeking subrogation out of the proceeds of the prior action, the insurer removed the action, the insured filed motions to compel production, and the court, on review, held, inter alia, that the letter from the law firm to the insurer was protected by the attorney-client privilege.

§ 61. Suit between insurer and insured—Held communication or documentation not protected, or privilege not applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was otherwise not applicable, the court referencing a dispute between an insurer and insured.

South Carolina

State Farm Fire and Casualty Company v. Admiral Insurance Company, 225 F. Supp. 3d 474 (D.S.C. 2016) (applying South Carolina law) The court held that a fraternity's liability insurer failed to show that it had an attorney-client relationship with counsel retained to defend the fraternity in an underlying action arising from a fraternity hazing event, and thus, the insurer's communications with counsel were not protected from discovery by the attorney-client privilege in an action by the homeowner who hosted the event, alleging that the insurer acted in bad faith and breached the policy by not including him in a settlement with the underlying plaintiff.

§ 62. Defamation considerations—Determination whether communication protected, or whether privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing defamation considerations.

Wyoming

Williams v. Blount, 741 P.2d 595 (Wyo. 1987) A statement by a title insurance company officer to a bank officer engaged in a business conversation about a title insurance policy, concerning the financial stability of the individual insured under the title policy, was a conditionally privileged communication, the court held, and, absent malice, a defamation claim would not lie against the party making the statement. The subject matter of the communication in this case was a routine business transaction in which both parties had a pecuniary interest, the court related. Under the doctrine of conditionally privileged communication, an absence of malice is presumed, and malice on the part of a defendant must be established by a plaintiff, the court explained. The communication in such case will, prima facie, be considered as having been made in good faith, that is, without malice, and the burden of proving the existence of malice is cast upon the person claiming to have been defamed, the court stated. Malice is a necessary element to move the communication out from under the protective doctrine of conditionally privileged communication, the court continued, and here, the lower court concluded that there was no malice. Given the framework of a conditionally privileged communication, an absence of malice entitles the defendant to judgment as a matter of law, the court concluded.

§ 63. Defamation considerations—Held issue of fact as to whether communication protected, or whether privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that an issue of fact had been presented as to whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing defamation considerations.

South Carolina

Johns v. Amtrust Underwriters, Inc., 996 F. Supp. 2d 413 (D.S.C. 2014) (applying South Carolina law) Under South Carolina law, a "qualified privilege," as an affirmative defense to slander, is defined as a communication made in good faith on any subject matter in which the person communicating has an interest or duty if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable, the court held, and here, a genuine issue of material fact remained as to whether a program director was motivated by ill will in speaking with an employee's supervisors regarding her work performance on the insurer's claim files that led to her termination from employment with the third-party administrator of the insurer's claims, thus precluding summary judgment on the employee's claims against the director and insurer for tortious interference with an at-will employment contract.

§ 64. Uninsured motorist insurance implications

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing uninsured motorist insurance considerations.

South Dakota

Dakota, Minnesota & Eastern R.R. Corp. v. Acuity, 2009 SD 69, 771 N.W.2d 623 (S.D. 2009) The attorney-client privilege did not protect communications between an attorney and insurer client regarding an investigation and denial of an insured's claim for uninsured motorist benefits, the court held, where the insurer delegated its initial claims function to the attorney, and where the attorney exclusively conducted an investigation into the claim and solely made the initial determination to deny uninsured motorist (UM) benefits. In this case, the court noted, an insurance company claims manager testified that outside counsel exclusively conducted the investigation and solely made the initial determination to deny the UM claim. The evidence suggested that the insurer completely delegated its claims function to outside counsel, the court explained. Given the particular circumstances presented, the court stated, the rule was applicable. Reasoning thusly, the court held that where an insurer unequivocally delegates its initial claims function and relies exclusively upon outside counsel to conduct the investigation and determination of coverage, the attorney-client privilege does not protect such communications.

§ 65. Underinsured motorist insurance implications

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing underinsured motorist insurance implications.

South Carolina

Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003) Assuming that an attorney-client relationship could be created between an attorney for an underinsured motorist (UIM) insurer and the named defendant in an injured motorist's suit to recover UIM benefits, no such privilege existed between the insurer's attorney and named defendant, the court held, and thus, the injured motorist was entitled to redepose the named defendant in order to question her in regards to discussions she may have had with the UIM insurer. In so ruling, the court pointed out that the UIM insurer's attorney had specifically disclaimed the existence of any attorney-client relationship, the attorney stated that he had no right to control the named defendant, there was no evidence to suggest that the attorney acted as the named defendant's advisor, and the attorney appeared at the deposition in order to represent the insurer's interests, rather than those of the named defendant. Here, given the particular circumstances presented, the circuit court erred in quashing the plaintiff's subpoena to reconvene the deposition of the named defendant, the court opined. As any communications between the insurer's attorney and the named defendant were not protected by the attorney-client privilege, the plaintiff should have been permitted to question her in this regard, the court concluded, as a result of which the matter would be remanded for the plaintiff to take the named defendant's deposition and would be remanded for a new trial.

§ 66. Bankruptcy implications

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing bankruptcy implications.

Indiana

Woodruff v. American Family Mut. Ins. Co., 291 F.R.D. 239, 85 Fed. R. Serv. 3d 872 (S.D. Ind. 2013) (applying Indiana law) Under Indiana law, even if an attorney retained by an insurer of an automobile insurance policy to represent the insured in a negligence action had an attorney-client relationship with the insurer as well as the insured, the insurer could not claim

the protection of the attorney-client privilege over its communications with the attorney regarding the defense of the insured in order to prevent the discovery of those communications in an action by the insured's bankruptcy estate against the insurer, alleging bad faith and breach of contract with respect to the insurer's handling of the negligence action, the court held.

§ 67. Excess insurance implications—Held communication or documentation protected, or privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court referencing excess insurance implications.

Tennessee

Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 505 (W.D. Tenn. 1999) (applying Tennessee law) Under Tennessee law, as predicted by the district court, the draft of an agreement prepared by the insured's outside counsel and forwarded to the insured's vice president and treasurer relating to coverage issues involving a primary carrier and first layer excess carrier as they applied to a dispute between the insured and its products liability insurer that arose after a policy with its products liability insurer became effective did not further the insured's purported fraud in the procurement of products liability policy, the court held. As such, the court declared, the crime fraud exception to the attorney-client privilege (§ 12) did not require the disclosure of the draft in the products liability insurer's action against the insured.

§ 68. Excess insurance implications—Held communication or documentation not protected, or privilege not applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was otherwise not applicable, the court referencing excess insurance implications.

Oklahoma

Niemeyer v. U.S. Fidelity and Guar. Co., 1990 OK 32, 789 P.2d 1318 (Okla. 1990) Even if underinsured motorist coverage was excess to that provided by a tortfeasor's insurer, the tortfeasor's insurer did not owe a statutory duty to an underinsured motorist carrier as an excess carrier to report its investigative findings to the underinsured motorist carrier, so as to provide a defense to a claim of tortious interference with contract (§ 69) when the tortfeasor's insurer provided purportedly false, derogatory information to the underinsured motorist carrier not protected by privilege, which caused the latter to offer only $1,000 in settlement of claim, the court held, since the two insurers did not share the same insured.

§ 69. Tortious interference with contract implications

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing tortious interference with contract implications.

Oklahoma

Niemeyer v. U.S. Fidelity and Guar. Co., 1990 OK 32, 789 P.2d 1318 (Okla. 1990) A petition alleging that a tortfeasor's insurer provided false derogatory information to a claimant's underinsured motorist carrier, causing the carrier to offer only $1,000 to settle a claim despite a $200,000 policy limit, was sufficient to state a cause of action for tortious interference with contract despite the failure to plead specific facts demonstrating that a dissemination of false information was not "justified, privileged or excused" (Okla. Stat. Ann. tit. 12, § 2001), the court held.

§ 70. Claim for fees and expenses

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing a party's claim for fees and expenses.

District of Columbia

Feld v. Fireman's Fund Ins. Co., 292 F.R.D. 129 (D.D.C. 2013) (applying District of Columbia law) Under District of Columbia law, the attorney-client privilege, in a suit between an insured and insurer, did not protect communications relating solely to the payment and amount of attorney's fees, the court held. That is, the court explained, the attorney-client privilege did not shield from disclosure, in the insured's suit against the homeowner's insurer seeking to recover $2.4 million of the more than $4.5 million in legal fees and expenses incurred in the underlying suit against the insured, communications from the attorney to the insured about the insurer's position that did not rest on any confidential information obtained from the insured, information on rates relayed by the insured to the attorney with the intent that it then be conveyed to the insurer, and communications regarding fees, costs and invoices, including any fee arrangement between the insured and attorney that did not reveal litigation strategy or other confidences about the underlying action.

VI. Additional Considerations

§ 71. Notice of attorney retention as triggering privilege

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing whether the provision of notice of the retention of an attorney triggered a party's privilege.

Indiana

Medical Assur. Co., Inc. v. Weinberger, 295 F.R.D. 176 (N.D. Ind. 2013) (applying Indiana law) The court held that notice that an attorney has been retained, without additional proof that the insurer was doing something more than investigating and processing the insurance claim, is not enough to lead an insurer to anticipate litigation and claim work product privilege.

§ 72. Effect of cooperation clause

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the effect upon the proceedings of a policy's "cooperation" clause.

Connecticut

Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408 (D. Del. 1992) (applying Connecticut law) A cooperation clause in an insurance policy did not prevent an insured from asserting the attorney-client privilege in a coverage dispute, the court held, where the insurer did not seek documents in order to cooperate on underlying litigation, but to succeed in the coverage dispute. The claim that the "cooperation clause" in the policy prevented the assertion of the attorney-client privilege relied on a theory of contractual waiver, the court explained, and here, the pertinent clause read as follows: "The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury or property damage with respect to which insurance is afforded under this policy." Connecticut courts deciding the issue have explicitly rejected constructions of cooperation clauses that would compel the production of privileged documents in insurance cases, the court stressed. That is, simply because an insured has a duty to cooperate with assigned defense counsel, the insured should not lose its rights to a defense protected by the attorney-client privilege, the court indicated.

Here, the court stressed, the cooperation clause did not imply a duty to produce documents protected by attorney-client privilege in a coverage dispute. The insurer did not seek these documents in order to cooperate on underlying litigation, but to succeed in the plaintiff's coverage dispute against the insurer. Insurance law principles do not support imposing a duty to cooperate that applies regardless of coverage, the court declared. The plaintiff's position was consistent with its duties under the insurance policy, for either the policy provided coverage, in which case the denial of coverage breached the insurance contract and relieved the plaintiff of the duty to cooperate, or there was no duty to cooperate because the damage was not the type "to which insurance is afforded under this policy," the court explained. On the other hand, the insurer could not simultaneously contend that it was entitled to performance of this duty and that its previous denial of coverage was justified, the court concluded.

§ 73. Determination as to whether insurer's in-house or retained attorney acted as claims adjuster—Held communication or documentation protected, or privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the communication or documentation was protected, or that the privilege was otherwise applicable, the court discussing the impact or propriety of a determination as to whether an insurer's in-house or retained attorney acted as a claims adjuster.

Indiana

Cummins, Inc. v. Ace American Ins. Co., 2011 WL 1832813 (S.D. Ind. 2011) (applying Indiana law) In a case in which the plaintiff filed a motion to compel regarding documents that the defendant insurance companies withheld from production on attorney-client privilege or work product grounds, the court, noting that no evidence had been presented that a law firm took on claims adjustment functions for the plaintiff's claim, and that the plaintiff did not point to any, held that based upon the court's in camera review of the documents that the insurers had withheld from discovery on attorney-client privilege grounds, the insurers' privilege objection was well-founded.

§ 74. Determination as to whether insurer's in-house or retained attorney acted as claims adjuster—Held communication or documentation not protected, or privilege not applicable

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held, given the particular circumstances presented, that the communication or documentation was not protected, or that the privilege was otherwise not applicable, the court discussing the impact or propriety of a determination as to whether an insurer's in-house or retained attorney acted as a claims adjuster.

Indiana

Woodruff v. American Family Mut. Ins. Co., 291 F.R.D. 239, 85 Fed. R. Serv. 3d 872 (S.D. Ind. 2013) (applying Indiana law) The court held that under Indiana law, where an attorney is performing the non-attorney role of insurance claims adjuster, the attorney's communications are not privileged. The privilege of the insurer of an automobile insurance policy did not apply to protect documents created by the insurer's staff attorney while the attorney was acting as the sole claims adjuster for a negligence action against the insured, the court explained, where the documents did not contain any opinions on liability and insurance coverage issues, and where it did not appear to have been generated for the purpose of seeking legal opinions.

South Dakota

Bertelsen v. Allstate Ins. Co., 2011 SD 13, 796 N.W.2d 685 (S.D. 2011) When attorneys for insurers act as claims adjusters, their communications to clients and impressions about the facts are treated as the ordinary business of claims investigation, which is outside the scope of the attorney-client privilege, the court held.

§ 75. Determination as to whether insurer's in-house or retained attorney acted as claims adjuster—Further submissions of proof required

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, held that the parties would be required to submit proof as to the time and extent of the attorney's efforts in the attorney's purported dual role of claims adjuster/investigator and attorney.

Massachusetts

Kay Const. Corp. v. Control Point Associates, Inc., 16 Mass. L. Rptr. 631, 2003 WL 22285925 (Mass. Super. Ct. 2003) In a case in which the investigation by an insurer of the plaintiff construction company's claims was conducted by, or under the supervision of, an attorney, the defendants maintained that certain documents, responses to interrogatories and answers to questions posed at depositions were protected either by the attorney-client privilege, the work product doctrine, or both, and the court, on review, held that while the point that the attorney in fact assumed the dual role of claims investigator and legal counsel might be presumed to be when service of the complaint in this case was made in June 2001, the court would give the parties the opportunity to submit pleadings directed solely to this issue. The defendants, the court explained, might make an in camera submission, if necessary, to assist the court in determining the appropriate date after which communications become privileged. Before any party were to make any further submission to the court, however, the parties would be required to confer to determine if agreement could be reached on the scope of disclosures, the court stressed.

§ 76. In camera review of documents under inquiry

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court discussing whether an in camera review of the communications by the court would be required or allowed.

West Virginia

State of West Virginia ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 601 S.E.2d 25 (2004) An insurer was entitled to a writ of prohibition preventing the enforcement of an order requiring the disclosure of documents allegedly protected by the attorney-client privilege and the work-product doctrine in an insured's bad faith action, the court held, the court adding that a remand was necessary so that the trial court could conduct an in camera examination of the purportedly privileged communications to determine if the documents were protected from discovery or if they were rendered discoverable due to the crime-fraud exception. In an action for bad faith against an insurer, the court instructed, the general procedure to be followed to depose attorneys employed by the insurer is as follows: (1) the party desiring to take the deposition(s) must do so in accordance with the mandates of W. Va. R. Civ. P. 30; (2) if the responding party asserts a privilege to any of the questions posed, the responding party must object to such questioning in accordance with the directives of W. Va. R. Civ. P. 30(d)(1); and (3) if the party seeking testimony for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an in camera proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery. The court stated that it was apparent that, while an in camera review was ostensibly conducted, it was not the meaningful review, the court adding that while the insurer purportedly tendered a privilege log to the lower court in an attempt to shield its documents from disclosure, said log did not contain the requisite specificity delineated in governing case law.

§ 77. Identification of documents subject to privilege by proponent of privilege

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the necessity of the identification of documents subject to privilege by the proponent of the privilege.

South Dakota

Lamar Advertising of S.D., Inc. v. Kay, 267 F.R.D. 568, 76 Fed. R. Serv. 3d 824 (D.S.D. 2010) (applying South Dakota law) To properly assert the attorney-client privilege under South Dakota law with respect to an automobile insurer's claims file, insureds were required to identify the general nature of each document in the claims file which they contended was privileged and to set forth the facts which established all elements of the privilege they were claiming (S.D. Codified Laws § 19-13-3), the court held.

§ 78. Privilege log implications—Determination whether log must be filed

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court discussing whether a party was required to submit a privilege log.

Oklahoma

Scott v. Peterson, 2005 OK 84, 126 P.3d 1232 (Okla. 2005) A roofer and the roofer's liability insurer were required to file privilege logs in support of their claim that an insurance claims file was subject to the attorney-client privilege and was not discoverable under the work product doctrine in a homeowner's action against the roofers, the court held, where such a log was necessary for the trial court to adjudicate the asserted privilege (Okla. Stat. Ann. tit. 12, § 3237(A)(2)). Homeowners sought a writ of prohibition, seeking an order directing the lower tribunal to compel the roofer's liability insurer to produce a claims file, and the court, on review, granted the writ, the court holding, inter alia, that the roofer and liability insurer were required to submit a privilege log in support of their claim of attorney-client privilege and exemption from discovery under the work product doctrine.

§ 79. Privilege log implications—Log as determinative of documents to be produced

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court considering whether a privilege log was determinative as to the documents to be produced by the parties.

First Circuit

Bacchi v. Massachusetts Mut. Life Ins. Co., 110 F. Supp. 3d 278 (D. Mass. 2015) In a case in which an insured brought a class action against a life insurer for allegedly failing to distribute surplus funds to policyholders as required by Massachusetts law limiting surplus funds that a mutual life insurance company may retain, the insured moved to compel production, and the court, on review, denied the motion, the court holding, inter alia, that there was no basis to discredit the insurer's representations in its privilege log that it had produced all responsive non-privileged material and exercised good faith in withholding any privileged information. The defendant, as the party advancing the claim of privilege, has the burden of establishing each element of the privilege, the court continued, and generally, a privilege claim is made by serving a privilege log that separately lists each document, specifies who created the document and all recipients, and concisely states the basis for the claim of privilege. Whatever the form, the information provided must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim," the court indicated. The court stated that it had no basis to discredit the insurer's representations in its privilege log that it had produced all responsive non-privileged material and exercised good faith in withholding any information on the ground of attorney-client privilege, the court reiterated, where, by signing the insurer's disclosures and discovery responses, insurer's counsel represented that the disclosures were complete and correct when made, thereby placing the insurer and counsel at risk for sanctions should it later be determined that the certifications were made improperly. There was no evidence that the certifications were inaccurate, and the insurer offered plausible explanations for why some requested information might not exist, the court concluded.

§ 80. Privilege log implications—Impact of party's failure to submit privilege log

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court considering the impact of a party's failure to submit a privilege log.

West Virginia

Hager v. Graham, 267 F.R.D. 486 (N.D. W. Va. 2010) (applying West Virginia law) An automobile insurer that was sued by injured plaintiffs in a third-party bad faith action did not meet its burden in asserting the work product doctrine and quasi attorney-client privilege under West Virginia law in response to the plaintiffs' request for production of the insurer's investigative files and claim files with respect to an underlying automobile accident, the court held, and thus, the insurer's objection to the request for production had to fail, where the insurer failed to provide a privilege log, thereby precluding the district court from holding an in camera review and making an independent decision as to each document. The plaintiffs, who were allegedly involved in an auto accident, brought action in state court against the defendant and the defendant's auto insurer, alleging negligence and bad faith, the action was removed to federal court, the plaintiffs filed a motion to compel, and the court, on review, granted the motion, the court ruling, inter alia, that the defendant insurer did not meet its burden in asserting the work product doctrine and attorney-client privilege. The court rejected the defendant's argument that it was not obligated to produce the discovery because the plaintiffs did not meet their burden. However, the court declared, it was the defendant who had not fulfilled its burden under the discovery process, for the defendant failed to provide a privilege log, in accordance with both the federal and Local Rules of Civil Procedure, and failed to sufficiently specify why the material sought was protected.

§ 81. Sealing of privileged material

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the propriety or impact of sealing privileged material.

Seventh Circuit

Valley Forge Insurance Company v. Hartford Iron & Metal, Inc., 148 F. Supp. 3d 743 (N.D. Ind. 2015) On an insurer's motion for summary judgment seeking declaratory judgment regarding the parties' rights and obligations under Indiana law under a series of commercial general liability insurance policies and settlement agreements, an e-mail from an insurer's claims managers that "might be seeking" legal guidance or advice from an attorney that had been submitted on the insured's motion to supplement could be sealed to ensure that potentially privileged communications were not publicly disclosed on the case docket (Fed. R. Civ. P. 56(c)), the court held.

§ 82. Act of insured aiding insurer-provided attorney in preparing legal case

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the act of an insured in aiding an insurer-provided attorney in preparing the legal case at issue.

Montana

Draggin' Y Cattle Co., Inc. v. Addink, 2014 WL 8880334 (Mont. Dist. Ct. 2014) Where the insured communicates with the insurer for the express purpose of seeking legal guidance with respect to a concrete claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case, application of the attorney-client privilege is appropriate as an extension to those employed to assist the attorney, the court held.

§ 83. Sanctions for failure of insured to comply with discovery requests

The courts in the following cases, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court discussing the propriety of sanctions due to the failure of an insured to comply with discovery requests.

Ninth Circuit

Merrick v. Paul Revere Life Ins. Co., 500 F.3d 1007 (9th Cir. 2007) In a case in which an insured brought suit against a disability insurer for breach of contract and breach of the duty of good faith and fair dealing after it denied his total disability claim under an "own occupation" disability insurance policy, the federal district court entered judgment on a jury verdict awarding the insured $1.65 million in compensatory and $10 million in punitive damages and denied a new trial motion, the insurer appealed, and the court, on review, held, inter alia, that the lower tribunal did not clearly err in finding that the insurer withheld discovery documents and thus in suppressing documents as a sanction, the court adding that the district courts have the inherent power to exclude evidence as a sanction for discovery abuses. That is, the court continued, the district court's finding that the insurer withheld discovery documents, in support of the court's decision to suppress certain evidence placed in a claims file after litigation commenced based on discovery abuses, was not clearly erroneous, as the insurer's pretrial conduct and the dearth of documents actually produced supported an inference of withholding. The insurers challenged the district court's order suppressing certain evidence placed in the claim file after litigation commenced, and the district court granted this motion upon finding that the insurers withheld evidence that they were ordered to produce regarding their post-litigation treatment of the plaintiff's claim, the court indicated. The insurers argued that the court erred in finding that they had withheld any evidence, the court stated, but, the court stressed, the courts "need not tolerate flagrant abuses of the discovery process," but instead have "inherent power" to exclude evidence as a sanction for such abuses. The court noted that it reviews the imposition of discovery sanctions for abuse of discretion and the underlying factual determinations for clear error, and, based upon the record presented here, the court concluded that it could not conclude that the district court's finding that the insurers withheld evidence was clearly erroneous.

Indiana

Brown v. Katz, 868 N.E.2d 1159 (Ind. Ct. App. 2007) In a case in which a claimant sought review of a judgment of the lower tribunal dismissing his malicious prosecution action after determining that he had failed to adequately comply with a discovery order, the court, on review, affirmed, the court ruling that the claimant's repeated blanket claims of attorney-client privilege and insured-insurer privilege in refusing to comply with discovery requests warranted dismissal of the action.

Massachusetts

Global Investors Agent Corp. v. National Fire Ins. Co. of Hartford, 76 Mass. App. Ct. 812, 927 N.E.2d 480 (2010) The trial court acted within its discretion in assessing sanctions on insureds for failure to comply with discovery orders pertaining to communications with counsel in an action against commercial general liability insurers alleging a failure to defend in prior litigation, where it had been asserted that such discovery orders were purportedly protected by privilege, the court held. The filing of an interlocutory appeal did not suspend the original order compelling discovery, the court elaborated.

§ 84. Trade secret assertion

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view

that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing a trade secret assertion.

New Mexico

Pincheira v. Allstate Insurance Co., 142 N.M. 283, 2007-NMCA-094, 164 P.3d 982 (Ct. App. 2007), aff'd on other grounds, 2008-NMSC-049, 144 N.M. 601, 190 P.3d 322 (2008) An insurer could resist discovery based on the trade secret privilege without filing a motion for a protective order, the court held. Insureds brought a bad faith action against an insurer, the lower tribunal granted the insureds' motion to compel production of documents and denied the insurer's request for a protective order, the insurer appealed, and the court, on review, held that the insurer could resist discovery based on the trade secret privilege without filing a motion for a protective order, that, when asserting the trade secret privilege, the insurer was only required to establish the existence of a trade secret, and was not required to show, as an independent element, good cause or proof of harm, and that if the insurer established that the disputed documents were trade secrets, the insureds would be required to show that the documents were both relevant and necessary.

Comment

The court commented that a statement by the Court of Appeals in a prior appeal in a bad faith action brought by the insureds against the insurer, that documents sought by the insureds during discovery were not trade secrets, was without the force of binding law, for purposes of a remand to the trial court to evaluate whether the documents were subject to the trade secret privilege following a subsequent appeal in the action. As the prior appeal was dismissed as untimely, such statement was not necessary to the decision in the prior appeal, and thus, such statement was dicta, the court related.

§ 85. Nonpublic information held by insurers—Determination whether communication protected, or whether privilege otherwise applicable

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing nonpublic information in the possession of insurers.

Alabama

Ex parte Mutual Sav. Life Ins. Co., 899 So. 2d 986 (Ala. 2004) The trial court could order an insurance company defendant to disclose its customers' nonpublic personal information to the plaintiff, a nonaffiliated third party, without providing notice to those customers engaging in the opt-out requirement of the Gramm-Leach-Bliley Act, the court held, where an exception to the Act permitting the disclosure of nonpublic personal information to a nonaffiliated third party to respond to judicial process applied when the trial court orders the disclosure of a customer's nonpublic personal information during discovery in a civil action.

§ 86. Nonpublic information held by insurers—Balancing of interests

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the balancing of interests to be performed prior to the release of nonpublic information in the possession of insurers.

West Virginia

Martino v. Barnett, 215 W. Va. 123, 595 S.E.2d 65, 5 A.L.R. Fed. 2d 745 (2004) The Gramm-Leach-Bliley Act, 15 U.S.C.A. § 6802(e)(8), which protects from disclosure certain nonpublic personal information held by insurers, and the West Virginia Insurance Commission's Privacy Rule, allow the use of any judicial process expressly authorized by statute or court rule, whether by way of discovery or for any other purpose expressly authorized by law, to obtain information relevant to the proceeding to which the judicial process relates from an insurance company that would otherwise fall within the privacy protections under the Act or the Rule, the court held, but access to the information a claimant may seek is not without restriction, and trial courts have a right and a duty to balance the interests at stake and to fashion protective orders which limit access to necessary information only and uphold such principles of nondisclosure as attorney-client privilege and work product immunity.

§ 87. Where defense, but not indemnification, provided by insurer

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing the situation where defense, but not indemnification, is provided to the insured by the insurer.

Oklahoma

Cudd Pressure Control, Inc. v. New Hampshire Ins. Co., 297 F.R.D. 495, 93 Fed. R. Evid. Serv. 816 (W.D. Okla. 2014) (applying Oklahoma law) An insured had no right to share in confidential attorney-client communications under Oklahoma law or to receive work product of attorneys who were separately retained by liability insurers to instruct them regarding their rights and obligations under employers liability insurance policies during a prior wrongful death action against the insured, for which the insurers provided a defense but denied coverage and indemnification under the policies, the court held. The court, in so ruling, pointed out that the defendants had redacted or withheld certain documents from production based on claims of privilege for attorney-client communications and attorney work product. The claims were made with respect to certain pages of documents listed in three privilege logs, the court stated.

§ 88. Statements made at time of rescission of policy

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court referencing statements made at the time of the parties' rescission of the policy at issue.

Oklahoma

Roesler v. TIG Ins. Co., 251 Fed. Appx. 489 (10th Cir. 2007) (applying Oklahoma law) Under Oklahoma law, opinions of an insurer's lawyers at the time of the rescission of a professional liability policy were privileged communications given in response to the insurer's request for a professional opinion, and thus, were protected by the attorney-client privilege, the court held, and the insurer did not act unreasonably or in bad faith by failing to voluntarily sacrifice that privilege prior to litigation.

§ 89. Discoverability of facsimile cover sheets

The following authority, generally addressing insured-insurer communications as privileged without specific regard or reference to the recognized split of authority, that is, the broader view that an insured's communication to its insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the privilege, and the narrower view that such communications are only within the privilege if actually made for the purpose of obtaining legal advice, adjudicated whether the communication was protected, or whether the privilege was otherwise applicable, the court considering the discoverability of facsimile cover sheets.

West Virginia

Mordesovitch v. Westfield Ins. Co., 244 F. Supp. 2d 636 (S.D. W. Va. 2003) (applying West Virginia law) The insured sued his underinsured motorist (UIM) insurer after reaching settlements with the insurer and a bar in his prior state-court action against the insurer, the underinsured motorist who killed his son, and the bar, which had served alcohol to the motorist, alleging that the insurer engaged in unfair trade practices by improperly seeking subrogation out of the proceeds of the prior action, the insurer removed the action, the insured filed motions to compel production of documents, and the court, on review, held, inter alia, that under West Virginia law, facsimile cover sheets from a law firm to the insurer, or from the insurer to the law firm, were not protected by the attorney-client privilege, given that the documents contained no communication, legal or otherwise. Moreover, the facsimile cover sheets had no information of relevance or importance to the insured in his first-party bad faith action against the insurer, and the insured thus lacked the substantial need required for the documents' disclosure under West Virginia's work product doctrine (W. Va. R. Civ. P. 26(b)(3)), the court concluded.

—

RESEARCH REFERENCES

West's Key Number Digest

- West's Key Number Digest, Insurance 1312
- West's Key Number Digest, Privileged Communications and Confidentiality 124, 152, 158, 168, 409

Westlaw Search Query

- privilege! /5 communicat! /10 insurer insured adjuster adjustor & da(aft 5/16/2019)

A.L.R. Library

- A.L.R. Index, Attorney-Client Privilege
- A.L.R. Index, Insurance
- A.L.R. Index, Privileged Communications
- West's A.L.R. Digest, Privileged Communications and Confidentiality 124
- Waiver of Insured-Insurer Communications Privilege, 48 A.L.R.7th Art. 7
- Insured-Insurer Communications As Privileged—View That Communication Must Seek Legal Advice for Attorney-Client Privilege To Apply, 43 A.L.R.7th Art. 3
- Insured-Insurer Communications As Privileged—View That Communications Are Privileged When They Concern Potential Suit, 42 A.L.R.7th Art. 3
- Privileged Communications Between Accountant and Client—Limitations or Restrictions, Waiver, and Persons Entitled to Invoke, 26 A.L.R.7th Art. 8
- Privileged Communications Between Accountant and Client—General Principles, Evidentiary Considerations, and Attorney-Client Privilege Implications, 26 A.L.R.7th Art. 3
- Discoverability of Communications Between Insurer and Reinsurer, 104 A.L.R.6th 207
- Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Nonattorney Consultants, Professionals, and Similar Contractors, 66 A.L.R.6th 83
- Waiver of evidentiary privilege by inadvertent disclosure—state law, 51 A.L.R.5th 603
- What persons or entities may assert or waive corporation's attorney-client privilege—modern cases, 28 A.L.R.5th 1
- Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege—modern cases, 26 A.L.R.5th 628
- Liability of insurer or agent of insurer for failure to advise insured as to coverage needs, 88 A.L.R.4th 249
- Discoverability of traffic accident reports and derivative information, 84 A.L.R.4th 15
- Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue—modern cases, 81 A.L.R.4th 939
- Insurance Implications of Invoking Fifth Amendment Right Against Self-Incrimination, 85 A.L.R. Fed. 3d Art. 2

Legal Encyclopedias

- Am. Jur. 2d, Depositions and Discovery [Westlaw® Search Query]
- Am. Jur. 2d, Witnesses [Westlaw® Search Query]
- C.J.S., Witnesses [Westlaw® Search Query]

Treatises and Practice Aids

- Couch on Insurance 3d, Privileged Information [Westlaw® Search Query]

Trial Strategy

- Proof of Basis for, and Grounds for Lifting, Work Product Protection Against Discovery, 39 Am. Jur. Proof of Facts 3d 1
- Proof of Waiver of Attorney-Client Privilege, 32 Am. Jur. Proof of Facts 3d 189
- Insurance Bad-Faith Actions—"Advice-of-Counsel" Defense, 16 Am. Jur. Proof of Facts 3d 419
- Protected Communication Between Physician and Patient, 45 Am. Jur. Proof of Facts 2d 595
- Defense of a First-Party Bad Faith Claim Action Against an Insurer, 97 Am. Jur. Trials 211
- Actions Against Insurer For Bad Faith Failure To Settle Claim, 21 Am. Jur. Trials 229
- Motions for Production and Inspection, 4 Am. Jur. Trials 223
- Cause of Action in Tort for Bad Faith Refusal of Insurer to Pay Claim of Insured, 55 Causes of Action 2d 359

Law Reviews and Other Periodicals

- Gartner-Ilai, Longa, Who You Gonna Call?—Communications Between Policyholders and Their Insurance Agents: A Fine Line Between Privilege and Waiver, 15 J. Tex. Ins. L. 25
- Maus, Garaffa, Parker III, Discovery of the Insurer's Claims File: Exploring the Limits of Plaintiff's Fishing License (Updated 2017), 84 Def. Couns. J. 1 (2017)
- Smalley, Collins, Koh, Confidentiality, Privilege, and Work Product: Special Problems of the in-House Lawyer, 35 Corp. Couns. Rev. 207 (2016)

Additional References

- Trial Materials, State Farm Fire and Casualty Company's Memorandum in Opposition to the Defendant's Motion to Compel [State Farm Fire and Casualty Company v. Admiral Insurance Company], 2016 WL 11556617
- Trial Materials, Response in Opposition to Motion to Compel [State Farm Fire and Casualty Company v. Admiral Insurance Company], 2016 WL 11556613

—

Table of Cases, Laws, and Rules

United States

15 U.S.C.A. § 6802(e)(8). See 86

45 C.F.R. § 164.502(a). See 51

Fed. R. Civ. P. 26(b)(3). See 36

Fed. R. Civ. P. 56(c). See 81

Fed. R. Evid. 501. See 38

First Circuit

Bacchi v. Massachusetts Mut. Life Ins. Co., 110 F. Supp. 3d 278 (D. Mass. 2015) — 79

Pasteris v. Robillard, 121 F.R.D. 18 (D. Mass. 1988) — 28

Seventh Circuit

Stout v. Illinois Farmers Ins. Co., 150 F.R.D. 594 (S.D. Ind. 1993) — 36

Valley Forge Insurance Company v. Hartford Iron & Metal, Inc., 148 F. Supp. 3d 743 (N.D. Ind. 2015) — 81

Ninth Circuit

Merrick v. Paul Revere Life Ins. Co., 500 F.3d 1007 (9th Cir. 2007) — 83

Alabama

Ala. R. Civ. P. 26(b)(1). See 60

Ala. R. Evid. 502. See 60

Alfa Insurance Corporation, Ex parte, 284 So. 3d 891 (Ala. 2019) — 60

Gulf States Conference Association of Seventh Day Adventists, Inc. v. Saint Paul United Methodist Church, 2016 WL 9753774 (M.D. Ala. 2016) (applying Alabama law) — 53

John Alden Life Ins. Co., Ex parte, 999 So. 2d 476 (Ala. 2008) — 51

Meadowbrook Ins. Group, Inc., Ex parte, 987 So. 2d 540 (Ala. 2007) — 3

Mutual Sav. Life Ins. Co., Ex parte, 899 So. 2d 986 (Ala. 2004) — 85

National Security Ins. Co., Inc., Ex parte, 773 So. 2d 461 (Ala. 2000) — 50

Nationwide Mut. Fire Ins. Co., Ex parte, 898 So. 2d 720 (Ala. 2004) — 25

Connecticut

EDO Corp. v. Newark Ins. Co., 145 F.R.D. 18 (D. Conn. 1992) (applying Connecticut law) — 48

Grodovich v. Immediate Medical Care Center Inc., 12 Conn. L. Rptr. 234, 1994 WL 421464 (Conn. Super. Ct. 1994) — 10

Hutchinson v. Farm Family Cas. Ins. Co., 273 Conn. 33, 867 A.2d 1 (2005) — 13

Jacobs v. Dickey, 21 Conn. L. Rptr. 392, 1998 WL 70601 (Conn. Super. Ct. 1998) — 24

Metropolitan Life Ins. Co. v. Aetna Cas. and Sur. Co., 249 Conn. 36, 730 A.2d 51 (1999) — 3, 13

Niemtiz v. Town of Barkhamsted, 2007 WL 4571131 (Conn. Super. Ct. 2007) — 19

Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408 (D. Del. 1992) (applying Connecticut law) — 72

District of Columbia

Feld v. Fireman's Fund Ins. Co., 292 F.R.D. 129 (D.D.C. 2013) (applying District of Columbia law) — 70

Hawaii

Hawai'i Rules of Evidence, Rule 503(a)(2). See 26

DiCenzo v. Izawa, 68 Haw. 528, 723 P.2d 171 (1986) — 26

Idaho

Vaught v. Dairyland Ins. Co., 131 Idaho 357, 956 P.2d 674 (1998) — 22

Indiana

Ind. Code Ann. § 13-30-9-5. See 17

Ind. Code Ann. § 34-1-14-5. See 30

Ind. Code Ann. § 34-46-3-1. See 34, 45, 60

Bartlett v. State Farm Mut. Auto. Ins., 206 F.R.D. 623 (S.D. Ind. 2002) (applying Indiana law) — 60

Brown v. Katz, 868 N.E.2d 1159 (Ind. Ct. App. 2007) — 83

Community Bank v. Progressive Casualty Insurance Company, 2009 WL 10689431 (S.D. Ind. 2009) (applying Indiana law) — 58

Crisp v. I/N Tek, L.P., 2008 WL 222287 (N.D. Ind. 2008) (applying Indiana law) — 38

Cummins, Inc. v. Ace American Ins. Co., 2011 WL 1832813 (S.D. Ind. 2011) (applying Indiana law) — 73

DeMoss Rexall Drugs v. Dobson, 540 N.E.2d 655 (Ind. Ct. App. 1989) — 33
Elwell v. First Baptist Church of Hammond, Indiana, Inc., 2017 WL 3262532 (N.D. Ind. 2017) (applying Indiana law) — 19
Kimbrough v. Anderson, 55 N.E.3d 325 (Ind. Ct. App. 2016) — 48
Madison v. Hawkins, 644 N.E.2d 184 (Ind. Ct. App. 1994) — 37
Medical Assur. Co., Inc. v. Weinberger, 295 F.R.D. 176 (N.D. Ind. 2013) (applying Indiana law) — 34, 45, 55, 71
Richey v. Chappell, 594 N.E.2d 443 (Ind. 1992) — 30
Sowell v. Dominguez, 2011 WL 4496505 (N.D. Ind. 2011) (applying Indiana law) — 33
Steinrock Roofing & Sheet Metal, Inc. v. McCulloch, 965 N.E.2d 744 (Ind. Ct. App. 2012) — 47
Strack and Van Til, Inc. v. Carter, 803 N.E.2d 666 (Ind. Ct. App. 2004) — 30
Valley Forge Insurance Company v. Hartford Iron & Metal, Inc., 148 F. Supp. 3d 743 (N.D. Ind. 2015) (applying Indiana law) — 17
Woodruff v. American Family Mut. Ins. Co., 291 F.R.D. 239, 85 Fed. R. Serv. 3d 872 (S.D. Ind. 2013) (applying Indiana law) — 66, 74

Kentucky
Ky. R. Evid. 503(b)(3). See 52
Brewer v. Maynard, 2006 WL 7131975 (S.D. W. Va. 2006) (applying Kentucky law) — 52

Maryland
Md. Code Ann., Cts. & Jud. Proc. § 9-108. See 5
Md. Rule 2-401(b). See 47
Cutchin v. State, 143 Md. App. 81, 792 A.2d 359 (2002) — 5
North River Ins. Co. v. Mayor and City Council of Baltimore, 343 Md. 34, 680 A.2d 480 (1996) — 47

Massachusetts
Global Investors Agent Corp. v. National Fire Ins. Co. of Hartford, 76 Mass. App. Ct. 812, 927 N.E.2d 480 (2010) — 83
Kay Const. Corp. v. Control Point Associates, Inc., 16 Mass. L. Rptr. 631, 2003 WL 22285925 (Mass. Super. Ct. 2003) — 75
Pasteris v. Robillard, 121 F.R.D. 18 (D. Mass. 1988) (applying Massachusetts law) — 27
RFF Family Partnership, LP v. Burns & Levinson, LLP, 32 Mass. L. Rptr. 88, 2013 WL 7855976 (Mass. Super. Ct. 2013) — 20
Sanchez v. Witham, 2003 Mass. App. Div. 48, 2003 WL 1880131 (2003) — 54
Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1 (1st Cir. 2012) (applying Massachusetts law) — 14

Michigan
AMI Stamping LLC v. ACE American Insurance Company, 2015 WL 12990251 (E.D. Mich. 2015) (applying Michigan law) — 58
Co-Jo, Inc. v. Strand, 226 Mich. App. 108, 572 N.W.2d 251 (1997) — 32
Patrick v. State Farm Fire & Casualty Company, 2016 WL 10519131 (E.D. Mich. 2016) (applying Michigan law) — 23, 46

Mississippi
Miss. R. Evid. 502. See 58
Miss. R. Evid. 502(b). See 41
Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 19 Fed. R. Serv. 3d 242 (5th Cir. 1991) (applying Mississippi law) — 58
Liberty Mut. Ins. Co. v. Tedford, 644 F. Supp. 2d 753 (N.D. Miss. 2009) (applying Mississippi law) — 16, 41

Montana
Mont. Code Ann. § 26-1-803. See 60
Mont. Code Ann. § 33-28-108(3). See 56

Mont. Code Ann. §§ 39-71-604(2), 50-16-527, 50-16-805(1). See 35
Mont. R. Prof. Cond. 1.6. See 44
American Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court, 2012 MT 61, 364 Mont. 299, 280 P.3d 240 (2012) — 3, 42
Amtrust North America, Inc. v. Safebuilt Insurance Services, Inc., 186 F. Supp. 3d 278 (S.D. N.Y. 2016) (applying Montana law) — 56
Dion v. Nationwide Mut. Ins. Co., 185 F.R.D. 288 (D. Mont. 1998) (applying Montana law) — 60
Draggin' Y Cattle Co., Inc. v. Addink, 2014 WL 8880334 (Mont. Dist. Ct. 2014) — 82
Palmer by Diacon v. Farmers Ins. Exchange, 261 Mont. 91, 861 P.2d 895 (1993) — 60
Redding v. Prosight Specialty Management Company, Inc., 2013 WL 12316880 (D. Mont. 2013) (applying Montana law) — 13
Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, In re, 2000 MT 110, 299 Mont. 321, 2 P.3d 806 (2000) — 44
Simms v. Schabacker, 2014 MT 328, 377 Mont. 278, 339 P.3d 832 (2014) — 35
Wade v. State Farm Mut. Auto. Ins. Co., 203 Fed. Appx. 827 (9th Cir. 2006) (applying Montana law) — 3

Nevada
Nev. Rev. Stat. Ann. § 49.095. See 39
OOIDA Risk Retention Group, Inc. v. Bordeaux, 2016 WL 427066 (D. Nev. 2016) (applying Nevada law) — 39
Residential Constructors, LLC v. Ace Property and Cas. Ins. Co., 2006 WL 3149362 (D. Nev. 2006) (applying Nevada law) — 40

New Mexico
Pincheira v. Allstate Insurance Co., 142 N.M. 283, 2007-NMCA-094, 164 P.3d 982 (Ct. App. 2007) — 84

North Carolina
N.C. Gen. Stat. Ann. § 58-26.1(a). See 29
Lawyers Title Ins. Co. v. Golf Links Development Corp., 87 F. Supp. 2d 505 (W.D. N.C. 1999) (applying North Carolina law) — 29
Nationwide Mut. Fire Ins. Co. v. Bourlon, 172 N.C. App. 595, 617 S.E.2d 40 (2005) — 18
Phillips v. Dallas Carriers Corp., 133 F.R.D. 475 (M.D. N.C. 1990) (applying North Carolina law) — 9, 31

Oklahoma
Okla. Stat. Ann. tit. 12, § 2001. See 69
Okla. Stat. Ann. tit. 12, § 3237(A)(2). See 78
Cudd Pressure Control, Inc. v. New Hampshire Ins. Co., 297 F.R.D. 495, 93 Fed. R. Evid. Serv. 816 (W.D. Okla. 2014) (applying Oklahoma law) — 87
Niemeyer v. U.S. Fidelity and Guar. Co., 1990 OK 32, 789 P.2d 1318 (Okla. 1990) — 68, 69
Roesler v. TIG Ins. Co., 251 Fed. Appx. 489 (10th Cir. 2007) (applying Oklahoma law) — 88
Scott v. Peterson, 2005 OK 84, 126 P.3d 1232 (Okla. 2005) — 78

Puerto Rico
CH Properties, Inc. v. First American Title Ins. Co., 48 F. Supp. 3d 143 (D.P.R. 2014) (applying Puerto Rico law) — 60

South Carolina
ContraVest Inc. v. Mt. Hawley Insurance Company, 273 F. Supp. 3d 607 (D.S.C. 2017) (applying South Carolina law) — 6
Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003) — 65
Hege v. Aegon USA, LLC, 2011 WL 1791883 (D.S.C. 2011) (applying South Carolina law) — 57
Johns v. Amtrust Underwriters, Inc., 996 F. Supp. 2d 413 (D.S.C. 2014) (applying South Carolina law) — 63

Muhler Company, Inc. v. State Farm Fire & Casualty Co., 2018 WL 4599587 (D.S.C. 2018) (applying South Carolina law) — 13

Sentry Select Insurance Company v. Maybank Law Firm, LLC, 426 S.C. 154, 826 S.E.2d 270 (2019) — 8
State Farm Fire and Casualty Company v. Admiral Insurance Company, 225 F. Supp. 3d 474 (D.S.C. 2016) (applying South Carolina law) — 15, 58, 61

South Dakota
S.D. Codified Laws § 19-13-2(1). See 38
S.D. Codified Laws § 19-13-2(5). See 53
S.D. Codified Laws § 19-13-3. See 77

Bertelsen v. Allstate Ins. Co., 2011 SD 13, 796 N.W.2d 685 (S.D. 2011) — 7, 60, 74

Dakota, Minnesota & Eastern R.R. Corp. v. Acuity, 2009 SD 69, 771 N.W.2d 623 (S.D. 2009) — 64
Lamar Advertising of S.D., Inc. v. Kay, 267 F.R.D. 568, 76 Fed. R. Serv. 3d 824 (D.S.D. 2010) (applying South Dakota law) — 53, 77
Roy v. D.J.L. Homes, Inc., 2007 WL 8030880 (D.S.D. 2007) (applying South Dakota law) — 38

Tennessee
Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 505 (W.D. Tenn. 1999) (applying Tennessee law) — 12, 59, 67

Virginia
Va. S. Ct. Rules, R. 4:1(b)(2). See 21

Chevalier-Seawell v. Mangum, 90 Va. Cir. 420, 2015 WL 10521527 (2015) — 48, 55
Petter v. Acevedo, 31 Va. Cir. 7, 1993 WL 945900 (1993) — 11
Wood v. Campbell, 71 Va. Cir. 402, 2006 WL 2590479 (2006) — 21

West Virginia
W. Va. R. Civ. P. 26(b)(1). See 4
W. Va. R. Civ. P. 26(b)(3). See 89
W. Va. R. Civ. P. 30. See 76
W. Va. R. Civ. P. 30(d)(1). See 76

Hager v. Graham, 267 F.R.D. 486 (N.D. W. Va. 2010) (applying West Virginia law) — 80

Horkulic v. Galloway, 222 W. Va. 450, 665 S.E.2d 284 (2008) — 49

Kidwiler v. Progressive Paloverde Ins. Co., 192 F.R.D. 536 (N.D. W. Va. 2000) (applying West Virginia law) — 27
Martino v. Barnett, 215 W. Va. 123, 595 S.E.2d 65, 5 A.L.R. Fed. 2d 745 (2004) — 86
Medical Assurance of West Virginia, Inc., State ex rel. v. Recht, 213 W. Va. 457, 583 S.E.2d 80 (2003) — 4

Montpelier U.S. Ins. Co., State ex rel. v. Bloom, 233 W. Va. 258, 757 S.E.2d 788 (2014) — 4
Mordesovitch v. Westfield Ins. Co., 244 F. Supp. 2d 636 (S.D. W. Va. 2003) (applying West Virginia law) — 60, 89

Mt. Hawley Ins. Co. v. Felman Production, Inc., 271 F.R.D. 125 (S.D. W. Va. 2010) (applying West Virginia law) — 43
Smith v. Scottsdale Ins. Co., 40 F. Supp. 3d 704 (N.D. W. Va. 2014) (applying West Virginia law) — 47

West Virginia ex rel. Allstate Ins. Co., State of v. Madden, 215 W. Va. 705, 601 S.E.2d 25 (2004) — 76

Wyoming
Williams v. Blount, 741 P.2d 595 (Wyo. 1987) — 62

Footnotes

1 See Insured-Insurer Communications As Privileged—View That Communications Are Privileged When They Concern Potential Suit, 42 A.L.R.7th Art. 3, and Insured-Insurer Communications As Privileged—View That Communication Must Seek Legal Advice for Attorney-Client Privilege to Apply, 43 A.L.R.7th Art. 3.

2 This article supersedes section 3.5 of Insured-insurer communications as privileged, 55 A.L.R.4th 336.

3 Couch on Insurance 3d § 250:18.

4 Couch on Insurance 3d § 250:18.

5 See Insured-Insurer Communications As Privileged—View That Communications Are Privileged When They Concern Potential Suit, 42 A.L.R.7th Art. 3.

6 See Insured-Insurer Communications As Privileged—View That Communication Must Seek Legal Advice for Attorney-Client Privilege To Apply, 43 A.L.R.7th Art. 3.

7 Couch on Insurance 3d § 250:18.

8 Couch on Insurance 3d § 250:19.

9 Couch on Insurance 3d § 250:19.

10 Couch on Insurance 3d § 250:20.

11 Am. Jur. 2d, Witnesses § 395.

12 See, for example, Metropolitan Life Ins. Co. v. Aetna Cas. and Sur. Co., 249 Conn. 36, 730 A.2d 51 (1999).

13 See Wade v. State Farm Mut. Auto. Ins. Co., 203 Fed. Appx. 827 (9th Cir. 2006) (applying Montana law).

14 See, for example, American Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court, 2012 MT 61, 364 Mont. 299, 280 P.3d 240 (2012).

15 See Ex parte Meadowbrook Ins. Group, Inc., 987 So. 2d 540 (Ala. 2007).

End of Document

Restatement (Third) of the Law Governing Lawyers § 15 (2000)

Restatement of the Law - The Law Governing Lawyers | October 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

Topic 1. Creating a Client–Lawyer Relationship

§ 15 A Lawyer's Duties to a Prospective Client

Comment:
Reporter's Note
Case Citations - by Jurisdiction

(1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:

(a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61- 67;

(b) protect the person's property in the lawyer's custody as stated in §§ 44- 46; and

(c) use reasonable care to the extent the lawyer provides the person legal services.

(2) A lawyer subject to Subsection (1) may not represent a client whose interests are materially adverse to those of a former prospective client in the same or a substantially related matter when the lawyer or another lawyer whose disqualification is imputed to the lawyer under §§ 123 and 124 has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter, except that such a representation is permissible if:

(a) (i) any personally prohibited lawyer takes reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client, and (ii) such lawyer is screened as stated in § 124(2)(b) and (c); or

(b) both the affected client and the prospective client give informed consent to the representation under the limitations and conditions provided in § 122.

Comment:

a. *Scope and cross-references.* This Section summarizes the duties of a lawyer to a person seeking legal services. Duties attach even when no client-lawyer relationship ensues. On application of the attorney-client privilege to communications with a prospective client, see § 72. Application of rules parallel to those of § 132(2) on former-client conflicts of interest and those of §§ 123- 124 on imputation of conflicts is considered in Comment *c* hereto. Whether a person who consults a lawyer forms a client-lawyer relationship is determined under § 14. On duties owed by a lawyer to nonclients, see §§ 51 and 56.

b. *Rationale.* Prospective clients are like clients in that they often disclose confidential information to a lawyer, place documents or other property in the lawyer's custody, and rely on the lawyer's advice. But a lawyer's discussions with a prospective client often are limited in time and depth of exploration, do not reflect full consideration of the prospective client's problems, and leave both prospective client and lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients, as indicated in the Section and following Comments.

c. *Confidential information of a prospective client.* It is often necessary for a prospective client to reveal and for the lawyer to learn confidential information (see § 59) during an initial consultation prior to their decision about formation of a client-lawyer relationship. For that reason, the attorney-client privilege attaches to communications of a prospective client (see § 70, Comment *c*). The lawyer must often learn such information to determine whether a conflict of interest exists with an existing client of the lawyer or the lawyer's firm and whether the matter is one that the lawyer is willing to undertake. In all instances, the lawyer must treat that information as confidential in the interest of the prospective client, even if the client or lawyer decides not to proceed with the representation (see Subsection (1)(a); see also § 60(2)). The duty exists regardless of how brief the initial conference may be and regardless of whether screening is instituted under Subsection (2)(a)(ii). The exceptions to the principles of confidentiality and privilege apply to such communications (see §§ 61- 67).

Subsection (2) states rules parallel to those governing former-client conflicts under § 132, but it relaxes two analogous former-client rules. First, personal disqualification of a lawyer who deals with a prospective client occurs only when the subsequent matter presents the opportunity to use information obtained from the former prospective client that would be "significantly harmful." In contrast, § 132 applies whenever there is a "substantial risk" of adverse use of the former client's confidential information, regardless of the degree of threatened harm. Second, screening is permitted under Subsection (2)(a) so long as the lawyer takes reasonable steps to limit his or her exposure to confidential information during the initial consultation. In contrast, screening under § 124(2)(a) is permissible only when information obtained in the earlier representation would not likely be of significance in the subsequent representation.

In order to avoid acquiring disqualifying information, a lawyer considering whether or not to undertake a new matter may limit the initial interview to such confidential information as reasonably appears necessary for that purpose. Where that information indicates that a conflict of interest or other reasons for nonrepresentation exists, the lawyer should so inform the prospective client or simply decline the representation. If the prospective client still wishes to retain the lawyer, and if consent is possible under § 122(1), consent from any other affected present or former client should be obtained before further confidential information is elicited. The lawyer may also condition conversations with the prospective client on the person's consent to the lawyer's representation of other clients (see § 122, Comment *d*) or on the prospective client's agreement that any information disclosed during the consultation is not to be treated as confidential (see § 62). The prospective client's informed consent to such an agreement frees the lawyer to represent a client in a matter and to use in that matter, but only if the agreement so provides, confidential information received from the prospective client. A prospective client may also consent to a representation in other ways applicable to a client under § 122.

Even in the absence of such an agreement, when a consultation with a prospective client does not lead to a lawyer's retention the lawyer is not always prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter. A prospective client's assurance of confidentiality through prophylactic prohibition as broad as that required in the case of a former client under § 132 must yield to a reasonable degree to the need of the legal system and to the interests of the lawyer and of other clients, including the need of a lawyer to obtain information needed to determine whether the lawyer may properly accept the representation without undue risk of prohibitions if no representation ensues. Thus, under Subsection (2), prohibition exists only when the lawyer has received from the prospective client information that could be significantly harmful to the prospective client in the matter. In such an instance and absent the prospective client's consent, the lawyer must withdraw from a substantially related representation commenced before the prospective client communicated with the lawyer and must not represent a client in such a matter in the future, including a client the lawyer ordinarily represents on a continuing basis.

When a tribunal is asked to disqualify a lawyer based on prior dealings with a former prospective client, that person bears the burden of persuading the tribunal that the lawyer received such information. The prohibition is imputed to other lawyers as provided in § 123, but may be avoided if all personally prohibited lawyers are screened as stated in § 124(2)(b) and (2)(c) (see Subsection (2)(a)). In that situation, screening avoids imputation even when the requirements of § 124(2)(a) have not been met. In deciding whether to exercise discretion to require disqualification, a tribunal may consider whether the prospective client disclosed confidential information to the lawyer for the purpose of preventing the lawyer or the lawyer's firm from representing an adverse party rather than in a good-faith endeavor to determine whether to retain the lawyer. The tribunal may also consider

whether the disclosure of significantly harmful confidential information resulted from the failure of the lawyer or the prospective client to take precautions reasonable in the circumstances. In addition to screening, Subsection (2)(b) permits representation if both the former prospective client and any affected present client consent.

Illustrations:

1. Person makes an appointment with Lawyer to discuss obtaining a divorce from Person's Spouse. During the initial consultation, Lawyer makes no effort to limit the conversation or obtain any agreement on Person's part to nonconfidentiality. During the course of the one-hour discussion, Person discusses his reasons for seeking a divorce and the nature and extent of his and Spouse's property interests. Because Person considers Lawyer's suggested fee too high, Person retains other counsel. Thereafter, Spouse seeks Lawyer's assistance in defending against Person's divorce action. Lawyer may not accept the representation of Spouse. If Lawyer is screened as provided in § 124(2)(b) and (c), Lawyer's disqualification is not imputed to other members of Lawyer's firm (see Subsection (2)(a)).

2. The President of Company A makes an appointment with Lawyer, who had not formerly had dealings with Company A. At the outset of the meeting, Lawyer informs President that it will first be necessary to obtain information about Company A and its affiliates and about the general nature of the legal matter to perform a conflicts check pursuant to procedures followed in Lawyer's firm. President supplies that information in a 15-minute meeting, including the information that the matter involves a contract dispute with Company B. The ensuing conflicts check reveals a conflict of interest with another Client of the firm (other than Company B), and Lawyer accordingly declines the representation. Lawyer and the other firm lawyers may continue representing Client (see Subsection (2)(a)).

3. Same facts as Illustration 2, except that Lawyer is later approached by Company B to represent it in its contract dispute with Company A. Both Lawyer and other firm lawyers may accept the representation unless Company A had disclosed to Lawyer confidential information that could be significantly harmful to Company A in the contract dispute. Even if such a disclosure had been made, if Lawyer is screened as provided in § 124(2)(b) and (c), Lawyer's disqualification is not imputed to other members of Lawyer's firm (see Subsection (2)(a)).

4. Same facts as Illustration 2, except that President wishes their first meeting both to discuss conflicts facts and to review Lawyer's preliminary thoughts on the merits of the contract dispute. Lawyer states willingness to do so only if Company A agrees that Lawyer would not be required to keep confidential information revealed during the preliminary discussion. President agrees, and the preliminary discussion ranges over several aspects of the dispute. Lawyer later declines the representation because of a conflict involving another firm client. Thereafter, Lawyer is approached by Company B to represent it in its contract dispute with Company A. Lawyer may accept the representation. Because of President's agreement, Lawyer is not required to keep confidential from Company B information learned during the initial consultation.

d. Protecting a prospective client's property. When prospective clients confide valuables or papers to a lawyer's care, the lawyer is under a duty to safeguard them in the same way as valuables or papers of any person that are in the lawyer's possession as the result of a professional relationship (see §§ 44- 46). Ordinarily, if no client-lawyer relationship ensues, the lawyer must promptly return all material received from the prospective client.

e. A lawyer's duty of reasonable care to a prospective client. When a prospective client and a lawyer discuss the possibility of representation, the lawyer might comment on such matters as whether the person has a promising claim or defense, whether the lawyer is appropriate for the matter in question, whether conflicts of interest exist and if so how they might be dealt with, the time within which action must be taken and, if the representation does not proceed, what other lawyer might represent the prospective client. Prospective clients might rely on such advice, and lawyers therefore must use reasonable care in rendering it.

The lawyer must also not harm a prospective client through unreasonable delay after indicating that the lawyer might undertake the representation. What care is reasonable depends on the circumstances, including the lawyer's expertise and the time available for consideration (see § 52).

If a lawyer provides advice that is intended to be only tentative or preliminary, the lawyer should so inform the prospective client. Depending on the circumstances, the burden of removing ambiguities rests with the lawyer, particularly as to disclaiming conclusions that the client reasonably assumed from their discussion, for example whether the client has a good claim.

f. Other duties to a prospective client. In addition to duties of confidentiality and care, the lawyer is subject to general law in dealing with a prospective client. The lawyer, for example, may not give the prospective client harmful advice calculated to benefit another client (see §§ 51(2) & 56).

g. Compensation of a lawyer for consultation with a prospective client. In the absence of circumstances indicating otherwise, prospective clients would ordinarily not expect to pay for preliminary discussions with a lawyer. When a client-lawyer relationship does not result, a lawyer is not entitled to be compensated unless that has been expressly agreed or it is otherwise clear from the circumstances that payment will be required.

Reporter's Note

*Comment c. Confidential information of a prospective client.*See § 72, Comment *d,* and Reporter's Note thereto. The position in the Comment is in most respects consistent with the position in ABA Formal Opin. 90-358 (1990). Few cases address explicitly the question of the later disqualifying effect of having learned the minimum information necessary to decide whether or not the lawyer would have a conflict of interest taking a case. The position taken in the Comment follows from the principles of this section and § 132 on former-client conflicts of interest. See also, e.g., Poly Software Int'l, Inc. v. Su, 880 F.Supp. 1487 (D.Utah.1995) (no disqualification when lawyer avoided learning details of case in half-hour consultation with opposing party); Bennett Silvershein Assoc. v. Furman, 776 F.Supp. 800 (S.D.N.Y.1991) (no disqualification warranted by brief consultation 10 years earlier about tenuously related matter); B.F. Goodrich Co. v. Formosa Plastics Corp., 638 F.Supp. 1050 (S.D.Tex.1986) (no disqualification where prospective client held one-day discussion of case with lawyer as part of "beauty contest" but client's inside legal counsel regulated disclosures and there was no showing that confidential information disclosed could be detrimental to client); INA Underwriters Insurance Co. v. Rubin, 635 F.Supp. 1 (E.D.Pa.1983) (no disqualification where lawyer held only preliminary discussion with prospective client, and lawyer was screened); Hughes v. Paine, Webber, Jackson & Curtis, Inc., 565 F.Supp. 663 (N.D.Ill.1983) (similar); Derrickson v. Derrickson, 541 A.2d 149 (D.C.1988) (husband had sought unsuccessfully to retain lawyer in divorce case 8 years earlier; lawyer permitted to take wife's later case arising out of same facts); Cummin v. Cummin, 695 N.Y.S.2d 346 (N.Y.App.Div.1999) (no disqualification when firm lawyer spoke briefly to opposing party 6 years earlier and was screened from present representation); State ex rel. DeFrances v. Bedell, 446 S.E.2d 906 (W.Va.1994). But see Bridge Prods. Inc. v. Quantum Chemical Corp., 1990 WL 70857 (N.D.Ill.1990) (disqualification required when lawyer did not seek waiver and potential client, in one-hour discussion as part of "beauty contest," disclosed its settlement terms and strategic advice of its other lawyers, despite screening instituted by lawyer's firm); Bays v. Theran, 639 N.E.2d 720 (Mass.1994) (telephone conversation about possibility of representation, including discussion of merits, created lawyer-client relationship barring representation of adverse party); Desbiens v. Ford Motor Co., 439 N.Y.S.2d 452 (N.Y.App.Div.1981) (firm reviewed plaintiff's file in auto accident and decided not to represent him; access to plaintiff's information now bars firm from handling defense of products-liability claim arising out of same facts); Lovell v. Winchester, 941 S.W.2d 466 (Ky.1997) (consultation with parties who expected lawyer to represent them bars later representation of opposing party). On the relevance of a prospective client's disclosures allegedly intended to produce disqualification, see In re American Airlines, Inc., 972 F.2d 605, 613 (5th Cir.1992).

*Comment d. Protecting a prospective client's property.*See § 44, Comment *b,* and Reporter's Note thereto; ABA Model Rules of Professional Conduct, Rule 1.15 (1983) (referring to "property of clients or third persons").

Comment e. A lawyer's duty of reasonable care to a prospective client. Meighan v. Shore, 40 Cal.Rptr.2d 744 (Cal.Ct.App.1995) (lawyer who speaks to wife and injured husband but represents only husband should advise wife of existence of loss-of-consortium claim); Miller v. Metzinger, 154 Cal.Rptr. 22 (Cal.Ct.App.1979) (lawyer who advises potential client must mention statute-of-limitations expiration); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn.1980) (lawyer who tells prospective client that client has no claim is liable for negligence in that opinion); Procanik v. Cillo, 543 A.2d 985 (N.J.Super.Ct.App.Div.1988) (lawyer who states reasons for declining case must be professionally reasonable in those reasons, but need not disclose lawyer's opinion on how likely it is that courts will overrule adverse precedent); compare Flatt v. Superior Court, 885 P.2d 950 (Cal.1994) (after initially interviewing prospective client, lawyer determined from conflict check within firm that intended defendant in suit was present firm client; no duty to inform prospective client to file suit within limitations period).

Comment g. Compensation of a lawyer for consultation with a prospective client. No authority on point has been found.

Case Citations - by Jurisdiction

—

M.D.Ala.
Colo.
Ill.App.
Ind.
Mo.App.
N.J.
N.Y.
N.D.
Tex.App.
Wis.

M.D.Ala.

M.D.Ala. 2011. Cit. in case quot. in sup. Government, on behalf of alleged victims of sexual harassment by rental agent who managed certain rental housing properties, sued rental agent and others for housing discrimination under the Fair Housing Act (FHA). This court granted third-party housing advocate's motion to quash defendants' subpoena, holding that notes made by a paralegal of telephone conversations with persons who called in response to a form letter distributed by housing advocate were protected by the attorney-client privilege. The court reasoned that the callers contacted advocate to explore the possibility of raising potential FHA claims, whether or not they were fully knowledgeable about such claims or the particulars of the Act, and whether or not they ultimately agreed to be represented; preliminary consultations of this kind were protected by the attorney-client privilege. U.S. v. Gumbaytay, 276 F.R.D. 671, 679.

Colo.

Colo. 2011. Subsec. (1)(c) cit. and quot. but not fol., quot. in case quot. in disc., and cit. in conc. op.; com. (d) cit. in case cit. in disc. Prospective clients brought an action for legal malpractice and negligent misrepresentation against attorney and her law firm, alleging that attorney provided them with incorrect information regarding a statute of limitations, causing them to miss a filing deadline. The trial court granted defendants' motion to dismiss. The court of appeals reversed as to plaintiffs' negligent-misrepresentation claim. Reversing and remanding, this court held, among other things, that the court of appeals erred in relying on Restatement Third of the Law Governing Lawyers § 15(1)(c) as a basis for establishing a duty of care owed by an attorney to a nonclient; under Colorado law, attorneys did not owe a duty of reasonable care to nonclients, and to hold that the tort of negligent misrepresentation might be based on an attorney's duty of reasonable care to prospective clients would diminish the requirement that a plaintiff establish an attorney-client relationship in order to state a claim of malpractice. The concurring

opinion maintained that the scope of § 15(1)(c) and its applicability to legal-malpractice actions in Colorado was not before the court. Allen v. Steele, 252 P.3d 476, 479-481, 484-486.

Ill.App.

Ill.App.2015. Cit. in sup. Criminal defendant, who was in custody on charges of aggravated criminal sexual assault, was charged with solicitation of murder for hire, after he allegedly hired a fellow inmate to kill some or all of the witnesses in his sexual-assault case. The trial court granted defendant's motions to suppress certain wire-recorded evidence that the state had allegedly obtained using information from an attorney that defendant had consulted with about his sexual-assault case, but had not yet retained, who also happened to represent the inmate solicited by defendant. Reversing and remanding, this court held, among other things, that the evidence could not be suppressed on the basis that the attorney had violated any duty owed to defendant, as a prospective client, under Restatement Third of the Law Governing Lawyers § 15. The court reasoned, in part, that defendant failed to establish that the attorney received in his consultations with defendant information that could have been significantly harmful to defendant in either the sexual-assault case or the solicitation case. People v. Shepherd, 26 N.E.3d 964, 974.

Ind.

Ind.2009. Com. (c) quot. in sup. Criminal defendant appealed his convictions for the murders of his father, stepmother, and two stepsisters. Affirming, this court held, inter alia, that the trial court did not err in denying defendant's motion for a special prosecutor. Although the court recognized that the county prosecutor had, while in private practice, met with defendant while defendant was interviewing attorneys to act as his defense counsel regarding the murder of his family, prosecutor was not retained by defendant. The court concluded that, for a prosecutor's previous involvement with a defendant to merit disqualification, there had to be some showing that the prosecutor received confidential information that could assist the prosecution, and here there was none. Pelley v. State, 901 N.E.2d 494, 507.

Mo.App.

Mo.App.2011. Cit. in sup., cit. in ftn., cit. in cases cit. and quot. in sup., com. (c) quot. in sup. Former wife petitioned for a writ of prohibition preventing the trial court from enforcing its order requiring law firm to withdraw from its representation of her in connection with former husband's motion to modify a dissolution decree. This court entered an order in prohibition, holding that husband did not have an attorney-client relationship with law firm. While husband had consulted with law firm prior to filing the dissolution action, he did not hire law firm to represent him, and thus was a former prospective client rather than a former client; in addition, husband did not show that the matter of the consultation and this matter were the same or substantially related and that the information received during the consultation would be significantly harmful if used in this matter. State ex rel. Thompson v. Dueker, 346 S.W.3d 390, 395, 396.

N.J.

N.J.2011. Subsec. (2) and com. (b) quot. in sup., com. (c) quot. in sup. and in ftn. Contractor sued corporate restaurant owner, seeking payment for construction renovation and remodeling work it performed for the restaurant. The trial court denied defendant's motion to disqualify plaintiff's counsel based on defendant's assertion that defendant's principal, 18 months earlier, had consulted with plaintiff's counsel as a prospective client. On interlocutory appeal, the court of appeals affirmed. Affirming, this court held that defendant failed to demonstrate that the matters disclosed during the consultation were either the same or substantially related to the subject matter of this action, or that the information disclosed during that consultation was significantly harmful to defendant in this action. O Builders & Associates, Inc. v. Yuna Corp. of NJ, 206 N.J. 109, 123-125, 127, 19 A.3d 966, 974, 975, 977.

N.Y.

N.Y.2015. Rptr's Note to com. (c) quot. in sup. In a divorce proceeding, husband filed a motion to disqualify wife's attorney on grounds of conflict of interest based on the prospective-client rule, alleging that he spoke with attorney's staff for an

intake interview and exchanged information that could be harmful to his position. This court denied plaintiff's motion, holding that attorney did not receive confidential information or information that could be harmful to plaintiff in this matter, and the prospective-client rule did not apply, because plaintiff did not act in good faith. Citing Restatement Third of Law Governing Lawyers § 15, the court explained that the prospective-client rule contained an element of good faith, and concluded that plaintiff contacted attorney only out of motivation to ensure that attorney could not represent defendant. Bernacki v. Bernacki, 47 Misc.3d 316, 320, 1 N.Y.S.3d 761, 764.

N.D.

N.D.2015. Cit. in sup.; com. (g) quot. in sup. Father filed a disciplinary complaint against attorney, alleging that attorney agreed to represent him in a proceeding to modify his parenting schedule against his child's mother, even though attorney had previously consulted with the child's maternal grandfather about appealing the initial primary-residential-responsibility determination. The inquiry committee issued an admonition against attorney; the disciplinary board affirmed. This court dismissed the complaint, holding that there was not clear and convincing evidence that the consultation with the grandfather established an attorney-client relationship. Citing Restatement Third of the Law Governing Lawyers § 15, the court explained that usually prospective clients would not expect to pay for a consultation, but, here, the grandfather's payment of an initial consultation fee did not, by itself, establish an attorney-client relationship. Kuntz v. Disciplinary Bd. of Supreme Court of North Dakota, 869 N.W.2d 117, 124.

Tex.App.

Tex.App.2010. Com. (b) cit. in ftn. (erron. cit. as Restatement Third of Agency). After former client brought legal-malpractice claims against lawyer, lawyer moved to compel arbitration pursuant to an arbitration clause in the parties' legal services contract. The trial court ruled that the clause was invalid or unenforceable. Conditionally granting lawyer's petition for a writ of mandamus, this court held, among other things, that the trial court erred if it refused to compel arbitration based on the unconscionability of the clause. The court rejected client's argument that mere consultation between an attorney and a prospective client created a fiduciary relationship, noting that neither Restatement Third, The Law Governing Lawyers § 15, nor Comment *b* of that section, either stated or directly supported that proposition. In re Pham, 314 S.W.3d 520, 527.

Wis.

Wis.2003. Cit. in disc. The Office of Lawyer Regulation appealed referee's finding that attorney did not violate disciplinary rule prohibiting disclosure of information related to representation of a client without client consent. Adopting the referee's findings and dismissing the action, the court held that, even though attorney had not been formally retained to represent potential client in a divorce action, his disclosures were impliedly authorized in order for him to carry out his then pending representation of potential client. In re Disciplinary Proceedings Against Duchemin, 260 Wis.2d 12, 21, 658 N.W.2d 81, 85.

End of Document

Restatement (Third) of the Law Governing Lawyers § 14 (2000)

Restatement of the Law - The Law Governing Lawyers | October 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

Topic 1. Creating a Client–Lawyer Relationship

§ 14 Formation of a Client–Lawyer Relationship

Comment:
Reporter's Note
Case Citations - by Jurisdiction

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

Comment:

a. *Scope and cross-references.* This Section sets forth a standard for determining when a client-lawyer relationship begins. Nonetheless, the various duties of lawyers and clients do not always arise simultaneously. Even if no relationship ensues, a lawyer may owe a prospective client certain duties (see § 15; § 60 & Comment *d* thereto). A lawyer representing a client may perform services also benefiting another person, for example arguing a motion for two litigants, without owing the nonclient litigant all the duties ordinarily owed to a client (see § 19(1)). Even if a relationship ensues, the client may not owe the lawyer a fee (see § 17 & Comment *b* thereto; § 38 & Comment *c* thereto; Restatement Second, Agency § 16). When a fee is due, the person owing it is not necessarily a client (see § 134). Moreover, a client-lawyer relationship may be more readily found in some situations (for example, when a person has a reasonable belief that a lawyer was protecting that person's interests; see Comment *d* hereto) than in others (for example, when a person seeks to compel a lawyer to provide onerous services). In some situations—for example, when a lawyer agrees to represent a defendant without knowing that the lawyer's partner represents the plaintiff—a lawyer is forbidden to perform some duties for the client (continuing the representation) while nevertheless remaining subject to other duties (keeping the client's confidential information secret from others, including from the lawyer's own partner).

When a client-lawyer relationship arises, its scope is subject to the principles set forth in § 19(1), and its termination is governed by §§ 31 and 32. Agency and contract law are also applicable, except when inconsistent with special rules applicable to lawyers. The scope of responsibilities may change during the representation.

b. *Rationale.* The client-lawyer relationship ordinarily is a consensual one (see Restatement Second, Agency § 15). A client ordinarily should not be forced to put important legal matters into the hands of another or to accept unwanted legal services. The consent requirement, however, is not symmetrical. The client may at any time end the relationship by withdrawing consent (see §§ 31, 32, & 40), while the lawyer may properly withdraw only under specified conditions (see §§ 31 & 32). A lawyer may be held to responsibility of representation when the client reasonably relies on the existence of the relationship (see Comment *e*), and a court may direct the lawyer to represent the client by appointment (see Comment *g*). Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination. A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant. Agreement between client and lawyer likewise defines the scope of the representation, for example, determining whether it encompasses a single matter or is continuing (see § 19(1); § 31(2)(e) & Comment *h*). Even when a representation is continuing, the lawyer is ordinarily free to reject new matters.

c. *The client's intent.* A client's manifestation of intent that a lawyer provide legal services to the client may be explicit, as when the client requests the lawyer to write a will. The client's intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer. The client may hire the lawyer to work in its legal department. The client may demonstrate intent by ratifying the lawyer's acts, for example when a friend asks a lawyer to represent an imprisoned person who later manifests acceptance of the lawyer's services. The client's intent may be communicated by someone acting for the client, such as a relative or secretary. (The power of such a representative to act on behalf of the client is determined by the law of agency.) No written contract is required in order to establish the relationship, although a writing may be required by disciplinary or procedural standards (see § 38, Comment *b*). The client need not necessarily pay or agree to pay the lawyer; and paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else, for example, when an insurance company designates a lawyer to represent an insured (see § 134).

The client-lawyer relationship contemplates legal services from the lawyer, not, for example, real-estate-brokerage services or expert-witness services. A client-lawyer relationship results when legal services are provided even if the client also intends to receive other services. A client-lawyer relationship is not created, however, by the fact of receiving some benefit of the lawyer's service, for example when the lawyer represents a co-party. Finally, a lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising.

A client-lawyer relationship can arise even if the client's consent to enter into the relationship is not fully informed. The lawyer should, however, consult with the client about such matters as the benefits and disadvantages of the proposed representation and conflicts of interest. On consultation in general, see § 20. A lawyer who fails to disclose such matters may be subject to fee forfeiture, professional discipline, malpractice liability, and other sanctions (see §§ 15, 20, 37, 48, 121, & 122).

d. *Clients with diminished capacity.* Individuals who are legally incompetent, for example some minors or persons with diminished mental capacity, often require representation to which they are personally incapable of giving consent (see Restatement Second, Agency § 20). A guardian for such an individual may retain counsel for the incapacitated person, subject in some instances to court approval. A court also may appoint counsel to represent an incompetent party without the party's consent. A person of diminished capacity nevertheless may be able to consent to representation, and to become liable to pay counsel, under the doctrine of "necessaries" (see § 31, Comment *e*; § 39; Restatement Second, Contracts § 12, Comment *f*). Representing a client of diminished capacity is considered in § 24 (see also § 31, Comment *e* (client's incompetence does not automatically end lawyer's authority)).

e. *The lawyer's consent or failure to object.* Like a client, a lawyer may manifest consent to creating a client-lawyer relationship in many ways. The lawyer may explicitly agree to represent the client or may indicate consent by action, for example by performing services requested by the client. An agent for the lawyer may communicate consent, for example, a secretary or paralegal with express, implied, or apparent authority to act for the lawyer in undertaking a representation.

A lawyer's consent may be conditioned on the successful completion of a conflict-of-interest check or on the negotiation of a fee arrangement. The lawyer's consent may sometimes precede the client's manifestation of intent, for example when an insurer designates a lawyer to represent an insured (see § 134, Comment *f*) who then accepts the representation. Although this Section treats separately the required communications of the client and the lawyer, the acts of each often illuminate those of the other.

Illustrations:

1. Client telephones Lawyer, who has previously represented Client, stating that Client wishes Lawyer to handle a pending antitrust investigation and asking Lawyer to come to Client's headquarters to explore the appropriate strategy for Client to follow. Lawyer comes to the headquarters and spends a day discussing strategy, without stating then or promptly thereafter that Lawyer has not yet decided whether to represent Client. Lawyer has communicated willingness to represent Client by so doing. Had Client simply asked Lawyer to discuss the possibility of representing Client, no client-lawyer relationship would result.

2. As part of a bar-association peer-support program, lawyer A consults lawyer B in confidence about an issue relating to lawyer A's representation of a client. This does not create a client-lawyer relationship between A's client and B. Whether a client-lawyer relationship exists between A and B depends on the foregoing and additional circumstances, including the nature of the program, the subject matter of the consultation, and the nature of prior dealings, if any, between them.

Even when a lawyer has not communicated willingness to represent a person, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services, and the lawyer, who reasonably should know of this reliance, does not inform the person that the lawyer will not do so (see § 14(1)(b); see also § 51(2)). In many such instances, the lawyer's conduct constitutes implied assent. In others, the lawyer's duty arises from the principle of promissory estoppel, under which promises inducing reasonable reliance may be enforced to avoid injustice (see Restatement Second, Contracts § 90). In appraising whether the person's reliance was reasonable, courts consider that lawyers ordinarily have superior knowledge of what representation entails and that lawyers often encourage clients and potential clients to rely on them. The rules governing when a lawyer may withdraw from a representation (see § 32) apply to representations arising from implied assent or promissory estoppel.

Illustrations:

3. Claimant writes to Lawyer, describing a medical-malpractice suit that Claimant wishes to bring and asking Lawyer to represent Claimant. Lawyer does not answer the letter. A year later, the statute of limitations applicable to the suit expires. Claimant then sues Lawyer for legal malpractice for not having filed the suit on time. Under this Section no client-lawyer relationship was created (see § 50, Comment *c*). Lawyer did not communicate willingness to represent Claimant, and Claimant could not reasonably have relied on Lawyer to do so. On a lawyer's duty to a prospective client, see § 15.

4. Defendant telephones Lawyer's office and tells Lawyer's Secretary that Defendant would like Lawyer to represent Defendant in an automobile-violation proceeding set for hearing in 10 days, this being a type of proceeding that Defendant knows Lawyer regularly handles. Secretary tells Defendant to send in the papers concerning the proceeding, not telling Defendant that Lawyer would then decide whether to take the case, and Defendant delivers the papers the next day. Lawyer does not communicate with Defendant until the day before the hearing, when Lawyer tells Defendant that Lawyer does not wish to take the case. A trier of fact could find that a client-lawyer relationship came into existence when Lawyer failed to communicate that Lawyer was not representing Defendant. Defendant relied on Lawyer by not seeking other counsel when that was still practicable. Defendant's reliance was reasonable because Lawyer regularly handled Defendant's type of case, because Lawyer's agent had responded to Defendant's request for help by asking Defendant to transfer papers needed for the proceeding, and because the imminence of the hearing made it appropriate for Lawyer to inform Defendant and return the papers promptly if Lawyer decided not to take the case.

The principles of promissory estoppel do not bind prospective clients as readily as lawyers. Clients who are not sophisticated about how client-lawyer relationships arise should not be forced to accept unwanted representation or to pay lawyers for unwanted services. Nevertheless, promissory estoppel may bind a person who has not requested a lawyer's services. That may occur, for example, when a person has regularly retained a lawyer to prepare and file certain reports, knows that the lawyer is preparing and filing the next report, and accepts the benefit of the lawyer's services without warning the lawyer that they are unwanted. Also, a person's knowing acceptance of the benefits of a lawyer's representation, when the person could have chosen not to accept them, may constitute consent by ratification. If an employer, for example, notifies an employee that it has arranged for a lawyer to represent the employee in a prosecution arising out of the employment, and the employee confers with the lawyer and takes no action when the lawyer purports to speak for the employee in court, the employee has ratified the relationship. The client may end the relationship by discharging the lawyer (see §§ 32 & 40).

f. Organizational, fiduciary, and class-action clients. When the client is a corporation or other organization, the organization's structure and organic law determine whether a particular agent has authority to retain and direct the lawyer. Whether the lawyer is to represent the organization, a person or entity associated with it, or more than one such persons and entities is a question of fact to be determined based on reasonable expectations in the circumstances (see Subsection (1)). Where appropriate, due consideration should be given to the unreasonableness of a claimed expectation of entering into a co-client status when a significant and readily apparent conflict of interest exists between the organization or other client and the associated person or entity claimed to be a co-client (see § 131).

Under Subsection (1)(b), a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer. Hence, the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know that, contrary to the lawyer's own intention, a person, individually, or agents of an entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity (see Subsection (1)(b); see also § 103, Comment *b* (extent of a lawyer's duty to warn an unrepresented person that the lawyer represents a client with conflicting interests)). Such clarification may be required, for example, with respect to an officer of an entity client such as a corporation, with respect to one or more partners in a client partnership or in the case of affiliated organizations such as a parent, subsidiary, or similar organization related to a client person or client entity. An implication that such a relationship exists is more likely to be found when the lawyer performs personal legal services for an individual as well or where the organization is small and characterized by extensive common ownership and management. But the lawyer does not enter into a client-lawyer relationship with a person associated with an organizational client solely because the person communicates with the lawyer on matters relevant to the organization that are also relevant to the personal situation of the person. In all events, the question is one of fact based on the reasonable and apparent expectations of the person or entity whose status as client is in question.

In trusts and estates practice a lawyer may have to clarify with those involved whether a trust, a trustee, its beneficiaries or groupings of some or all of them are clients and similarly whether the client is an executor, an estate, or its beneficiaries. In the absence of clarification the inference to be drawn may depend on the circumstances and on the law of the jurisdiction. Similar issues may arise when a lawyer represents other fiduciaries with respect to their fiduciary responsibilities, for example a pension-fund trustee or another lawyer.

Class actions may pose difficult questions of client identification. For many purposes, the named class representatives are the clients of the lawyer for the class. On conflict-of-interest issues, see § 125, Comment *f.* Yet class members who are not named representatives also have some characteristics of clients. For example, their confidential communications directly to the class lawyer may be privileged (compare § 70, Comment *c),* and opposing counsel may not be free to communicate with them directly (see § 99, Comment *l*).

Lawyers in class actions must sometimes deal with disagreements within the class and breaches by the named parties of their duty to represent class members. Although class representatives must be approved by the court, they are often initially self-selected, selected by their lawyer, or even (when a plaintiff sues a class of defendants) selected by their adversary. Members of

the class often lack the incentive or knowledge to monitor the performance of the class representatives. Although members may sometimes opt out of the class, they may have no practical alternative other than remaining in the class if they wish to enforce their rights. Lawyers in class actions thus have duties to the class as well as to the class representatives.

A class-action lawyer may therefore be privileged or obliged to oppose the views of the class representatives after having consulted with them. The lawyer may also propose that opposing positions within the class be separately represented, that subclasses be created, or that other measures be taken to ensure broader class participation. Withdrawal may be an option (see § 32), but one that is often undesirable because it may leave the class without effective representation. The lawyer should act for the benefit of the class as its members would reasonably define that benefit.

g. Nonconsensual relationship: appointed counsel. A lawyer may be required to represent a client when appointed by a court or other tribunal with power to do so. A lawyer may discuss the proposed representation with the prospective client and may give the court reasons why appointment is inappropriate or should be terminated.

The appointment may be rejected by the prospective client, except for persons, such as young children, lacking capacity to make that decision. In the case of some parties, for example corporations and other entities, the party may appear in court only through a lawyer. A court may require a criminal defendant to choose between an unwelcome lawyer and self-representation, and in criminal cases standby or advisory counsel may be appointed when the defendant elects self-representation. When a court appoints a lawyer to represent a person, that person's consent may ordinarily be assumed absent the person's rejection of the lawyer's services.

h. Client-lawyer relationships with law firms. Many lawyers practice as partners, members, or associates of law firms (see § 9(1)). When a client retains a lawyer with such an affiliation, the lawyer's firm assumes the authority and responsibility of representing that client, unless the circumstances indicate otherwise. For example, the lawyer ordinarily may share the client's work and confidences with other lawyers in the firm (see § 61, Comment *d),* and the firm is liable to the client for the lawyer's negligence (see § 58). Should the lawyer leave the firm, the client may choose to be represented by the departing lawyer, the lawyer's former firm, neither, or both (see §§ 31 & 32; see also § 9(3)). On the other hand, a client's retention of a lawyer or firm ordinarily does not permit the lawyer or firm, without further authorization from the client, to retain a lawyer outside the firm at the client's expense to represent the client (see Restatement Second, Agency § 18). On imputation of conflicts of interest within a law office, see § 123.

i. Others to whom lawyers owe duties. In some situations, lawyers owe duties to nonclients resembling those owed to clients. Thus, a lawyer owes certain duties to members of a class in a class action in which the lawyer appears as lawyer for the class (see Comment *f*) and to prospective clients who never become clients (see § 15). Duties may be owed to a liability-insurance company that designates a lawyer to represent the insured even if the insurer is not a client of the lawyer, to trust beneficiaries by a lawyer representing the trustee, and to certain nonclients in other situations (see § 134, Comment *f*; see also Comment *f* hereto). What duties are owed can be determined only by close analysis of the circumstances and the relevant law and policies. A lawyer may also become subject to duties to a nonclient by becoming, for example, a trustee, or corporate director. On conflicts between such duties and duties the lawyer owes clients, see § 135; see also § 96. On civil liability to nonclients, see §§ 51 and 56.

Reporter's Note

*Comment b. Rationale.*On continuing relationships, see, e.g., IBM Corp. v. Levin, 579 F.2d 271 (3d Cir.1978); § 31, Comment *h,* and Reporter's Note thereto.

*Comment c. The client's intent.*See, e.g., Davis v. State Bar, 655 P.2d 1276 (Cal.1983) (client told lawyer client wanted to bring suit; lawyer asked for documents and wrote letters); Dawson v. Duncan, 494 N.E.2d 900 (Ill.App.Ct.1986) (retainer by agent); Zych v. Jones, 406 N.E.2d 70 (Ill.App.Ct.1980) (no relationship when lawyer filed appearance for party at third person's request and party said he would notify lawyer if party wanted lawyer's services but never so notified lawyer). On ratification by a client, see E. Wood, Fee Contracts of Lawyers 65-66 (1936); Annot., 78 A.L.R. 3d 318 (1961). On retention by an agent, see Randolph v. Resolution Trust Corp., 995 F.2d 611 (5th Cir.1993). On nonlegal services, see Sheinkopf v. Stone, 927 F.2d 1259 (1st Cir.1991) (lawyer provided investment advice, not legal services, to sophisticated client); In re

Petrie, 742 P.2d 796 (Ariz.1987) (lawyer's unsuccessful assertion that lawyer was not to perform legal services); Otaka, Inc. v. Klein, 791 P.2d 713 (Hawaii 1990) (lawyer-broker who performed some legal services had client-lawyer relationship).

*Comment d. Clients with diminished capacity.*See Cook v. Connolly, 366 N.W.2d 287 (Minn.1985) (parent authorized by statute to retain lawyer for child); In re Sippy, 97 A.2d 455 (D.C.1953) (in mother's proceeding to commit disobedient minor daughter, lawyer retained by daughter, not lawyer retained by mother, represents daughter); Fed. R. Civ. P. 17(c) (representative, next friend, or guardian ad litem may sue or defend on behalf of infant or incompetent person); E. Wood, Fee Contracts of Lawyers 32-33, 61-65 (1936).

*Comment e. The lawyer's consent or failure to object.*E.g., Davis v. State Bar, 655 P.2d 1276 (Cal.1983); Morris v. Margulis, 718 N.E.2d 709 (Ill.App.Ct.1999) (firm declined to represent client, but later gave advice); De Vaux v. American Home Assurance Co., 444 N.E.2d 355 (Mass.1983) (lawyer's secretary told would-be client to send letter, arranged medical examination, and told client to write opposing party; jury could find real or apparent authority); George v. Caton, 600 P.2d 822 (N.M.Ct.App.), cert. quashed, 598 P.2d 215 (N.M.1979) (lawyer said he would handle case); In re McGlothlen, 663 P.2d 1330 (Wash.1983) (lawyer offered to answer questions and later gave advice). On promissory estoppel, see, e.g., Hacker v. Holland, 570 N.E.2d 951, 956 (Ind.Ct.App.1991) (lawyer promised only to protect interests, but without promising to represent client); Kurtenbach v. Te-Kippe, 260 N.W.2d 53, 56 (Iowa 1977). A number of promissory-estoppel cases involve lawyers for one party to a transaction who offered to provide services for other parties, who reasonably relied on the lawyers and were allowed to recover for their negligence. Nelson v. Nationwide Mortgage Corp., 659 F.Supp. 611 (D.D.C.1987) (lawyer volunteered to explain documents and answered questions); Simmerson v. Blanks, 254 S.E.2d 716 (Ga.Ct.App.1979) (lawyer offered to file financing statement); Stinson v. Brand, 738 S.W.2d 186 (Tenn.1987) (buyer's lawyer was also trustee under deed of trust). See also Rice v. Forestier, 415 S.W.2d 711 (Tex.Civ.App.1967) (client delivered papers in suit to lawyer representing client in other matters; lawyer did nothing). For estoppel of a client, see Freedman v. Horton, Schwartz & Perse, 383 So.2d 659 (Fla.Dist.Ct.App.1980) (client who knew but did not object when client's lawyer retained another lawyer is liable for second lawyer's fees); Citicorp Real Estate, Inc. v. Buchbinder & Elegant, P.A., 503 So.2d 385 (Fla.Dist.Ct.App.1987) (mortgagee liable for fee because was functional equivalent of owner, accepted lawyer's services, and asked for bill).

*Comment f. Organizational, fiduciary, and class-action clients.*See Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978) (considering whether trade association or its members were clients); United States v. Walters, 913 F.2d 388 (7th Cir.1990) (in circumstances presented, corporate officers retained counsel in their individual capacities); Arctic Slope Native Assoc. v. Paul, 609 P.2d 32 (Alaska 1980) (retaining counsel for corporation before its incorporation); ABA Model Rules of Professional Conduct, Rule 1.13 (1983); Moore, Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations, 45 S.C. L. Rev. 659 (1994); Leubsdorf, Pluralizing the Client-Lawyer Relationship, 77 Corn. L. Rev. 825 (1992); Pope, Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics, 68 Ore. L. Rev. 1 (1989).

On whether a person associated with an organization is a co-client along with the organization, see generally, e.g., Wick v. Eismann, 838 P.2d 301 (Idaho 1992) (whether lawyer for corporation owning motor speedway also represented minority shareholder for purposes of legal-malpractice liability); Doe v. Poe, 595 N.Y.S.2d 503 (N.Y.App.Div.1993) (trial court's denial of action to enjoin lawyers from disclosing to intra-corporate committee CEO's communications to it potentially harmful to him was supported by facts); ABA Formal Opin. 92-365, at 2-5 (1992) (whether lawyer for trade association also represents individual member is question of fact); ABA Formal Opin. 91-361, at 4 n.4 (1991) (whether lawyer for partnership represents any individual partner in addition to partnership as entity is question of fact concerning intent of parties, which may be implied from circumstances); compare, e.g., Hopper v. Frank, 16 F.3d 92 (5th Cir.1994) (on facts, no evidence that business partners who hired lawyer to represent limited partnership in sale of limited-partnership interests also represented individual partners); Rose v. Summers, Compton, Wells & Hamburg, 887 S.W.2d 683 (Mo.Ct.App.1994) (on facts, lawyer for limited partnership did not also represent limited partners, thus precluding their legal-malpractice suit); Bowen v. Smith, 838 P.2d 186 (Wyo.1992) (no

evidence that lawyer for corporation, employed in the interest of majority shareholder, also represented minority shareholders, thus barring their legal-malpractice suit).

On the relevance of common ownership and management, compare, e.g., Meyer v. Mulligan, 889 P.2d 509 (Wyo.1995) (question of fact whether husband and wife, incorporators of corporation to own motel, were co-clients with standing to sue lawyer for corporation for legal malpractice), with, e.g., Rice v. Strunk, 670 N.E.2d 1280 (Ind.1996) (on facts, no evidence that lawyer for partnership owning and operating apartments had client-lawyer relationship with general partner-operating manager sufficient to warrant malpractice suit by that person; court refuses to follow decisions holding that lawyer for general partnership always represents each general partner).

The general rule is that confidential communications between a lawyer for an organization and an employee or agent of the organization about a matter of interest to the organization does not thereby make the lawyer counsel for the associated person with respect to that person's own interests in the same matter. Thus, the organization may continue to employ the lawyer to oppose the person in the same or a substantially related matter. See, e.g., Kubin v. Miller, 801 F.Supp. 1101, 1116 (S.D.N.Y.1992); Ferranti Intern. plc v. Clark, 767 F.Supp. 670 (E.D.Pa.1991); Professional Serv. Indus., Inc. v. Kimbrell, 758 F.Supp. 676 (D.Kan.1991); Talvy v. American Red Cross, 618 N.Y.S.2d 25 (N.Y.App.Div.1994); see also § 103, Comment *e*, and Reporter's Note thereto. If, however, an officer or agent and the organization are co-clients, the normal rules of conflicts of interest (see § 121, Comment *e(i)*) would preclude subsequent representation of the company against the officer or agent in a substantially related matter by the same firm. E.g., Cooke v. Laidlaw, Adams & Peck, 510 N.Y.S.2d 597 (N.Y.App.Div.1987) (even if no communications between officer and lawyer representing both company and officer, lawyer and firm disqualified from representing company adversely to office in substantially related matter). On the right of a lawyer for an organization to share confidential communications of an organization's agents with other agents of the organization, see § 131, Comment *e,* and Reporter's Note thereto.

On decisions recognizing that even a long-standing personal relationship between the lawyer for an organization and a constituent does not by itself entail the relationship of client and lawyer, see, e.g., Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332 (Fed.Cir.1988) (lawyers who represented original patentee had no client-lawyer relationship with inventor, employee of patentee, and thus were not precluded from seeking to invalidate patent now held by inventor's new employer); Ferranti Intern. plc v. Clark, 767 F.Supp. 670 (E.D.Pa.1991) (former in-house lawyer who originally hired outside law firm to conduct investigation could not object to outside law firm's representing corporation in suit against same former in-house lawyer for activities uncovered in investigation, where firm made clear that they did not represent any individual in investigation); Robertson v. Gaston Snow & Ely Bartlett, 536 N.E.2d 344 (Mass.), cert. denied, 493 U.S. 894, 110 S.Ct. 242, 107 L.Ed.2d 192 (1989) (despite fact that law firm provided estate-planning services for corporate officer and retained his will in office safe, insufficient proof that firm representing corporation in corporate reorganization also represented officer in that matter sufficient to create duty on part of law firm to protect his future employment with new corporation); Doe v. Poe, 595 N.Y.S.2d 503 (N.Y.App.Div.1993) (fact that chief executive officer and board chairman of bank hired law firm and directed their activities did not make officer personal client of law firm). On relationships with shareholders, see, e.g., Egan v. McNamara, 467 A.2d 733 (D.C.1983) (on facts, long-term lawyer for corporation had no client-lawyer relationship with majority shareholder); Felty v. Hartweg, 523 N.E.2d 555 (Ill.App.Ct.1988) (lawyer for corporation had no client-lawyer relationship with minority shareholder and thus no duty to disclose to shareholder misconduct of corporate officer). See also, e.g., ABA Formal Op. 91-361 (1991) (when scope of representation so provides, lawyer for partnership represents entity rather than the individual partners).

On the other hand, in particular circumstances and in the absence of warning from the lawyer, a constituent of an organizational client may reasonably rely on the lawyer's apparent willingness to provide legal services for the constituent in addition to the entity, thus creating an implied client-lawyer relationship. See, e.g., Rosman v. Shapiro, 653 F.Supp. 1441 (S.D.N.Y.1987) (50% shareholder in closely held corporation); E.F. Hutton & Co. v. Brown, 305 F.Supp. 371 (S.D.Tex.1969) (officer of corporation, where officer was party to proceeding and lawyer appeared on officer's behalf); Cooke v. Laidlaw, Adams & Peck, Inc., 510 N.Y.S.2d 597 (N.Y.App.Div.1987) (corporate officer, where lawyer for corporation appeared in SEC proceeding on behalf of officer); Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex.Ct.App.1991) (driver of corporate employer, who

allegedly gave incriminating statement to corporation's lawyer after lawyer's promise of confidentiality); Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985) (general partners in limited partnership, where they reasonably believed lawyer for partnership was acting on their behalf).

Some decisions dealing with whether a person associated with an organization that is represented by counsel is a co-client of the same lawyer involve the question whether an officer of a corporation may invoke the attorney-client privilege concerning the officer's communications to the lawyer. Decision turns on whether the officer reasonably understood that the lawyer was representing the officer's personal interests as opposed to those of the organization. See, e.g., United States v. Keplinger, 776 F.2d 678 (7th Cir.1985) (subjective but unreasonable belief of corporate officer that company's lawyers represented him insufficient to establish client-lawyer relationship for purposes of attorney-client privilege); E.F. Hutton & Co. v. Brown, 305 F.Supp. 371 (S.D.Tex.1969) (vice president of brokerage firm called to testify before SEC extensively discussed proposed testimony with company lawyers and was accompanied by lawyers to 2 hearings; lawyers and vice president gave conflicting testimony on whether he was told they represented only company; held: communications were privileged because at both hearings lawyers entered appearance for vice president and were referred to as personal counsel of vice president, which they did not refute, but lawyer could not assert privilege against corporation in subsequent adverse proceeding due to co-client exception to privilege).

A position contrary to that of the Section and Comment is that per se rules determine whether a lawyer for an organization also represents its members. E.g., Pucci v. Santi, 711 F.Supp. 916, 927 n.4 (N.D.Ill.1989), and authorities cited (lawyer for partnership always represents each general partner); Schwartz v. Broadcast Music, Inc., 16 F.R.D. 31 (S.D.N.Y.1954) (each member of unincorporated association is client of association's lawyer).

On the principle that whether a lawyer for an organization represents an affiliated organization is a question of fact to be determined under the principles stated in § 14, see, e.g., Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 265-66 (Minn.1992) (whether lawyer for pension trust also represented particular corporate member of trust is question of fact precluding summary judgment in legal-malpractice suit); ABA Formal Opin. 95-390 (1995) (whether conflict exists is question of fact whether affiliate is also client, whether understanding exists between lawyer and client-organization that lawyer will not represent adverse to affiliate or whether such representation would materially and adversely affect lawyer's ability to represent client-organization).

On trusts and estates practice, see Whitfield v. Lindemann, 853 F.2d 1298 (5th Cir.1988), cert. denied, sub nom., Klepak v. Dole, 490 U.S. 1089, 109 S.Ct. 2428, 104 L.Ed.2d 986 (1989) (lawyer liable to pension plan for aiding trustee in breach of duties); Elam v. Hyatt Legal Services, 541 N.E.2d 616 (Ohio 1989) (lawyer representing executor liable for negligence to remainderpersons to whom executor owed fiduciary duty); Hazard, Triangular Lawyer Relationships: An Exploratory Analysis, 1 Geo. J. Leg. Ethics 15 (1987).

On class-action lawyers, see In re Agent Orange Products Liability Litigation, 800 F.2d 14 (2d Cir.1986) (lawyer who has approved settlement may later represent dissenting class members on appeal); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir.1978) (decision to appeal taken in first instance by nominal plaintiffs, but lawyer may oppose their position); Greenfield v. Villager Indus., Inc., 483 F.2d 824 (3d Cir.1973) (lawyer's duty to ensure that class members receive proper notice of proposed settlement); see Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1447-57 (1981).

*Comment g. Nonconsensual relationship: appointed counsel.*ABA Model Rules of Professional Conduct, Rule 6.2 (1983) (lawyer may not seek to avoid appointment except for good cause); ABA Model Code of Professional Responsibility, EC 2-29 (1969) (similar). Compare Mallard v. U.S. District Court, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) (28 U.S.C. § 1915(d) does not authorize appointment of unwilling counsel for indigent in civil case).

For the right of a litigant to reject appointed counsel and proceed pro se, see Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (criminal prosecution); Knox Leasing v. Turner, 562 A.2d 168 (N.H.1989) (civil action);

28 U.S.C. § 1654. But compare McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (considering extent to which standby appointed counsel may participate in criminal trial over defendant's objection); Jones v. Niagara Frontier Transp. Author., 722 F.2d 20 (2d Cir.1983) (corporation may appear only through lawyer); Merco Constr. Engineers v. Municipal Court, 581 P.2d 636 (Cal.1978) (same); Tracy-Burke Assocs. v. Dept. of Employment Security, 699 P.2d 687 (Utah 1985) (same).

*Comment h. Client-lawyer relationships with law firms.*On the presumption that retaining one lawyer makes that lawyer's firm and its other lawyers subject to the responsibilities of a lawyer representing that client, see, e.g., Bossert Corp. v. City of Norwalk, 253 A.2d 39 (Conn.1968) (imputation of conflict of interest to retained lawyer); Saltzberg v. Fishman, 462 N.E.2d 901 (Ill.App.Ct.1984) (right of firm to collect fees); Staron v. Weinstein, 701 A.2d 1325 (N.J.Super.Ct.App.Civ.1997) (lawyer with of-counsel relationship to firm had apparent authority to bind firm to represent client); George v. Caton, 600 P.2d 822 (N.M.Ct.App.), cert. quashed, 598 P.2d 215 (N.M.1979) (malpractice liability); Harman v. La Crosse Tribune, 344 N.W.2d 536 (Wis.Ct.App.), cert. denied, 469 U.S. 803, 105 S.Ct. 58, 83 L.Ed.2d 9 (1984) (all lawyers in firm have duty of loyalty to client); E. Wood, Fee Contracts of Lawyers 178-81 (1936). On the division of fees when a lawyer leaves a firm or the firm dissolves, see generally R. Hillman, Lawyer Mobility (1994); Marks, Barefoot Shoemakers: An Uncompromising Approach to Policing the Morals of the Marketplace When Law Firms Split Up, 19 Ariz. St. L.J. 509 (1987). On a lawyer's usual lack of authority to retain another lawyer outside the firm without the client's consent, see Kiser v. Bailey, 400 N.Y.S.2d 312 (N.Y.Civ. Ct.1977); E. Wood, Fee Contracts of Lawyers 286-89 (1936).

Case Citations - by Jurisdiction

—

C.A.1
C.A.3
C.A.4
C.A.5
C.A.7
C.A.8,
C.A.D.C.
M.D.Ala.
D.Ariz.
C.D.Cal.Bkrtcy.Ct.
D.Conn.
D.Del.Bkrtcy.Ct.
D.D.C.
E.D.La.
W.D.La.
D.Me.
D.Md.
D.Minn.Bkrtcy.Ct.
N.D.Miss.
D.Mont.
E.D.N.Y.
E.D.N.Y.Bkrtcy.Ct.
D.N.Mar.I.
E.D.Va.
Ariz.App.

Cal.App.
Del.Ch.
D.C.App.
Fla.App.
Ill.App.
Iowa,
Iowa
Iowa,
Iowa
La.
La.App.
Me.
Md.
Md.Spec.App.
Mass.
Mich.
Minn.
Miss.
Miss.App.
Mo.App.
Nev.
N.H.
N.J.Super.App.Div.
N.J.Super.
N.Y.
N.D.
Ohio.
Ohio App.
Tenn.
Tex.App.
Utah
Va.
N.M.C.C.A.

C.A.1

C.A.1, 2002. Subsec. (1)(b) cit. in ftn. Federal district court jury in Maine found that a lawyer and her law firm had simultaneously represented a client and client's son, who had interests adverse to client, and then compounded problem by suing client on son's behalf. Jury awarded client damages. Answering a certified question, Maine Law Court held that issue of existence of an attorney-client relationship was one of fact. On appeal of federal case, defendants argued that district court's earlier jury instruction, given without benefit of Law Court's later opinion, was potentially misleading to jury. This court affirmed the verdict, holding that district court was within its discretion in finding that facts of this case did not warrant that specific jury instruction, where it had already instructed that jury should consider all facts and circumstances, and that the lawyers must have expressly or impliedly agreed to the representation. Estate of Keatinge v. Biddle, 316 F.3d 7, 13.

C.A.3

C.A.3, 2007. Cit. in disc. and sup. Chapter 11 debtor subsidiaries brought an adversary proceeding against controlling corporation for breach of contract, breach of fiduciary duties, estoppel, and misrepresentation arising from the manner in which it ceased funding debtors' corporate parent. The district court ordered defendant to turn over documents that were withheld based on the attorney-client privilege. This court vacated and remanded for a determination of whether defendant and debtors were

parties to a joint representation, since the district court could only compel defendant to produce the disputed documents because of the adverse-litigation exception to the co-client privilege if it found that defendant and debtors were jointly represented by the same attorneys on a matter of common interest that was the subject matter of those documents. In re Teleglobe Communications Corp., 493 F.3d 345, 362, 380.

C.A.3, 2001. Quot. in sup., subsec. (1)(a) cit. but dist., subsec. (1)(b) cit. in sup. (citing § 26, Proposed Final Draft No. 1, 1996, which is now § 14 of the Official Draft). Corporation brought legal-malpractice claims against attorney, alleging that defendant breached his professional duties to it by allowing its malpractice claim against lawyer who previously represented it in sale of industrial property to become time-barred. Reversing the district court's grant of summary judgment for defendant and remanding, this court held, inter alia, that a genuine issue of material fact existed as to whether an attorney-client relationship arose between the parties concerning a potential malpractice claim against lawyer who previously represented plaintiff. Dixon Ticonderoga Co. v. Estate of O'Connor, 248 F.3d 151, 169.

C.A.4

C.A.4, 2014. Com. (h) quot. in ftn. In a tort case based on alleged asbestos exposure, this court reversed and remanded the court of appeals' decision denying defendant's motion for vacatur of an underlying remand order. In the course of its discussion, this court pointed out that it used the phrase "plaintiffs' counsel" to refer to both of plaintiffs' attorneys, because those attorneys came from the same firm. The court explained that, according to Restatement Third of The Law Governing Lawyers § 14, Comment *h*, when a client retained a lawyer, the lawyer's firm assumed the authority and responsibility of representing that client, unless the circumstances indicated otherwise. Barlow v. Colgate Palmolive Co, 772 F.3d 1001, 1005.

C.A.5

C.A.5, 1994. Quot. in case quot. in sup. (citing § 26, P.D. No. 6, 1990, which is now § 14). Corporation's two majority stockholders, along with corporation, formed a limited partnership, which purchased all of corporation's assets. Limited partnership engaged Ohio law firm to prepare public offering documents, but attempted public offering of limited partnership interests was unsuccessful and corporation went bankrupt. Stockholders filed legal malpractice suit against law firm in Mississippi state court, alleging that firm's delay in providing final public offering documents did not give plaintiffs sufficient time to sell partnership interests, resulting in offering's failure and plaintiffs' financial losses. Upon removal, Mississippi federal district court entered judgment for law firm, determining that stockholders lacked standing to sue. Affirming, this court held that plaintiffs lacked standing to sue because they failed to establish an attorney-client relationship in their individual capacities separate from their partnership. Even if attorney-client relationship existed with stockholders prior to partnership's formation, partnership's acceptance of benefits of the attorney-client relationship—the final offering documents—and both parties' agreement that stockholders would not pay or be personally liable for legal fees, made clear that attorney-client relationship with limited partnership preempted any prior arguable relationship with stockholders. Hopper v. Frank, 16 F.3d 92, 95.

C.A.7

C.A.7, 2021. Cit. in sup. Start-up company and its founder filed a claim for legal malpractice against company's former attorney after attorney obtained an arbitration award against them for years of unpaid wages, alleging that they would not have been liable for the award if he had not advised them to enter into an illegal agreement with him to defer his compensation. The district court granted attorney's motion to dismiss. Affirming, this court held that, even if founder was attorney's client on certain matters where he advised her personally or he otherwise owed her a duty as an intended beneficiary of his attorney–client relationship with company, founder failed to plead any plausible malpractice claims arising from those matters. The court cited Restatement Third of the Law Governing Lawyers § 14 in explaining that an attorney's duty normally extended only to the client. UFT Commercial Finance, LLC v. Fisher, 991 F.3d 854, 858.

C.A.8,

C.A.8, 2013. Com. (c) quot. in sup. Defendant was indicted for conspiring to distribute drugs and conspiring to possess drugs with the intent to distribute based, in part, on statements that made he made to an attorney who represented one of his coconspirators. The district court denied defendant's motion to dismiss the indictment or, alternatively, suppress his statements to the attorney, and sentenced defendant to imprisonment after a jury convicted him on both counts. Affirming, this court held, among other things, that defendant did not have an attorney-client relationship with the attorney, and the government therefore could not have unconstitutionally intruded into any such relationship by refusing to suppress the statements. The court reasoned, in part, that defendant conceded that his conversations with the attorney regarding the sentencing disparities for different types of cocaine were among "a mix of social exchanges and discussions regarding legal issues of importance to" defendant, and that conversations of that nature did not suffice to form an attorney-client relationship. U.S. v. Williams, 720 F.3d 674, 688.

C.A.D.C.

C.A.D.C.2009. Com. (f) cit. in disc. United States sought civil forfeiture of almost $7 million on the ground that the money was involved in a scheme to launder money earned through an unlawful offshore Internet gambling enterprise. The district court invoked the fugitive-disentitlement statute to grant summary judgment to government against a claim to the money filed by a British Virgin Islands corporation. Reversing, this court held that a genuine issue of fact existed as to whether the statute applied to corporation's majority shareholder, and thus whether corporation's claim could be dismissed under the statute, since government failed to satisfy its burden to show that shareholder remained outside the United States to avoid pending criminal charges. The court concluded that, while shareholder's knowledge of one of the criminal warrants against him satisfied the statute's requirement of notice, the mere fact that he was a majority shareholder was not sufficient to impute corporation's knowledge of outstanding warrants to him; shareholders were not ordinarily deemed to be “clients” of a corporation's lawyers, who, in this case, had such notice. U.S. v. $6,976,934.65, Plus Interest Deposited into Royal Bank of Scotland Intern. Account No. 2029-56141070, Held in Name of Soulbury Ltd., 554 F.3d 123, 129.

C.A.D.C.2006. Cit. in disc., com. (c) quot. in disc. Investment adviser and hedge fund petitioned for review of an SEC rule regulating hedge funds under the Investment Advisers Act of 1940, challenging the rule's requirement that an investor in a hedge fund, rather than just the fund itself, be counted as a client of the fund's adviser for purposes of the Act's exemption from registration for advisers with fewer than 15 clients. Vacating the rule and remanding, this court held that the SEC's interpretation of the word “client,” which had the effect of requiring hedge-fund advisers to register with the SEC if the funds they advised had 15 or more “shareholders, limited partners, members, or beneficiaries,” was unreasonable and came close to violating the Act's plain language. The court observed that construction of a statutory term required that the words of the statute be read in context. Goldstein v. S.E.C., 451 F.3d 873, 878.

M.D.Ala.

M.D.Ala.2011. Cit. in case quot. in sup. Government, on behalf of alleged victims of sexual harassment by rental agent who managed certain rental housing properties, sued rental agent and others for housing discrimination under the Fair Housing Act (FHA). This court granted third-party housing advocate's motion to quash defendants' subpoena, holding that notes made by a paralegal of telephone conversations with persons who called in response to a form letter distributed by housing advocate were protected by the attorney-client privilege. The court reasoned that the callers contacted advocate to explore the possibility of raising potential FHA claims, whether or not they were fully knowledgeable about such claims or the particulars of the Act, and whether or not they ultimately agreed to be represented; preliminary consultations of this kind were protected by the attorney-client privilege. U.S. v. Gumbaytay, 276 F.R.D. 671, 679.

D.Ariz.

D.Ariz.2014. Subsec. (1)(a) quot. in case quot. in sup. Insured who originally lived in Michigan but later moved to Arizona brought claims sounding in breach of contract and bad faith against insurer, alleging that insurer breached a personal-injury-protection policy it had issued to insured's father in Michigan by failing to pay insured benefits due and to inform him of the extent of his benefits after an automobile accident in Michigan rendered him a quadriplegic. This court denied in part insurer's motion for summary judgment, holding that a genuine issue of fact existed as to whether insured knew or reasonably should have known of insurer's alleged bad-faith actions prior to the deadline for the statute of limitations. Citing Restatement Third

of the Law Governing Lawyers § 14 on formation of an attorney—client relationship, the court noted that there was conflicting evidence as to whether insured's former attorney continued to represent him during the relevant period such that attorney's knowledge of the extent of insured's entitlement to attendant-care benefits could be imputed to insured. Barten v. State Farm Mut. Auto. Ins. Co., 28 F.Supp.3d 978, 988.

C.D.Cal.Bkrtcy.Ct.

C.D.Cal.Bkrtcy.Ct.2021. Com. (c) cit. in ftn. In a reopened bankruptcy case, purported purchaser of real property filed a motion for administrative expenses, alleging that it was entitled to reimbursement for payments it made on the mortgage securing the property, because its contributions substantially benefited the bankruptcy estate. This court denied purchaser's motion for administrative expenses, holding, inter alia, that there were no tangible benefits to the estate from purchaser's expenditures. Citing Restatement of the Law Governing Lawyers § 14, Comment *c*, the court noted that purchaser's assertion that it was entitled to administrative expenses because the bankruptcy estate retained an attorney as counsel in violation of the implied attorney–client relationship between the attorney and purchaser, despite the fact that purchaser provided the attorney its confidential information related to the real-property purchase, and observed that determining the veracity of purchaser's assertions was unnecessary for its holding. In re Machevsky, 637 B.R. 510, 518.

D.Conn.

D.Conn.2011. Quot. in sup. Former employees of bankrupt cookie companies brought a putative class action against companies' corporate shareholders and management firm hired by shareholders to run companies, alleging that defendants were liable under state and federal law for failing to provide companies' employees with 60 days' advance notice of the termination of their jobs. This court granted in part and denied in part defendants' motion for an order permitting their counsel to contact putative class members, holding that there was a basis for imposing limited restrictions on the parties' abilities to communicate with putative class members prior to class certification. The court noted that, while defendants' attorney's attempts to contact a particular company officer probably would have been unethical if officer had been represented by plaintiffs' counsel, there was no evidence that officer manifested an intent to receive legal services from plaintiffs' counsel before defendants' attorney contacted her, or that plaintiffs' counsel manifested consent to represent her. Austen v. Catterton Partners V, LP, 831 F.Supp.2d 559, 569.

D.Del.Bkrtcy.Ct.

D.Del.Bkrtcy.Ct.2008. Quot. in disc., com. (f) quot. in disc. Chapter 11 debtor-subsidiaries brought adversary proceeding asserting contract and tort claims against their corporate parents and officers and directors of parents. Denying plaintiffs' motion to compel discovery, this court held, inter alia, that defendants were not required to turn over certain documents that were protected by attorney-client privilege under the "adverse litigation exception," because plaintiffs and defendants were not jointly represented by the same counsel on a matter of common interest relating to the specific issue that was addressed in the withheld documents. The court reasoned, in part, that there was no explicit or implied joint representation of plaintiffs and defendants by defendants' counsel in connection with plaintiffs' claims against defendants. In re Teleglobe Communications Corp., 392 B.R. 561, 588.

D.D.C.

D.D.C.2020. Com. (f) quot. in sup. Buyers of a government-contracting firm under a verbal contract sued seller, alleging, among other things, breach of contract and fraud in the inducement. This court denied buyers' motion to disqualify seller's counsel, holding that buyers failed to show that seller's counsel also represented buyers in their individual capacity in the early stages of the parties' dispute. The court cited Restatement Third of the Law Governing Lawyers § 14 in noting that, while sometimes in the absence of warning from a lawyer, a constituent of an organizational client could reasonably rely on the lawyer's apparent willingness to provide legal services for the constituent in addition to the organization, thus creating an implied client–lawyer relationship, the overwhelming evidence in the record showed that seller's counsel repeatedly gave such warnings to buyers, and that there was no indication that seller's counsel learned any private information that remained private for more than a few days and was useful to seller in this action. Butler v. Enterprise Integration Corporation, 459 F.Supp.3d 78, 113.

D.D.C.2018. Subsec. (1)(b) quot. in sup. In criminal proceedings against owner of two companies and registered agent for the companies, who were charged as co-defendants with participating in an alleged scheme to defraud public schools, the government moved to disqualify owner's attorney based on allegations that attorney also represented the companies and registered agent under conflicts of interest to which the clients had not consented. This court denied the government's motion, holding that attorney never enjoyed an attorney–client relationship with registered agent that would form the basis for a disqualifying conflict. The court reasoned, in part, that the factors set forth in Restatement Third of the Law Governing Lawyers § 14 weighed against finding that an attorney–client relationship was formed, given that attorney never had a one-on-one conversation with registered agent, registered agent never paid attorney, and there was no indication that registered agent ever intended for attorney to provide her with legal services. United States v. Crowder, 313 F.Supp.3d 135, 144.

D.D.C.2013. Quot. in sup., com. (c) cit. in sup. Provider of summer camp programs, together with its founder, brought claims for conversion, inter alia, against purported business partner, alleging that defendant misappropriated a large sum of money from plaintiffs. Defendant moved to disqualify law firm representing plaintiffs, asserting that two law-firm partners had provided him with legal and personal advice. Denying defendant's motion without prejudice, this court held that defendant failed to present sufficient facts that an attorney-client relationship ever existed. Citing Restatement Third of the Law Governing Lawyers § 14, the court pointed out that neither party presented emails or other documentation affirmatively establishing the existence of an attorney-client relationship, and there were no allegations of a formal agreement, payment of attorney's fees, or explicit statements about the nature of the alleged relationship. Headfirst Baseball LLC v. Elwood, 999 F.Supp.2d 199, 209.

E.D.La.

E.D.La.2018. Quot. in case quot. in disc. After bringing a lawsuit against, among others, health-insurance company for conspiring with others to restrict competition in relevant markets, medical support company and others filed a motion to disqualify defendant's counsel, alleging that counsel had previously represented plaintiff in negotiations with the state insurance board regarding allegations of medical malpractice asserted by a hospital. This court granted plaintiff's motion to disqualify, holding, inter alia, that counsel's present and former representations were substantially related. The court explained that, under Restatement Third of the Law Governing Lawyers § 14, counsel had manifested consent to represent plaintiff during negotiations with government officials when it communicated with plaintiff through an engagement letter explicitly describing its services as "legal services" and describing its relationship to plaintiff as being plaintiff's "legal counsel." Academy of Allergy & Asthma in Primary Care v. Louisiana Health Service and Indemnity Company, 384 F.Supp.3d 644, 654.

W.D.La.

W.D.La.2020. Quot. in case quot. in sup. After former employee sued former employer for gender-based discrimination claims, defendant filed a motion to disqualify plaintiff's attorney, alleging that defendant previously retained attorney to teach workplace gender-discrimination seminars to its personnel. This court denied defendant's motion to disqualify, holding, inter alia, that disqualification of plaintiff's attorney was unwarranted, because attorney and defendant never had an attorney–client relationship with one another such that attorney's representation of plaintiff created a conflict of interest. Citing Restatement Third of the Law Governing Lawyers § 14, the court explained that defendant never requested services from attorney beyond training seminars, attorney did not make recommendations for substantive changes to defendant's policies, and attorney was not given any of defendant's confidential information. Flowers v. Heard, McElroy & Vestal, L.L.C., 551 F.Supp.3d 688, 700.

D.Me.

D.Me.2002. Coms. (c), (e), and (f) cit. in disc. Grantor of power of attorney brought suit for legal malpractice against lawyer engaged by holder. After the jury returned a verdict for plaintiff, defendant filed motions for judgment n.o.v and/or for a new trial. Denying the motions, the court held that whether an attorney-client relationship existed between the parties was a question of fact for the jury. Keatinge v. Biddle, 188 F.Supp.2d 3, 4.

D.Md.

D.Md.2017. Cit. and quot. in sup. Consumer Financial Protection Bureau sued buyer of structured settlements and attorney who purported to act as an independent professional advisor to consumers who were considering selling their structured settlements to

buyer, when in fact he had both personal and professional ties to buyer, alleging that defendants violated the Consumer Financial Protection Act by participating in a scheme to buy structured settlements on unfair terms. While originally granting defendants' motion to dismiss attorney under the Act's "practice of law" exclusion, this court granted plaintiff's subsequent motion to amend the complaint to clarify that consumers were unaware of the fact that attorney was a lawyer, such that the exclusion could not apply. The court reasoned that, under Restatement Third of the Law Governing Lawyers § 14, it was impossible for a "client" to form an attorney—client relationship with a person if the client did not know the person was an attorney. Consumer Financial Protection Bureau v. Access Funding, LLC, 281 F.Supp.3d 601, 605.

D.Md.2017. Subsec. (1)(a) quot. in case quot. in sup. (general cite). Federal agency that was charged with regulating the offering and provision of consumer-financial products and services sued company that purchased structured settlements from consumers, as well as attorney with personal and professional ties to company, who purportedly provided independent professional advice to consumers in connection with the sale of their structured settlements to company, alleging violations of the Consumer Financial Protection Act. This court granted attorney's motion to dismiss agency's claims against him, holding that attorney's conduct fell within the "practice of law" exclusion to the Act. The court reasoned, in part, that, when consumers utilized attorney as their independent professional advisor and attorney performed that function for them, both attorney and consumers manifested the intent necessary to form an attorney—client relationship under the Restatement Third of the Law Governing Lawyers. Consumer Financial Protection Bureau v. Access Funding, LLC, 270 F.Supp.3d 831, 849.

D.Minn.Bkrtcy.Ct.

D.Minn.Bkrtcy.Ct.2006. Coms. (c) and (f) cit. in disc. In one of two consolidated adversary proceedings, Chapter 7 trustee of estate of loan-placement agent brought claim for breach of fiduciary duty against law firm that agent hired to prepare loan documents for a multimillion-dollar casino loan that agent arranged. This court held, inter alia, that law firm violated its duty to disclose and its duty of loyalty to agent, because, although participant lenders for the casino loan were the actual clients represented by firm in an action against a third party in which agent was the named plaintiff, firm agreed to represent agent in a closely related action by one loan participant against agent without seeking informed consent from either agent or that participant. The court reasoned that law firm had an attorney-client relationship with the casino loan participants, because both law firm and agent fully understood that agent was retaining law firm to represent the loan participants as the true lenders, and not agent, which was merely the nominal lender. In re SRC Holding Corp., 352 B.R. 103, 183, affirmed in part, reversed in part 364 B.R. 1 (D.Minn.2007).

N.D.Miss.

N.D.Miss.2001. Quot. in case quot. in ftn. (quoting § 26 of Prelim. Draft No. 6, 1990, which is now § 14 of the Official Text). Mississippi resident who was evicted from her home sued foreclosing bank and bank's attorney, alleging, among other claims, breach of fiduciary duty and negligence. This court denied plaintiff's motion to remand case to state court, holding, inter alia, that attorney was fraudulently joined. Attorney was not liable for breach of fiduciary duty or negligence, because an attorney did not owe a duty, fiduciary or otherwise, to the adverse party in a case he was litigating. Any duty that extended to the adversary, whether one of a fiduciary nature or one of ordinary reasonable care, created a conflict of interest. James v. Chase Manhattan Bank, 173 F.Supp.2d 544, 550.

D.Mont.

D.Mont.2004. Quot. and cit. in sup., subsec. (1) cit. in sup., com. (f) cit. and quot. in sup. Students and their parents sued school district and district employees, alleging that students were surreptitiously videotaped while in the high-school locker room. Granting in part plaintiffs' motion for protective order, this court held, inter alia, that plaintiffs' counsel could conduct ex parte interviews with former and current employees, and agents of the school district, so long as these employees had not manifested an intent to be represented by counsel. Harry v. Duncan, 330 F.Supp.2d 1133, 1141, 1142.

E.D.N.Y.

E.D.N.Y.2018. Com. (f) quot. in sup. Consumer filed a putative class action against company, alleging violations of the Telephone Consumer Protection Act. This court granted defendant's motion to strike plaintiff's class allegations, holding that plaintiff could not adequately represent the interests of absent class members, because her husband, who formerly acted as counsel for plaintiff and the class before being replaced by substitute counsel, intended to seek fees for his work under a theory of quantum meruit, which would come out of the class's recovery because he was no longer in a position to negotiate with defendant. The court explained that, under Restatement Third of the Law Governing Lawyers § 14, a plaintiff's lawyer in a class action owed duties both to the named plaintiff and to the class, and that, if the interests of plaintiff and the class were to diverge over husband's fee request, then so would substitute counsel's loyalties. Wexler v. AT & T Corp., 323 F.R.D. 128, 131.

E.D.N.Y.2014. Subsec. (1) cit. in disc. and cit. in case quot. in disc., com. (e) quot. in case quot. in disc. In Chapter 11 bankruptcy proceedings, president of debtor company filed a pro se motion to disqualify debtor's law firm from representing debtor's liquidating trust in connection with certain litigation against him, on the basis that a conflict of interest existed due to the fact that, pre-petition, law firm, rather than acting exclusively for the benefit of debtor, had really been acting for the benefit of president and other insiders to help them to obtain debtor's assets in bankruptcy. Following an evidentiary hearing, bankruptcy court disqualified law firm. Reversing in part and remanding, this court held that president's delay in bringing the disqualification motion amounted to a waiver of his right to contest this alleged conflict of interest. The court pointed out that, among other things, president waited almost three years in bringing the disqualification motion, even though he knew of the conflict of interest; he conceded that he delayed for tactical purposes; and disqualification prejudiced the liquidating trust. KLG Gates LLP v. Brown, 506 B.R. 177, 186, 191.

E.D.N.Y.2006. Quot. in sup. In an action against criminal defendant accused of participating in a racketeering conspiracy with an organized crime family, government moved to disqualify defendant's attorney, in part on grounds that that his alleged prior representation of a government witness created a conflict of interest. Denying the motion, this court concluded, among other things, that attorney had acted as an unpaid investigator for witness, not an attorney, and thus no ethical standard would be breached by his representation of defendant. The court pointed out that witness did not believe that attorney had represented him and had testified that the "job" attorney had performed for him was "being a courier of messages." U.S. v. Pizzonia, 415 F.Supp.2d 168, 179.

E.D.N.Y.Bkrtcy.Ct.

E.D.N.Y.Bkrtcy.Ct.2012. Quot. in case quot. in sup., com. (c) quot. in sup. Chapter 7 trustee applied to retain law firm as his general and bankruptcy counsel. Creditor objected in part, arguing that law firm suffered from a disabling conflict of interest and was not disinterested, because it represented him and an entity that he owned and controlled in connection with a possible investment in a real estate venture in China. This court overruled creditor's objection, holding that the China real estate venture was not substantially related to claims that trustee might assert against creditor or entity. The court determined, as part of its inquiry, that entity was an actual client of law firm, and creditor was a prospective client, with respect to the China real estate venture; in the course of the preliminary discussions about the China venture among creditor, his brother, and law firm, creditor could be viewed as a person who discussed with a lawyer the possibility of forming a client-lawyer relationship with respect to that matter. In re Persaud, 467 B.R. 26, 38.

D.N.Mar.I.

D.N.Mar.I.2011. Quot. in sup. Lessee who prepaid the rent for the entirety of a 55-year lease of real property sued lessors, alleging that defendants wrongfully attempted to terminate the lease after only two years. Denying the parties' cross motions for summary judgment on plaintiff's claim for breach of fiduciary duty against one defendant who was also an attorney, this court held, among other things, that genuine issues of material fact remained as to whether plaintiff had an attorney-client relationship with that defendant with regard to the lease; a reasonable jury could find that defendant should have known that plaintiff was relying on him to provide legal services, in light of the fact that plaintiff was a foreign national who did not speak English and was not familiar with Commonwealth law, and had sought or at least received an explanation of the terms of the lease drafted by defendant. Sin Ho Nam v. Quichocho, 841 F.Supp.2d 1152, 1177.

E.D.Va.

E.D.Va.2008. Quot. in sup. Patent owner sued competitors for infringement of its patents on x-ray inspection systems. Granting plaintiff's motion for sanctions concerning alleged misrepresentations made by defendants to the court to avoid a default judgment, this court held that defendants' representations that they did not retain defense counsel for this litigation until after becoming aware of the entry of a default were entirely devoid of substance; defendants had a longstanding attorney-client relationship with an attorney retained as patent-prosecution counsel who, prior to the entry of default, was directed to explore defenses to the complaint and consider settlement possibilities, and defendants, immediately following the entry of default, officially retained him as litigation defense counsel. The court noted that attorney-client relationships arose out of substance and intent, even in the absence of a written contract. American Science and Engineering, Inc. v. Autoclear, LLC, 606 F.Supp.2d 617, 623.

Ariz.App.

Ariz.App.2014. Com. (h) quot. in sup. Law firm brought an action for breach of contract and unjust enrichment against former client. The trial court entered judgment on a jury verdict in favor of law firm, and awarded law firm attorney's fees. This court vacated the grant of attorney's fees in favor of law firm and remanded, holding that the rule forbidding an award of attorney's fees when a party represented itself applied to law firms, and that law firm was therefore ineligible for an award of its fees. The court rejected law firm's argument that it was not authorized to represent itself because a corporation or other legal entity had to be represented by a natural person, noting that the rules governing attorney conduct contemplated law firms representing clients, and that, because law firm was authorized to practice law, it was capable of self-representation. Munger Chadwick, P.L.C. v. Farwest Development and Const. of the Southwest, LLC, 329 P.3d 229, 231.

Ariz.App.2014. Quot. in case cit. in sup. After limited partnership sued minority partner, partner moved for a determination of no conflict with regard to the law firm that was defending him in partnership's suit against him and representing him in pursuing direct claims against partnership, seeking a ruling that law firm could also represent him on certain derivative claims that he planned to bring on behalf of partnership against majority partner. The trial court denied minority partner's motion, and granted partnership's motion to disqualify law firm. Reversing the trial court's disqualification order, this court held that no conflict of interest existed on the part of law firm, because it had no attorney—client relationship with partnership. The court reasoned that there was no evidence that partnership manifested to law firm its intent that law firm provide legal services to it or that law firm manifested any consent to do so; law firm's only attorney—client relationship was with minority partner. Simms v. Rayes, 316 P.3d 1235, 1238.

Cal.App.

Cal.App.2007. Com. (h) quot. in disc. Investment corporation, by and through its receiver, sued attorney and his law firm, alleging that attorney, who had represented an individual convicted of engaging in fraudulent activities with the corporation, improperly obtained monies belonging to the receivership. The trial court granted law firm's motion for summary judgment on the ground that law firm could not be held vicariously liable for attorney's alleged acts. Reversing in part, this court held that plaintiff raised triable issues of fact as to whether attorney committed his alleged acts within the scope of his authority as a partner of the firm. The court noted that, unless there was an agreement to the contrary, the retention of an attorney in a law firm constituted the retention of the entire firm. PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal.App.4th 384, 392, 58 Cal.Rptr.3d 516, 522.

Cal.App.2007. Subsec. (2) quot. in ftn. City's department of children and family services filed a petition to commence dependency proceedings, alleging, in part, that two brothers and two sisters, who lived with their mother and the father of sisters, were at risk of severe harm. The juvenile court disqualified nonprofit law center from representing all four siblings, relieved a panel attorney of his representation of the father of brothers, and appointed that attorney to represent brothers. This court affirmed as to the disqualification of law center, but noted that attorney should have been disqualified from representing brothers, because their interests were adverse to their father's. The court noted that the fact that attorney's representation of father was brief was irrelevant, because communication of confidential information was presumed when counsel was appointed for a parent in dependency proceedings. In re Zamer G., 153 Cal.App.4th 1253, 1262, 63 Cal.Rptr.3d 769, 776.

Del.Ch.

Del.Ch.2002. Com. (f) quot. in ftn. Shareholders of a corporation filed derivative suits to challenge a proposed stock purchase from a corporation wholly owned by controlling shareholder. When a proposed settlement was reached by participating plaintiffs, several objector plaintiffs opposed it and filed a motion to disqualify law firms participating in the stipulation of settlement on grounds of conflict of interest, alleging that firms could not ethically support settlement of the action when settlement was opposed by objectors. This court denied objectors' motion to disqualify, holding, inter alia, that participating firms' support for a settlement opposed by objectors did not warrant their disqualification in absence of unfair prejudice to objectors. Counsel owed a duty to act in good faith on behalf of all intended beneficiaries of the representative action, and not simply at direction of named plaintiffs. In re M & F Worldwide Corp., 799 A.2d 1164, 1175.

D.C.App.

D.C.App.2018. Cit. in ftn. In disciplinary proceedings, attorney was charged with violating the rules of professional conduct in connection with his representation of a friend whom he had invited to serve as an indemnitor for another client's surety bonds. After a hearing committee found that attorney and friend entered into an attorney–client relationship with regard to the indemnity agreement and that attorney violated the professional rules during that representation, the board on professional responsibility adopted the committee's conclusions and recommended sanctions. This court accepted the board's recommendation, holding, among other things, that substantial evidence supported the finding of an attorney–client relationship. The court rejected attorney's argument that no relationship was formed under Restatement Third of the Law Governing Lawyers § 14, noting that a client's request that an attorney render legal services and the attorney's acceptance did not have to be explicitly made, and could be inferred from context if substantial evidence supported a finding of such a relationship. In re Robbins, 192 A.3d 558, 564.

D.C.App.2014. Cit. in sup., cit. in case quot. in sup., subsecs. (1)(a)-(1)(b) quot. in sup. After attorney was suspended from the practice of law in West Virginia for 120 days, the District of Columbia Office of Bar Counsel recommended that reciprocal discipline be imposed on attorney in the District of Columbia. Adopting that recommendation, this court agreed with the West Virginia Supreme Court's finding that attorney committed numerous disciplinary violations when he distributed the proceeds of a medical-malpractice judgment to a client without informing client's bankruptcy trustee, who had applied to have attorney appointed as special counsel in the bankruptcy proceedings. Applying the approach of Restatement Third of the Law Governing Lawyers § 14, the court rejected attorney's argument that he never received notice of the bankruptcy court's order granting his appointment as special counsel and therefore did not commit any disciplinary infractions with regard to trustee. The court reasoned that an attorney-client relationship between attorney and trustee arose before the bankruptcy court issued the order granting attorney's appointment, because trustee had asked attorney to provide legal services, attorney had consented to provide those services, and attorney knew or should have known that trustee would rely on him to provide those services. In re Nace, 98 A.3d 967, 975, 976.

Fla.App.

Fla.App.2008. Quot. in sup. Client and three of his brothers brought a legal-malpractice action against law firm and its partners, after defendants failed to collect for plaintiffs any proceeds from the sale of a family-controlled piece of real property. The trial court granted summary judgment for defendants. Reversing and remanding, this court held that genuine issues of material fact existed as to whether client's brothers were clients of the law firm; the firm's own correspondence supported a conclusion that the test for the attorney-client relationship was satisfied, and that the firm undertook the representation of client both on his own behalf and on behalf of the brothers he had the authority to represent. Mansur v. Podhurst Orseck, P.A., 994 So.2d 435, 438.

Ill.App.

Ill.App.2015. Cit. in sup. Private-equity company and investors brought a legal-malpractice action against attorney and law firm that specialized in intellectual-property law, alleging that plaintiffs invested in a company that relied on a number of processes that were the subject of patents based on defendants' misrepresentation that the company owned and controlled the patents. The trial court entered judgment for plaintiffs. This court affirmed, holding that defendants owed a duty to all investors involved in the transaction. Citing Restatement Third of the Law Governing Lawyers § 14, the court explained that, even though the

retention agreement was only between private-equity company and defendants, defendants knew that there were other investors involved in the transaction that were dependent on their work, and the evidence showed that defendants consented to perform services for the transaction as a whole. Meriturn Partners, LLC v. Banner and Witcoff, Ltd., 391 Ill.Dec. 775, 780, 31 N.E.3d 451, 456.

Iowa,

Iowa, 2016. Subsec. (1)(b) cit. in case cit. in sup. State disciplinary board charged lawyer with violating the rules of professional conduct in connection with allegations that, following her removal as the attorney for an estate in probate proceedings, she sought and received a loan from the executor without obtaining the executor's informed consent. After the grievance commission found that lawyer violated the rules, this court suspended her license for 60 days, holding that she was still in an attorney-client relationship with the executor at the time of the loan. The court noted that, under Restatement Third of the Law Governing Lawyers § 14, an attorney-client relationship normally existed between the executor of an estate and the attorney designated by the executor to probate the estate, and explained that, under the circumstances here, lawyer's attorney-client relationship with the executor had not yet ended when attorney and executor discussed the loan. Iowa Supreme Court Attorney Disciplinary Bd. v. Pederson, 887 N.W.2d 387, 392.

Iowa

Iowa, 2015. Cit. in sup. Attorney disciplinary board filed a complaint against attorney, alleging that attorney violated the rules of professional conduct by, among other things, entering into an intimate relationship with a divorce client who hired him to prepare and file a qualified domestic relations order (QDRO), and then assaulting her after the relationship deteriorated. After a grievance commission panel found that the alleged violations had occurred, this court suspended attorney's license to practice law indefinitely with no possibility of reinstatement for 18 months, holding that, while it was unclear whether attorney's representation of client in connection with the QDRO was ongoing, attorney and client established a separate attorney—client relationship in connection with a will matter before they entered into their sexual relationship. The court cited Restatement Third of the Law Governing Lawyers § 14 in concluding that an attorney—client relationship was created when client sought assistance from attorney in drafting her will and attorney expressly agreed to draft a will for her. Iowa Supreme Court Attorney Disciplinary Bd. v. Blessum, 861 N.W.2d 575, 588.

Iowa,

Iowa, 2015. Cit. in sup., cit. in case cit. in sup. The Iowa Supreme Court Disciplinary Board brought disciplinary proceedings against attorney who had been appointed to represent a defendant who had been charged with domestic abuse, alleging that attorney violated the rules of professional conduct by engaging in sexual relations with the victim in the domestic-abuse case. The Iowa Supreme Court Grievance Commission concluded that attorney committed the alleged violations and recommended a 30-month suspension. This court suspended attorney indefinitely with no possibility of reinstatement for 30 months, holding, among other things, that the Board established by a preponderance of the evidence that there was an attorney—client relationship between attorney and victim under Restatement Third of the Law Governing Lawyers § 14. The court pointed out that victim testified that she believed that attorney was assisting her in a matter related to suspension of her driver's license, and that victim, at attorney's request, had obtained a notarized document that expressly stated that attorney was her lawyer in connection with the driver's license matter. Iowa Supreme Court Attorney Disciplinary Bd. v. Moothart, 860 N.W.2d 598, 605, 611.

Iowa, 2014. Subsec. (1)(b) quot. in sup. Executor/beneficiary of estate brought a legal-malpractice action against estate counsel, alleging that counsel failed to advise her about potential legal challenges to another beneficiary's option to purchase, at a below-market-value price, farmland that was property of the estate. The trial court granted summary judgment for counsel. The court of appeals reversed. Vacating the decision of the court of appeals and affirming the judgment of the trial court, this court held that the creation of an attorney—fiduciary relationship between counsel and executor did not impose on counsel an independent duty to represent executor's personal interests. The court observed no compelling reason to create a broader duty for estate attorneys, or to create a duty for an attorney to affirmatively advise a personal representative that the representation did not extend to representative's personal interests, referring to Restatement Third of the Law Governing Lawyers § 14(1)(b) in noting

that personal representatives were protected by Iowa law when they reasonably expected that an attorney was representing their personal interests. Sabin v. Ackerman, 846 N.W.2d 835, 842, 843.

Iowa

Iowa, 2011. Cit. in sup. Attorney disciplinary board brought a complaint against attorney relating to his representation of four separate clients, alleging, as to one client, that attorney violated the rules of professional conduct by failing to satisfy a hospital's lien on the proceeds of a settlement of the client's personal-injury action. Suspending attorney's license to practice law, this court held, inter alia, that, while an attorney-client relationship existed during attorney's prosecution and settlement of client's personal-injury action, such a relationship did not exist when attorney filed an appearance on behalf of client in hospital's lien action, because the undisputed evidence established that attorney filed an answer on behalf of client in that action without client's authority to do so. Iowa Supreme Court Attorney Disciplinary Bd. v. Netti, 797 N.W.2d 591, 599.

Iowa, 2009. Com. (f) quot. in sup. Patient and his wife brought medical malpractice action against doctor and clinic that employed doctor. After counsel for defendants violated a state statute by meeting with clinic's surgeon, who had also examined patient, without notice to plaintiff, the trial court granted plaintiffs' motion to compel production of a memorandum that counsel for defendants authored to memorialize his recollection of the meeting. On interlocutory appeal, this court affirmed in part, rejecting counsel for defendants' argument that he also represented surgeon and that the memorandum was therefore protected by surgeon's personal attorney-client privilege. The court explained that the memorandum did not reflect legal advice sought by surgeon but, rather, demonstrated counsel for defendants' investigation into clinic's liability for doctor's actions. Keefe v. Bernard, 774 N.W.2d 663, 670.

Iowa, 2008. Quot. in sup., com. (c) cit. and quot. in sup., com. (e) quot. in sup. Defendant was convicted by a jury of second-degree robbery and sentenced by the trial court as an habitual offender. The court of appeals reversed. Vacating the decision of the court of appeals and affirming the judgment and sentence of the trial court, this court held that incriminating statements defendant made to an attorney during a night of socializing prior to defendant's arrest were not privileged attorney-client communications, and thus were properly admitted into evidence at trial, because no attorney-client relationship existed when the statements were made; defendant never asked attorney to represent him, attorney never felt that the circumstances established an attorney-client relationship, and defendant could not have reasonably relied on attorney to provide legal services based merely on attorney's willingness to check into the status of the criminal investigation. State v. Parker, 747 N.W.2d 196, 204, 205.

La.

La.2006. Quot. in sup. In an attorney disciplinary proceeding, the Office of Disciplinary Counsel (ODC) filed formal charges against attorney who was also a stockbroker for allegedly mishandling the funds of a client of a lawyer who shared attorney's office, in violation of the Rules of Professional Conduct. The hearing committee recommended that the charges be dismissed, and the disciplinary board recommended a one year suspension from the practice of law. This court dismissed the charges, holding, inter alia, that the ODC failed to prove the existence of an attorney-client relationship between attorney and owner of the funds, a necessary element of proof for certain of the charges, because the undisputed facts established that owner did not manifest an intent that attorney provide legal services for her, but rather investment services only. In re Austin, 943 So.2d 341, 347.

La.App.

La.App.2021. Quot. in sup. Ex-wife brought a legal-malpractice action against attorney, alleging that defendant failed to properly reinstate a community-property regime for plaintiff and ex-husband, resulting in plaintiff not receiving certain properties when she and ex-husband divorced. The trial court granted defendant's exception raising objection of no right of action. This court affirmed in part, holding that plaintiff lacked reasonable belief that an attorney–client relationship existed between the parties. The court pointed out that plaintiff failed to satisfy the elements of determining the existence of an attorney–client relationship under Restatement Third of the Law Governing Lawyers § 14, because she presented no evidence that the parties agreed upon a fee arrangement for the provision of legal services, and, even if there was an attorney–client relationship

between the parties at the time the community-property regime was initially terminated, plaintiff did not reasonably contemplate that defendant's duty would continue. Pearce v. Lagarde, 330 So.3d 1160, 1168.

La.App.2010. Cit. and quot. in case quot. in sup. Clerical employee of a two-member limited-liability law firm asserted claims for both vicarious liability and independent negligence against firm, after a lawyer-member of the firm allegedly assaulted and raped her on the firm's premises after business hours. The trial court granted summary judgment for firm. Reversing and remanding, this court held that firm owed a duty to plaintiff that was independent of its vicarious liability for the accused lawyer-member's actions as an employee of the firm, because plaintiff was also an invitee or social guest of the firm after work and a pro bono client of the firm. The court noted that the accused lawyer-member had advised plaintiff on a child-custody issue, that firm's other lawyer-member had corresponded with the court and appeared in open court on plaintiff's behalf, and that the custody issue had apparently not been resolved, as plaintiff alleged that she and the accused lawyer-member had discussed the matter on the night of the alleged attack. Doe v. Hawkins, 42 So.3d 1000, 1008.

Me.

Me.2002. Subsec. (1)(b) cit. in disc. Grantor of durable power of attorney to his son as attorney-in-fact brought suit for breach of fiduciary duty against lawyer retained by son to assist him in handling father's business affairs, after lawyer sued father on behalf of son for failure to fund a trust for son's benefit. The trial court entered judgment on a jury verdict for plaintiff's estate following plaintiff's death, and certified questions of law. This court held that the mere fact that the holder of a power of attorney retained counsel did not create an attorney-client relationship between attorney and grantor, but facts might develop in particular cases that could support a finding that such an attorney-client relationship between attorney and grantor had been created. Estate of Keatinge v. Biddle, 789 A.2d 1271, 1273.

Md.

Md.2014. Subsec. (1)(b) quot. in sup. In disciplinary proceedings, attorney was charged with violating the rules of professional conduct by entering into a real-estate-investment partnership with a current client. After a hearing judge determined that attorney had violated the rules regarding conflicts of interest and misconduct, this court concluded that disbarment was the appropriate sanction. The court rejected attorney's argument that his attorney—client relationship with client had terminated after he successfully obtained an H1B visa for her, noting that, during or shortly before the month attorney and client formed their partnership, client paid attorney $1,000 to represent her in connection with an application for permanent residency, and attorney never expressed, in writing or otherwise, his lack of consent to assist client. Attorney Grievance Com'n of Maryland v. Agbaje, 438 Md. 695, 93 A.3d 262, 280-281.

Md.2013. Adopted and quot. in case quot. in conc. op., coms. (c) and (e) quot. in conc. op. Attorney grievance commission filed a petition for disciplinary action against attorney who was hired by a client to form a limited-liability company in exchange for a flat fee, alleging, among other things, that attorney violated the Maryland Rules of Professional Conduct when he deposited a check from the client in his personal checking account rather than in an attorney trust account. After a hearing, the trial court found that the payment was made in anticipation of future services, rather than for past legal services rendered, and thus had to be deposited in an attorney trust account, because, under the terms of the parties' legal-services agreement, an attorney-client relationship was not formed until the parties executed the agreement and client gave the check to attorney. The concurring opinion stressed that an attorney-client relationship could be formed before the signing of a retainer agreement, when a client manifested an intent to receive legal services and the attorney manifested consent to provide those services, and that an attorney therefore could in some cases be justified in immediately applying a portion of an after-acquired retainer to pay for work already done. Attorney Grievance Com'n of Maryland v. Stillwell, 434 Md. 248, 74 A.3d 728, 745.

Md.2009. Quot. in sup. (general cite). Attorney grievance commission filed a petition for disciplinary or remedial action against attorney, alleging that attorney violated rules of professional conduct in connection with his relationship with his ex-girlfriend. The trial court found, among other things, that there was no attorney-client relationship between attorney and ex-girlfriend. This court overruled commission's exception to that finding, noting that, in her deposition testimony, ex-girlfriend made it clear that she never intended for attorney to provide her with legal services, and that the trial court specifically found that neither attorney

nor ex-girlfriend, at any point in time, acted as if, or operated under the impression that an attorney-client relationship existed. Attorney Grievance Com'n of Maryland v. Shoup, 410 Md. 462, 979 A.2d 120, 136.

Md.2009. Com. (h) cit. but dist. and cit. in case cit. in disc. After a private attorney hired by defendant failed to appear on the day of trial and defendant decided to proceed pro se rather than being represented by attorney's law partner, a jury found defendant guilty of first-degree burglary. The court of appeals affirmed. Reversing, this court held, inter alia, that the trial court erred in concluding that defendant waived his right to an attorney and voluntarily elected to represent himself; while members of a law firm were sometimes treated as the same attorney for conflict-of-interests purposes, where, as here, the defendant exercised his right to select the private counsel of his choice, the defendant could not be forced to either accept an attorney that was not retained or to proceed pro se in the event that the chosen attorney did not appear on the date of the defendant's trial. Gonzales v. State, 408 Md. 515, 970 A.2d 908, 914, 920.

Md.2008. Subsec. (1)(b) quot. in sup. After state attorney grievance commission filed in this court a petition for discipline or remedial action against attorney, and a trial court hearing the case at this court's direction issued findings and conclusions, commission recommended a reprimand as the appropriate sanction. Agreeing that reprimand was the appropriate sanction, this court held that there was no inconsistency between the trial court's finding that attorney failed to communicate the scope of his representation of client at removal proceedings in Immigration Court in violation of state rules of professional conduct with its finding that no attorney-client relationship existed in respect to those proceedings; no attorney-client relationship existed with respect to the removal proceedings by clear and convincing evidence, because there was scant evidence that client manifested to attorney his intent that attorney provide him with legal services in connection with those proceedings. Attorney Grievance Com'n v. Akpan, 405 Md. 277, 950 A.2d 820, 822-823.

Md.2008. Subsec. (1)(b) quot. in case quot. in sup. Attorney grievance commission filed a petition for disciplinary action against attorney in connection with her representation of six former clients. After referral, the trial court made findings of fact and conclusions of law, culminating in a determination of numerous rules violations. Ordering disbarment, this court rejected attorney's claim that her attorney-client relationship with one of her clients did not begin until client signed the retainer agreement. The court concluded that client clearly manifested her intent to have attorney provide her with legal representation several months earlier when she handed over to attorney the documents and papers necessary to the representation and remitted a retainer fee, and that attorney's acceptance of the papers and fees manifested her intent to provide legal representation to client. Attorney Grievance Com'n of Maryland v. Kreamer, 404 Md. 282, 946 A.2d 500, 521.

Md.2007. Quot. in case quot. in disc. Attorney Grievance Commission filed a petition for disciplinary action against attorney, alleging violations of the rules of professional conduct in connection with his transactions involving a business associate. The trial court found that attorney falsely stated during a deposition in his personal-bankruptcy case that he was associate's attorney, and later invoked the attorney-client privilege in that same deposition to refuse to answer questions as to whether associate loaned him money. Ordering attorney disbarred, this court concluded that attorney knowingly testified falsely under oath that an attorney-client relationship existed when none was ever formed. The court found nothing to substantiate attorney's affirmative defense that business associate reasonably believed him to be his attorney; attorney had never previously represented associate, and attorney formed his limited-liability corporation as part of a self-interested business transaction, rather than as a mere agent for associate. Attorney Grievance Com'n of Maryland v. Siskind, 401 Md. 41, 930 A.2d 328, 346.

Md.2006. Adopted in case quot. in sup. After witness in a criminal trial invoked his Fifth Amendment right against self-incrimination and refused to testify, the trial court imposed on witness a five-month sentence for direct criminal contempt. The court of special appeals determined that the trial court made an adequate independent determination of the validity of witness's Fifth Amendment invocation. This court reversed and remanded with directions to dismiss the contempt action, holding that witness was deprived of his Sixth Amendment right to effective assistance of counsel when he was held in contempt based on his counsel's unauthorized disclosure of privileged information regarding the nature of his advice to witness and his opinion as to the applicability of the Fifth Amendment privilege. The court stated that an attorney-client privilege existed when witness and counsel conferred about the validity of witness's assertion of his Fifth Amendment right. Smith v. State, 394 Md. 184, 905 A.2d 315, 325.

Md.2003. Quot. in sup., com. (e) quot. in sup. Attorney Grievance Commission filed petition for disciplinary action against attorney who was named personal representative and sole legatee in will prepared by attorney for client, alleging violations of Maryland Rules of Professional Conduct. Hearing judge held that attorney violated Rule 1.8(c). This court overruled attorney's

exceptions, concluding that hearing judge's finding that attorney-client relationship existed when client's will was created was supported by clear and convincing evidence. Attorney-client relationship could arise by implication from client's reasonable expectation of legal representation and attorney's failure to dispel expectation. Here, attorney had done legal work for client before, client sought attorney's advice and assistance for matter within attorney's professional competence, and attorney told police following discovery of client's remains that he was client's attorney. Attorney Grievance Com'n of Maryland v. Brooke, 374 Md. 155, 821 A.2d 414, 425.

Md.Spec.App.

Md.Spec.App.2014. Subsec. (1)(b) quot. in case quot. in sup. Assignee of the fee interests of an attorney in several settlements that had not yet been disbursed sought judicial review of the decision of the Trustees of the Client Protection Fund of the Bar of Maryland (Fund) to deny its claims for reimbursement of the amounts allegedly owed to it under the assignment agreements, after attorney failed to pay assignee its assigned interests and was later disbarred. The trial court affirmed Fund's determination. Affirming, this court held, inter alia, that assignee lacked standing to make claims for compensation arising out of its assignment agreements with attorney, because there was no attorney—client relationship between them. Pointing to the test set out in Restatement Third of the Law Governing Lawyers § 14, the court reasoned that assignee made no manifestations in the assignment agreements that it intended for attorney to provide legal services to it. American Asset Finance, LLC v. Trustees of Client Protection Fund of Bar of Maryland, 216 Md.App. 306, 86 A.3d 73, 80.

Md.Spec.App.2013. Cit. in ftn., adopted in case cit. in sup. and quot. in ftn. Former husband moved to set aside separation agreements that he had entered into with former wife without the advice of independent legal counsel, alleging, among other things, that the agreements were invalid because there was a confidential relationship between husband and the attorney who represented wife in preparing the agreements. The trial court denied husband's motion. Affirming, this court held that, while the trial court erred in concluding that no attorney-client relationship existed between husband and attorney in connection with attorney's prior preparation of an immigration petition for husband, there was no confidential relationship between husband and attorney in connection with her preparation of the separation agreements. Attorney was not representing husband when she prepared the agreements; among other things, husband had no contact with attorney regarding the agreements, wife told husband that she would ask attorney to prepare the agreements for her, husband acknowledged both in an email to wife and in his motion to set aside that attorney did not represent him in preparing the agreements, and the agreements specifically advised husband to seek independent counsel. Shih Ping Li v. Tzu Lee, 210 Md.App. 73, 62 A.3d 212, 232.

Mass.

Mass.2011. Com. (h) quot. in sup. Named partner of a law firm petitioned for interlocutory relief from a trial court order denying firm's request to withdraw as counsel for a client who had entered into a contingent-fee agreement with firm and ordering named partner to enter an appearance on client's behalf. This court remanded for entry of a judgment vacating the order to the extent that it required named partner himself to appear on behalf of client, holding, among other things, that the language of the agreement was clear that the agreement was between client and firm, and not between client and named partner individually; the fact that named partner did not specify on the agreement that he was signing on behalf of firm did not render the agreement ambiguous. In re Kiley, 459 Mass. 645, 652, 947 N.E.2d 1, 7.

Mich.

Mich.2021. Com. (b) quot. in ftn.; coms. (c) and (e) cit. in ftn. Law office sued law firm and clients of law firm, alleging that defendants breached the terms of a referral agreement entered into between the parties, under which defendants would pay a portion of an underlying personal-injury judgment to plaintiff as compensation for plaintiff referring law firm to clients. The trial court entered judgment in part for plaintiff. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. This court affirmed in part, reversed in part, vacated in part, and remanded, holding, inter alia, that defendants bore the burden of persuasion in establishing their affirmative defense that the referral agreement was unenforceable because plaintiff did not have an attorney–client relationship with clients. Citing Restatement Third of the Law Governing Lawyers § 14, the court observed that whether clients and plaintiff intended to enter into such a relationship could be inferred from their actions and the circumstances. Law Offices of Jeffrey Sherbow, PC v. Fieger & Fieger, PC, 968 N.W.2d 367, 383, 384.

Minn.

Minn.2015. Cit. in treatise cit. in sup. In disciplinary proceedings, attorney was charged with violating the rules of professional conduct by, among other things, entering into an investment agreement with a client who was a member of his household. After a hearing, the referee found that attorney engaged in the majority of the alleged misconduct and recommended that attorney be suspended from the practice of law for 90 days. This court suspended attorney indefinitely with no right to petition for reinstatement for one year, holding, among other things, that the referee did not clearly err when he found that an attorney—client relationship existed between attorney and the client when they executed the investment agreement, because the client sought legal advice from attorney to help her close a conservatorship and invest her money, attorney provided her with legal advice and a power of attorney, and it was reasonable for her to have relied on attorney's legal advice. The court noted that, under Restatement Third of the Law Governing Lawyers § 14, it was incumbent on the lawyer to clarify any ambiguity as to whether an attorney—client relationship had been created. In re Disciplinary Action against Severson, 860 N.W.2d 658, 666.

Miss.

Miss.2016. Cit. in case quot. in sup. and cit. in ftn. (citing § 26 of T.D. No. 5, 1992, which is now § 14 of the Official Text) (erron. cit. as P.D. No. 6, 1990). Husband filed a legal-malpractice claim against lawyer and law firm, alleging wrongful conduct in connection with the administration of his late wife's estate. The trial court granted summary judgment for defendants. Reversing and remanding, this court held that there was a genuine issue of material fact concerning the existence of an attorney–client relationship between the parties. The court referred to the test set forth in the Restatement of the Law Governing Lawyers for determining when a relationship between a lawyer and client arose in pointing to evidence that defendants not only represented to plaintiff that they were his attorneys, but that they also made the same representation to the court in wife's probate proceedings.

Gibson v. Williams, Williams & Montgomery, P.A., 186 So.3d 836, 848.

Miss.2008. Subsecs. (1)(a) and (1)(b) and com. (e) quot. in sup. Inmate filed a complaint against attorney with the state bar, after attorney's paralegal, without attorney's knowledge or consent, corresponded with inmate on attorney's letterhead and worked on inmate's case. The complaint tribunal found, among other things, that attorney did not violate professional rules of conduct regarding representation of clients, because no attorney-client relationship existed between attorney and inmate. Affirming that portion of the decision, this court held, inter alia, that there was insufficient evidence to find that attorney, by her words, actions, or conduct, indicated that paralegal had authority to communicate her consent to undertake the representation of a client, and that no attorney-client relationship was established by attorney's failure to communicate her lack of consent to represent inmate. The court noted that attorney had no knowledge of inmate's case or paralegal's correspondence with inmate and, therefore, could not reasonably have known about inmate's reliance on her services. Mississippi Bar v. Thompson, 5 So.3d 330, 335, 336.

Miss.1991. Quot. in ftn. in sup. (quoting § 26, P.D. No. 6, 1990, which is now § 14). An inmate sued his attorney, alleging fraud, breach of trust, breach of contract, misrepresentation, and negligence and seeking compensatory and punitive damages. The inmate, who hired and paid the attorney to pursue an application for postconviction relief, claimed the attorney substantially failed to perform the duties incumbent upon him. The trial court dismissed the complaint on its face. This court reversed and remanded for further proceedings, holding that the inmate's payment of the attorney's fee formed an attorney-client relationship creating certain duties by the attorney toward the inmate, the nonperformance of which might entitle the inmate to relief. Singleton v. Stegall, 580 So.2d 1242, 1244.

Miss.App.

Miss.App.2009. Quot. in sup. Purchaser of real property sued seller's attorney, who prepared the deed and other documents for the transaction, alleging that defendant committed malpractice in failing to advise her of a mortgage lien on the property. The trial court granted summary judgment for defendant. Affirming, this court held, inter alia, that the evidence was insufficient to establish an attorney-client relationship between the parties. The court reasoned that plaintiff did not select attorney or direct him to prepare the documents, did not request or receive any legal advice from attorney or his staff, and paid the cost of the document preparation—which was undertaken by the seller—as part of the deal for the purchase of the property. Grandquest v. Estate of McFarland, 18 So.3d 324, 327.

Miss.App.2008. Quot. in case quot. in sup. (citing § 26 of Preliminary Draft No. 6, 1990, which is now § 14 of the Official Text). Lender sued borrower, seeking, among other things, payment under a settlement that had been entered as an agreed judgment in a prior action between the parties. The trial court ruled in favor of lender. Affirming, this court held, inter alia, that borrower was bound by the settlement even though he had not signed it, because the settlement had been signed by an attorney with whom borrower had an attorney-client relationship. The court noted that, while borrower, proceeding pro se, had answered the complaint and filed a counterclaim in the prior action, he subsequently authorized attorney to negotiate and enter into a settlement of the action with lender on his behalf, and attorney consented. Franklin v. BSL, Inc., 987 So.2d 1050, 1053.

Mo.App.

Mo.App.2011. Cit. in sup., cit. in ftn. Former wife petitioned for a writ of prohibition preventing the trial court from enforcing its order requiring law firm to withdraw from its representation of her in connection with former husband's motion to modify a dissolution decree. This court entered an order in prohibition, holding that husband did not have an attorney-client relationship with law firm. While husband had consulted with law firm prior to filing the dissolution action, he did not hire law firm to represent him, and thus was a former prospective client rather than a former client; in addition, husband did not testify that during his consultation with law firm he sought or received any legal advice or assistance from law firm, and there was no evidence that law firm intended to give legal advice and assistance to husband. State ex rel. Thompson v. Dueker, 346 S.W.3d 390, 394.

Nev.

Nev.2020. Com. (f) quot. in sup. In an action brought by state senators, among others, against senate majority leader and senate secretary for allegedly illegal legislative conduct, plaintiffs filed a motion to disqualify defense counsel on the ground that counsel, as the legislative counsel bureau legal division, had a concurrent conflict of interest with plaintiffs, because counsel represented all members of the state senate. The trial court denied defendants' petition for writ of mandamus. This court granted defendants' petition, finding that plaintiffs lacked standing to disqualify defense counsel, because counsel represented the legislature and not its members, counsel's defense of defendants as to their actions regarding the bills was ancillary to counsel's defense of the bills themselves, and plaintiffs were not acting on behalf of the legislature when challenging the bills. The dissent argued that the majority should have denied defendants' requested relief, because, under Restatement Third of the Law Governing Lawyers § 14, Comment *f*, whether defense counsel represented members of the legislature or only the legislature itself was a finding of fact, and the record did not indicate that the trial court abused its broad discretion in making its factual finding that defense counsel represented plaintiffs as well as defendants. State ex rel. Cannizzaro v. First Judicial District Court in and for County of Carson City, 466 P.3d 529, 535.

Nev.2005. Com. (f) cit. in ftn. in sup. Lender's assignees sued guarantors of bankrupt borrower, seeking to collect on personal guarantees. The trial court granted plaintiffs' motion to disqualify defendants' counsel. This court denied defendants' petition for a writ of mandamus, holding, inter alia, that the trial court did not abuse its discretion by concluding that attorney had previously represented assignees' affiliates in a substantially related matter, and, given that lender and assignees were affiliates' successors in interest, that assignees were attorney's former clients. The court noted that, although a lawyer representing a corporate entity generally represented only the entity itself, the inquiry into an attorney-client relationship was very fact-specific, and, in certain situations, courts had found a sufficient connection to other persons or entities to warrant the lawyer's disqualification. Waid v. Eighth Judicial District Court, 121 Nev. 605, 119 P.3d 1219, 1223.

N.H.

N.H.2009. Com. (c) cit. in sup. Professional Conduct Committee filed a petition recommending that attorney be disbarred. Ordering that attorney be suspended for two years, this court held that attorney who represented ward in connection with conservatorship of ward's estate violated conduct rule barring representations that were directly adverse to another client when he also represented ward's wife and conservator of ward's estate in their pursuit of a limited guardianship of ward for medical purposes. The court concluded that sufficient evidence existed that attorney formed attorney-client relationships with ward's conservator and wife, who consulted with attorney regarding the guardianship proceeding; consultation with the intent of seeking legal advice was the fundamental basis of the attorney-client relationship. In re Wyatt's Case, 159 N.H. 285, 982 A.2d 396, 409.

N.J.Super.App.Div.

N.J.Super.App.Div.2007. Cit. in ftn., com. (f) quot. in sup. Daughter who was executor/cobeneficiary of her mother's estate brought, along with her cobeneficiary sisters and estate, action for legal malpractice against attorney and law firm for allegedly giving daughter tax advice that resulted in large tax liability for each of the individual plaintiffs. Reversing as to daughter, this court held, inter alia, that defendants failed to clearly define the scope of their representation of daughter, and that daughter reasonably could have expected to be represented both as an individual and as executor. The court pointed to the wording of the retainer agreement and the fact that defendants did not expressly advise daughter that their representation was limited to her duties and responsibilities as an executor. Estate of Albanese v. Lolio, 393 N.J.Super. 355, 375, 923 A.2d 325, 337, 338.

N.J.Super.

N.J.Super.1999. Quot. in disc. (citing § 26, Prop. Final Draft No. 1, 1996, which is now § 14). State moved to disqualify murder defendant's law firm on the ground that firm had an ongoing professional relationship with the lead detective in the case, for whom it had provided representation in an unrelated workers' compensation matter. The trial court denied the motion. Affirming, this court held that detective became firm's former client once a final judgment was entered in the compensation proceedings, following which neither party undertook to reestablish the attorney-client relationship, and that firm's representation of defendant in the criminal case would not create an appearance of impropriety. State v. Bruno, 323 N.J.Super. 322, 732 A.2d 1136, 1142.

N.J.Super.1997. Coms. (a) and (e) cit. in sup., com. (h) quot. in sup. (citing § 26, Proposed Final Draft No. 1, 1996, which is now § 14). When an attorney let a statute of limitations run after he was retained to represent a husband and wife in a personal injury action, the clients sued the attorney and the attorney's former law firm for legal malpractice. The trial court granted the law firm summary judgment; this court reversed and remanded, holding that fact issues existed as to whether the law firm was liable for the attorney's malpractice. Plaintiffs made a sufficient showing that the firm became their counsel by virtue of both the retainer agreement and the fact that the attorney had at least apparent authority to enter into such agreements on the firm's behalf. Although the firm did not know of the clients' case and for that reason failed to notify plaintiffs that its relationship with the attorney was terminated, the retainer agreement referred to the firm as the firm retained. Furthermore, evidence of the firm's role in the attorney's cases and its entitlement to a share of the proceeds of any recovery obtained by the attorney was not developed, nor did the court know what the firm did to assure knowledge of, and proper control over, cases retained by the attorney as “of counsel” to the firm. Staron v. Weinstein, 305 N.J.Super. 236, 701 A.2d 1325, 1327, 1328.

N.J.Super.1996. Quot. in sup., illus. 1 to com. (e) quot. in sup. (citing § 26, Proposed Final Draft, 1996, which is now § 14). A female state employee, represented by a New Jersey law firm, sued the Speaker of the New Jersey Assembly for sexual harassment during the period from July 1994 to October 1995. In March 1993, an attorney in the same law firm, at the Speaker's request, agreed to undertake an investigation of alleged sexual harassment of State employees in the Office of Legislative Services. Trial court found that the attorney's undertaking created an appearance of impropriety and entered an order disqualifying the attorney and his law firm from representing the state employee in her lawsuit. This court affirmed the order of disqualification, holding that under the Rules of Professional Conduct both an actual conflict of interest and an appearance of a conflict of interest were present. The court determined that an attorney-client relationship was present between the attorney and the State, because even though the attorney was not ultimately retained by the State, he was consulted to conduct an investigation of sexual harassment of employees in a State office, he agreed to undertake that investigation, and he received confidential information and the Speaker's views on the subject of sexual harassment of State employees and how the State government was responding to the problem. Herbert v. Haytaian, 292 N.J.Super. 426, 678 A.2d 1183, 1188.

N.Y.

N.Y.2009. Com. (f) quot. in disc. Absent class member—i.e., class member who was not a named party—in a federal securities class action brought a special proceeding seeking a judgment directing law firms to turn over their files related to their representation of plaintiff and other class members in their prosecution of the class actions. The trial court granted plaintiff's petition; the appellate division reversed. Affirming, this court held that plaintiff, unlike a represented party in traditional individual litigation, did not enjoy a presumptive right of access to law firms' case files upon the representation's termination; moreover, plaintiff, who long ago had been unable to convince a federal district court that anything in 23 boxes of documents

he already had been granted suggested fraud, did not make an adequate showing to compel law firms to produce their files, in particular, the firms' work product and analysis relating to the class actions. Wyly v. Milberg Weiss Bershad & Schulman, LLP, 12 N.Y.3d 400, 410-411, 880 N.Y.S.2d 898, 908 N.E.2d 888, 895.

N.D.

N.D.2003. Com. (a) cit. in sup. Hearing panel recommended that attorney be suspended from practice of law for one year and pay costs. Attorney had threatened the father of his fiancée's child that, if father did not sign document seeking his consent to discuss child-visitation rights outside of his lawyer's presence, father would not receive visitation with his child that night. Father refused to sign and was denied visitation. This court adopted panel's recommendations, concluding that there was clear and convincing evidence that attorney violated state rules of professional conduct. The court determined that attorney had attorney-client relationship with his fiancée when he spoke to father, because attorney implied an attorney-client relationship when he inserted himself into the dispute between father and fiancée and acted with apparent authority. In re Application for Disciplinary Action Against Hoffman, 2003 ND 161, 670 N.W.2d 500, 504.

Ohio.

Ohio.2011. Cit. in sup. Nonprofit corporation brought a legal-malpractice action against attorney and law firm that were retained by a dissident member of corporation's board of trustees in his attempt to regain control of corporation, alleging that defendants had breached their obligations as attorneys and had negligently represented that a quorum was present at a board meeting during which dissident member removed opposing members from the board. The trial court granted summary judgment for defendants; the court of appeals reversed. Reversing, this court held that the malpractice claim asserted by plaintiff failed because there was no evidence that an attorney-client relationship existed between it and defendants. New Destiny Treatment Ctr., Inc. v. Wheeler, 129 Ohio St.3d 39, 44, 2011-Ohio-2266, 950 N.E.2d 157, 162.

Ohio App.

Ohio App.2022. Cit. in sup., cit. in case cit. in sup. Cotrustee, who was the manager of a family limited-liability company and a purported beneficiary of the family trust, brought a malpractice claim against attorneys who prepared settlor's estate documents. The trial court granted defendants' motion for summary judgment. This court affirmed, holding that plaintiff lacked standing to bring a legal-malpractice claim against defendants, because there was no attorney–client relationship between the parties. Citing Restatement Third of the Law Governing Lawyers § 14, the court explained that there was no express relationship between the parties, because plaintiff did not sign an engagement letter with defendants, and defendants' represention of the limited-liability company did not place the parties in a relationship based solely on plaintiff's position as the company's manager; furthermore, the fact that defendants wrote legal memoranda to plaintiff, her siblings, and settlor, in which defendants discussed settlor's estate plans, did not create an implied relationship between the parties. Meehan v. Smith, 192 N.E.3d 1214, 1221, 1222.

Tenn.

Tenn.2014. Quot. in sup. Defendant who was convicted of second-degree murder appealed, claiming in part that the trial court erred in ruling that the attorney—client privilege did not apply to communications between defendant and an attorney she spoke to at the crime scene. The court of appeals found that that defendant had no reasonable belief or expectation that attorney had assented to the formation of an attorney—client relationship. This court vacated the conviction on other grounds, but nevertheless held that the attorney—client privilege was inapplicable in this instance. The court pointed out that, as described in Restatement Third of The Law Governing Lawyers § 14, an attorney—client relationship arose when a person sought and received legal advice from an attorney in circumstances in which a reasonable person would have relied on such advice. In this case, attorney told defendant numerous times that she was not acting as her attorney and was present at the scene only because of her friendship with the victim. State v. Jackson, 444 S.W.3d 554, 599-600.

Tex.App.

Tex.App.2008. Cit. and quot. in disc. Investors in start-up venture sued venture's lawyer for breach of fiduciary duty, among other claims, alleging that defendant failed to incorporate the terms of investors' preliminary agreement, without changing them, into the final, signed partnership agreement with venture. The trial court entered summary judgment against plaintiffs. Affirming, this court held, inter alia, that the evidence did not raise a fact question concerning the existence of an attorney-client relationship between the parties. The court concluded that, while attorney-client relationships could arise by implication, determination of whether a contract could be implied required use of an objective standard—what the parties said and did—not their unstated subjective beliefs; here, there was no showing that plaintiffs ever manifested their intent that defendant provide legal services to them or that defendant reasonably should have known that plaintiffs relied on him to provide them with legal services. Span Enterprises v. Wood, 274 S.W.3d 854, 857, 858.

Tex.App.2003. Com. (e) cit. in disc. Law firms and lawyers who had entered into contingency-fee agreement with client and represented client in its trade-secrets claim moved to confirm arbitration award in dispute over attorneys' fees. Trial court confirmed arbitration award in favor of law firms, and entered summary judgment for lawyers. Appellate court affirmed in part, reversed in part, and remanded. On rehearing, this court affirmed trial court's judgment, holding, inter alia, that because evidence did not conclusively establish existence of an attorney-client relationship between lawyers and client before fee agreement was signed, whether such a relationship existed was a question of fact for arbitrators. The arbitrators' finding that lawyers did not represent client during negotiation of fee agreement, and thus did not owe client any fiduciary duties prior to execution of fee agreement, was not in manifest disregard of the law. Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 255.

Utah

Utah, 2005. Cit. and quot. in disc., com. (g) cit. and quot. in disc. and cit. in ftn. After physician's medical-malpractice insurer sought a declaration that it had no duty to defend absent physician in a malpractice suit against him, patient moved for appointment of counsel to represent physician's interests. The trial court appointed an attorney, who petitioned this court for extraordinary relief. Affirming, this court held that the trial court did not abuse its discretion when it appointed counsel for an absent, nonindigent civil litigant, and that, despite ethical concerns raised by physician's absence, such as the lack of consent by physician to the lawyer-client relationship, good-faith compliance with the appointment order provided attorney with a safe harbor in which to be free from exposure to disciplinary action. The court concluded that physician's consent to the representation could be fairly implied. Burke v. Lewis, 2005 UT 44, 122 P.3d 533, 541, 542.

Va.

Va.2011. Quot. in sup. County citizens petitioned for the removal of four members of the county board of supervisors. The trial court entered an order of nonsuit and imposed sanctions against petitioners. This court reversed the trial court's judgment imposing sanctions, holding that the trial court erred in sanctioning petitioners, because they were not the true parties to the removal action; the only parties to the action were the commonwealth, as the moving party, and supervisors, as the responding parties. The court noted that a petitioner in a removal action was analogous to a victim in a criminal proceeding, since, in both cases, the commonwealth's attorney did not owe the petitioner or victim a professional duty. Johnson v. Woodard, 281 Va. 403, 707 S.E.2d 325, 329.

N.M.C.C.A.

N.M.C.C.A.2020. Com. (g) quot. in ftn. Servicemember pleaded to and was found guilty of using cocaine. The trial court sentenced him to a term of confinement and a bad-conduct discharge, which was suspended and later remitted. After the adjournment of the court-martial, servicemember was administratively separated from the military while his mandatory appeal was pending. In response to a novel pleading filed by appointed appellate counsel for servicemember, this court held that servicemember was entitled to continued appellate representation by counsel, notwithstanding counsel's inability, despite the exercise of due diligence, to locate or communicate with servicemember. The court cited Restatement Third of the Law Governing Lawyers § 14 in support of its conclusion that counsel was ethically required to go forward with the representation absent affirmative indication that servicemember wished to waive or withdraw his appeal. United States v. Harper, 80 M.J. 540, 546.

End of Document

Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 719 (2d ed.)

Dobbs' Law of Torts | May 2023 Update
Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick

Part VII. Dignitary and Economic Torts

Subpart C. Economic Torts

Division 3. Particular Common Law and Equitable Torts

Chapter 55. Legal Malpractice

Topic A. Malpractice in Civil Matters: The Prima Facie Case

§ 719. Duty: establishing a client-lawyer relationship

Where the plaintiff has signed a retainer agreement with the lawyer, and the suit is over legal work done pursuant to that agreement, the lawyer clearly owes the client a duty of care. While most client-lawyer relationships are formed by express agreement, [1] such a relationship may also arise by implication. In those situations and some others, the existence of a duty of care is indeed a live issue: [2] without a client-lawyer relationship, there is rarely a duty, and without a duty, there can be no malpractice liability. [2.05]

Proving a relationship by implication. A client-lawyer relationship may be implied by circumstances when a person manifests to the lawyer his authorization for the lawyer to act on his behalf, and the lawyer manifests his acceptance of that authorization. [3] The lawyer may manifest this acceptance explicitly, or simply by failing to manifest such consent where she knows or reasonably should know that the would-be client is relying reasonably on the lawyer to provide legal services. [4] In essence, then, courts are looking for an implied contract between client and lawyer for the lawyer to perform legal work. [5] Many courts have said that neither a unilateral nor an unreasonable belief on the putative client's part that the lawyer is representing her will suffice to create a relationship. [6] Indeed, many require that there is first some "concrete communication by the plaintiff requesting that the attorney represent him." [7] Courts agree also that neither the payment of fees nor the signing of a retainer agreement is necessary, [8] although such facts are not irrelevant to the inquiry as to whether a client-lawyer relationship has been formed. [9] While the existence of a duty is a question of law for the court, a number of courts leave it to the jury to resolve any contested issues of fact on this issue. [10] Thus, in many of the cases in which the existence of an implied client-lawyer relationship is in question, the lawyer will be unable to escape on summary judgment. [11]

Representing entities. Issues of client identity sometimes arise when a lawyer has been retained to represent a legal entity, such as a corporation. Although the lawyer in such a situation is giving legal advice to the entity through the entity's constituents who are acting within that capacity, the lawyer's client is the entity itself, not those individuals. [12] Thus a lawyer representing an entity could be sued for legal malpractice by the entity itself, but not by its CEO or its General Counsel, let alone a lower-level employee or shareholders. [13] A lawyer may also represent constituents within the organization, however, either by express agreement or by implication. [14] In that case both the entity and those constituents would be owed a duty enforceable in a legal malpractice action.

Third-party fee payors. The rule that the payment of a lawyer's fee is not necessary to create a client-lawyer relationship has a flip side, also: The mere payment of a fee does not create such a relationship. Thus where a lawyer is retained to represent

a person, but another person or entity is paying the fee, the fee payor is not a client based on that payment alone,[15] and thus would not be owed a duty enforceable in a legal malpractice action absent an express agreement to the contrary, or other facts that would create an implied relationship.[16]

Representing insured persons. Traditionally, a lawyer retained and paid by an insurance company to provide representation to an insured person was thereby thrust into a "tripartite relationship" in which both the insurer and the insured were dual clients.[17] But beginning with a 1991 decision of the Michigan Supreme Court,[18] a growing number of jurisdictions have held that the insured is the *only* client.[19] Under either approach, the insured person would have standing to sue the lawyer for malpractice, even where the insurer was paying the bills. Under the dual-client approach the insurer would be similarly situated. Even under the insured-as-sole-client view, however, the insurer may be able to sue the lawyer for legal malpractice if the retainer agreement makes the insurer a client, or if a relationship arises by implication, as where the lawyer has given legal advice directly to the insurer.[20] Further, a few courts (including some in the insured-as-sole-client camp) have allowed the insurer to pursue a malpractice claim as its insured's equitable subrogee[21] against a lawyer whose malpractice in the insured's case caused the insurer a loss it would not otherwise have suffered.[22] In one recent case, answering a certified question, the court held that an insurer may bring a direct malpractice action against counsel hired to represent its insured, based on traditional negligence principles.[23] As the court explained, the insurer may recover upon proof, by clear and convincing evidence, that the lawyer's breach of duty to the insured client was a proximate cause of damages to the insurer, as where the lawyer has caused "a larger settlement or judgment in a case in which the insurer must pay."[24]

Footnotes

1 Where this is the case, the agreement itself usually specifies the basic duties owed by the lawyer, and the scope of the lawyer's undertaking. 1 MALLEN & SMITH, LEGAL MALPRACTICE§ 8:2 (2009 ed.).

2 See Restatement of the Law Governing Lawyers § 14, Introductory Note (2000) ("A fundamental distinction is involved between clients, to whom lawyers owe many duties, and nonclients, to whom lawyers owe few duties.").

2.05 See, e.g., Great American E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A., 100 So. 3d 420 (Miss. 2012) (excess insurer could not maintain a direct claim of legal malpractice against the lawyers that represented the insured).

3 See Kehoe v. Saltarelli, 337 Ill.App.3d 669, 786 N.E.2d 605, 272 Ill.Dec. 66 (2003); Miller v. Mooney, 431 Mass. 57, 725 N.E.2d 545 (2000); Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, _ So.3d _, 2010 WL 2305817 (Miss. 2010); Restatement of the Law Governing Lawyers § 14(1) (2000).

4 See Miller v. Mooney, 431 Mass. 57, 725 N.E.2d 545 (2000) (plaintiff may establish lawyer's implied consent to form the relationship "by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it"); In re Disciplinary Action Against McKechnie, 656 N.W.2d 661 (N.D. 2003) (client-lawyer relationship may arise "when a putative client reasonably believes that a particular lawyer is representing him and the lawyer does not disabuse the individual of this belief"); Restatement of the Law Governing Lawyers § 14(1)(b) (2000).

5 See Bryant v. Robledo, 938 So.2d 413 (Ala.App. 2005); Zenith Ins. Co. v. Cozen O'Connor, 148 Cal.App.4th 998, 55 Cal.Rptr.3d 911 (2007); Edmonds v. Williamson, 13 So.3d 1283 (Miss. 2009). See also 23 RICHARD A. LORD, WILLISTON ON CONTRACTS § 62:3 (4th ed. 2010).

6 See, e.g., Mansur v. Podhurst Orseck, P.A., 994 So.2d 435 (Fla. Dist. Ct. App. 2008); Cleveland Campers, Inc. v. McCormack, 280 Ga.App. 900, 635 S.E.2d 274 (2006); H-D Transport v. Pogue, 160 Idaho 428, 374 P.3d 591 (2016); Bloom v. Hensel, 59 A.D.3d 1026, 872 N.Y.S.2d 776 (2009); Rechberger v. Scolaro, Shulman, Cohen, Fetter & Burstein, P.C., 45 A.D.3d 1453, 848 N.Y.S.2d 459 (2007); Meyer v. Mulligan, 889 P.2d 509 (Wyo. 1995).

7 International Strategies Group, Ltd. v. Greenberg Traurig, LLP, 482 F.3d 1 (1st Cir. 2007) (applying Massachusetts law).

8 See Warren v. Williams, 313 Ill.App.3d 450, 730 N.E.2d 512, 246 Ill.Dec. 487 (2000) (city attorney who entered an appearance for a police officer who knew nothing of the suit created an attorney-client relationship with the officer); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (consultation about a potential medical malpractice claim; seeking and receiving advice when reasonable person would rely upon it is enough); Edmonds v. Williamson, 13 So.3d 1283 (Miss. 2009) (husband of injured party in products liability case neither signed a retainer nor paid a fee, but accepted lawyer's services, forming client-lawyer relationship); McVaney v. Baird, Holm, McEachen, Pederson, Hamann & Strasheim, 237 Neb. 451, 466 N.W.2d 499 (1991); George v. Caton, 93 N.M. 370, 376, 600 P.2d 822, 828 (1979).

9 See Cleveland Campers, Inc. v. McCormack, 280 Ga.App. 900, 635 S.E.2d 174 (2006).

10 E.g., Credit Union Central Falls v. Groff, 966 A.2d 1262 (R.I. 2009); Bangs v. Schroth, 201 P.3d 442 (Wyo. 2009). See also 4 MALLEN & SMITH, LEGAL MALPRACTICE§ 35:21 (2009 ed.) (“There is diversity whether the existence of the relationship is an issue of fact or law.”).

11 See, e.g., Dixon Ticonderoga Co. v. Estate of O'Connor, 248 F.3d 151 (3d Cir. 2001) (on the evidence before the court, it was a question of fact whether lawyer agreed to pursue claim against another lawyer or knew or should have known that client thought he was agreeing); Mansur v. Podhurst Orseck, P.A., 994 So.2d 435 (Fla. Dist. Ct. App. 2008) (reversing summary judgment for lawyers, finding triable issue of fact on whether plaintiffs were clients of the defendant lawyers); Bloom v. Hensel, 59 A.D.3d 1026, 872 N.Y.S.2d 776 (2009) (same).

12 ABA Model Rule of Professional Conduct 1.13(a) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).

13 E.g., Reynolds v. Henderson & Lyman, 903 F.3d 693 (7th Cir. 2018) (LLCs themselves were clients, but owner of LLCs was not, and was not an “intended beneficiary,” either, affirming summary judgment for law firm on owner's legal malpractice claim); In re Banks, 283 Or. 459, 583 P.2d 284 (1978); Bovee v. Gravel, 174 Vt. 486, 811 A.2d 137 (2002).

14 See Linegar v. DLA Piper LLP (US), 495 S.W.3d 276 (Tex. 2016) (allegation by stockholder that lawyers for the corporation advised him in his individual capacity, and that their negligent advice cost him money, was sufficient to give stockholder standing to sue firm for legal malpractice). ABA Model Rule of Professional Conduct 1.13(g) (but cautioning lawyers that such dual representation requires compliance with rules on conflicts of interest).

A lawyer who represents a constituent of an organization does not, by virtue of that relationship alone, also represent the organization itself. See New Destiny Treatment Ctr., Inc. v. Wheeler, 129 Ohio St. 3d 39, 2011, 2011-Ohio-2266, 950 N.E.2d 157 (2011) (no client-lawyer relationship existed between a

nonprofit organization and a lawyer who had represented a dissenting board member in an underlying dispute over control of the corporation, and thus corporation could not sue the lawyer and his law firm for alleged malpractice; dissenting board member had no authority to hire a lawyer for the corporation and corporation never ratified the hiring of the lawyer).

15 See, e.g., Helms v. Helms, 317 Ark. 143, 875 S.W.2d 849 (1994) (payor of wife's fees in divorce action); Fox v. White, 215 S.W.3d 257 (Mo.App. 2007) (stepfather who paid legal fees on behalf of stepson); Krug v. Krug, 179 A.D.2d 1041, 580 N.Y.S.2d 599 (1992) (man who paid fees for the representation of the woman he later married, in her divorce proceeding); Restatement of the Law Governing Lawyers § 134 (2000).

16 See Fox v. White, 215 S.W.3d 257 (Mo.App. 2007) (affirming dismissal of malpractice suit by third-party fee payor, holding that lawyer owed plaintiff no duty of care).

17 See Charles Silver, Does Insurance Counsel Represent the Company or the Insured?, 72 TEX. L. REV. 1583, 1586 (1994); Charles Silver & Kent Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 DUKE L.J. 255, 273–75 (1995); 4 MALLEN & SMITH, LEGAL MALPRACTICE§ 30:6 (2009 ed.) (strongly endorsing this as the best view).

Many courts continue to adhere to this position. See, e.g., Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. County of Clark, 123 Nev. 44, 152 P.3d 737 (2007); Nationwide Mut. Fire Ins. Co. v. Bourlon, 172 N.C. App. 595, 617 S.E.2d 40 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E.,2d 779 (2006); Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603 (Utah 2003).

18 Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294.

19 See, e.g., Paradigm Ins. Co. v. Langerman Law Offices, P.A., 200 Ariz. 146, 24 P.3d 593 (2001); State Farm Fire and Cas. Co. v. Weiss, 194 P.3d 1063 (Colo. App. 2008); Higgins v. Karp, 239 Conn. 802, 687 A.2d 539 (1997); Querrey & Harrow, Ltd. v. Transcontinental Ins. Co., 861 N.E.2d 719 (Ind. App. 2007); Pine Island Farmers Coop v. Erstad & Reimer, P.A., 649 N.W.2d 444 (Minn. 2002); In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 299 Mont. 321, 2 P.3d 806 (2000); Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 419 A.2d 417 (1980); Swiss Reinsurance America Corp. v. Roetzel & Andress, 163 Ohio App.3d 336, 837 N.E.2d 1215 (2005); State Farm Mutual Auto Ins. Co. v. Traver, 980 S.W.2d 625 (Tex. 1998); Barefield v. DPIC Companies, Inc., 215 W.Va. 544, 600 S.E.2d 256 (2004). Cf. ABA Formal Op. 282 (1950) (stating that the lawyer in such a situation "shall represent the insured as his client with undivided fidelity"); ABA Formal Op. 01-421 (2001) (lawyer retained and paid by insurer must exercise "independent professional judgment in representing an insured" and must not allow the insurer to interfere with that judgment); Restatement of the Law Governing Lawyers § 134, cmt. f (2000) (insured person is a client; insurer is not a client "simply by the fact that it designates the lawyer").

20 See, e.g., Paradigm Ins. Co. v. Langerman, 200 Ariz. 146, 24 P.3d 593 (2001); Pine Island Farmers Coop v. Erstad & Reimer, P.A., 649 N.W.2d 2002). The Paradigm court also held that a lawyer owes a duty to the insurer, even if the insurer is nonclient, because the lawyer's services are ordinarily intended to benefit both the insured and the insurer. Cf. Restatement of the Law Governing Lawyers § 51, cmt. g (2000) (even if the insurer is not a client, "[r]ecognizing that the lawyer owes a duty to the insurer promotes enforcement of the lawyer's obligations to the insured"). On suits against lawyers by non-clients, see § 725.

A lawyer for an insured does not create a client-lawyer with the insurer merely by sharing "courtesy copies" of its settlement evaluations. Great American E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A., 100 So. 3d 420 (Miss. 2012).

21 See Great American E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A., 100 So. 3d 420 (Miss. 2012) (excess insurer had equitable subrogation rights to pursue the same legal claim that the client-insured could have pursued, even though excess insurer could not pursue a direct claim of legal malpractice on its own behalf). Equitable subrogation is based on the concept that equity should allow a legal claim in "every instance in which one party, not a mere volunteer, pays a debt for another, primarily liable, which in good conscience should have been paid by the latter." Querry & Harrow, Ltd. v. Transcon, 861 N.E.2d 719 (Ind. App.), *opinion adopted*, 885 N.E.2d 1235 (Ind. 2008) (but holding that equitable subrogation should not be allowed in this setting).

22 See, e.g., National Union Ins. Co. v. Dowd & Dowd, P.C., 2 F.Supp.2d 1013 (N.D. Ill. 1998); St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP, 379 F.Supp.2d 183 (D. Mass. 2005); Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 294 (1991); American Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480 (Tex. 1992); Most courts have rejected such a theory, however. See Dale Joseph Gilsinger, Annotation, Right of Insurer to Assert Equitable Subrogation Claim Against Attorney for Insured on Grounds of Professional Malpractice, 50 A.L.R.6th 53 (2009). The insurer who must pay the reasonable costs for its insured to retain independent counsel may seek reimbursement of fees determined to be unreasonable, on an unjust enrichment theory, directly from counsel. Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C., 61 Cal. 4th 988, 190 Cal. Rptr. 3d 599, 353 P.3d 319 (2015).

23 Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 426 S.C. 154, 826 S.E.2d 270 (2019).

24 Sentry Select Ins. Co., 426 S.C. 154.

End of Document

NEW HAMPSHIRE BAR ASSOCIATION

Duties to Prospective Clients

Ethics Committee Advisory Opinion #2009-10/01

ABSTRACT:

A lawyer must be careful when exposed to confidential information from a prospective client. If a lawyer is exposed to such confidential information, it may disqualify the lawyer from later representing an opposing party. This opinion outlines certain steps to avoid disqualifying the entire law firm from representing others with materially adverse interests in the matter.

ANNOTATIONS:

New Hampshire's Rules of Professional Conduct generally prohibit an attorney from using or revealing confidential information received from a prospective client, even if the lawyer declines to represent the party who contacted him. If a lawyer reviews information relayed in an electronic message that could be significantly harmful to its sender, he or she may be disqualified from later representing an opposing party. Further, unless the steps described in this article are followed, the entire law firm could be disqualified from representing others with materially adverse interests in the matter.

The internet has changed the practice of law in many ways, including the way people find lawyers to represent them. Law firms have employed different means to leverage these changes into more business, but the Ethics Committee advises lawyers and law firms in the State to consider carefully the implications of using their websites to invite members of the public to email the firms' attorneys.

INTRODUCTION:

Among the new and revised ethical rules adopted by the New Hampshire Supreme Court in 2007 is Rule 1.18, Duties to Prospective Clients.

Rule 1.18. Duties to Prospective Clients

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.

This rule clarifies the status of persons who seek representation but do not become firm clients. It recognizes that the confidential information they share with a lawyer, under certain circumstances, should be protected from disclosure by the consulted lawyer. Similarly, the prospective relationship, under the right circumstances, should preclude the lawyer, and perhaps the other lawyers in his or her law firm, from representing others with adverse interests. At the same time, Rule 1.18 seeks to protect current clients' right to counsel of their choice and avoid unnecessary firm disqualifications by permitting a law firm to screen a lawyer who has reviewed otherwise disqualifying confidential information.

When a law firm's website invites the public to send an email to one of the firm's lawyers, it is opening itself to potential obligations to prospective clients. Careful compliance with the requirements of Rule 1.18 can help law firms avoid any adverse consequences, but compliance efforts should begin well before a firm's attorney considers whether to open the email.

DISCUSSION:

I. Recognizing the Prospective Client

Prior to the adoption of Rule 1.18, the Rules of Professional Conduct did not explicitly address pre-representation communications. However, ethics opinions recognized that, even if the representation was never undertaken, communications by a prospective client seeking legal representation could be protected from disclosure if the prospect's expectation of confidentiality was reasonable. ABA Formal Ethics Op. 90-358 (1990). Before the advent of the information superhighway, law firms had an easier time controlling the flow of potentially disqualifying

information. Initial interviews with prospective clients were conducted in person or over the phone. Lawyers could more easily set the ground rules. They could control the prospective clients' expectations that the lawyer would or could maintain the confidentiality of any information disclosed during the initial consultation, and discourage the unilateral disclosure of compromising confidences by limiting disclosure to information needed to complete a conflicts check and confirm the lawyer's subject matter competence. The lawyer's control was compromised when communication came in the form of unsolicited mail, so pre-1.18 ethics opinions also recognized that a person shouldn't have the power to unilaterally bind a lawyer to maintain confidentiality. A willingness on the part of the lawyer to at least discuss the prospects for representation was an essential prerequisite to the obligation to protect the prospective client's confidences. A person's unilateral disclosure, without a reasonable expectation of confidentiality and a willingness on the part of the lawyer to consider representation, was unprotected. This is codified in Rule 1.18(a) and the accompanying comments where the Rule's drafters sought to prevent exploitation of Rule 1.18 to disqualify an adverse party's counsel of choice. The ABA's comments continue the "reasonable expectation" standard from the pre-Rule 1.18 regime. See ABA Model Rule 1.18, Comment 2 ("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, is not a 'prospective client' within the meaning of paragraph (a)."). It also strips "prospective client" status from those individuals who make disclosures for the purpose of disqualifying an attorney from participation in the matter, and those conducting a so-called "beauty contest" by making contemporaneous contact with numerous attorneys or law firms. Id. Sending an unsolicited email is a unilateral act. The information that a person puts into an unsolicited email should not trigger confidentiality obligations if a lawyer, with no expectation that the sender is seeking legal representation or disclosing confidences, opens the email. When the law firm's website invites a member of the public to contact one of the firm's lawyers in an email, however, any disclosure made in the email looks less unilateral. Current technology restricts the attorney's ability to manage expectations and the flow of information. The ABA's Model Rule 1.18 applies only to persons who have made disclosures in "discussions" and "consultation" with a lawyer and does not explicitly address the status of persons who send emails to a law firm via its website. New Hampshire's Rule 1.18 does not specifically address emails either, but it is broader than the ABA's model rule and covers any disclosure made in a good faith pursuit of legal representation. Moreover, the New Hampshire comments accompanying the Rule address this explicitly.

> In its version of these provisions, New Hampshire's rule eliminates the terminology of 'discussion' or 'consultation' 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.

Rule 1.18, New Hampshire Comment 1. Thus, a "prospective client" can be the person who merely "provides information to a lawyer . . . ," with or without discussion or consultation, and the lawyer who "has received and reviewed information from a prospective client . . ." is subject to confidentiality obligations and may be disqualified from representing an adverse party in the same or any substantially related matter.

Under Rule 1.18(b), a lawyer effectively demonstrates a willingness to consider representation, and thereby triggers prospective client obligations, by reviewing the information received from the prospective client.

II. Confidentiality Obligations Owed to the "Prospective Client"

A person who discloses information in an email sent to an attorney – in a good faith search for representation and with a reasonable expectation that the attorney is willing to discuss that possibility – becomes a "prospective client" under New Hampshire's Rule 1.18. Whether or not the attorney ultimately agrees to represent the prospective client, or even intended to consider it, confidentiality obligations attach once the attorney receives and reviews the information in the email. The attorney must treat the information received and reviewed as if the prospective client were a former client and in accordance with the permissions and proscriptions contained in Rule 1.9. Rule 1.18(b). Thus, a lawyer shall not use information relating to the prospective representation, "to the disadvantage of the former [or prospective] client," and shall not disclose such information, unless such disclosure or disadvantageous use is required or permitted under other Rules of Professional Conduct or when the information is "generally known. "In short, once an attorney receives and reviews confidential information in a prospective client's email, that information must be protected from disclosure as if it had been disclosed by any other client or former client.

III. Disqualification and Screening to Avoid Imputed Disqualification

Receipt and review of the confidential information disclosed in an email received from a prospective client can also create conflicts of interest with a lawyer's current and future clients. Prior to the adoption of Rule 1.18, there was no clear limitation on the consulting lawyer's ability to represent parties with interests adverse to the prospective client and could only be inferred. Thus, depending on how the rules were interpreted, the attorney as well as the rest of the attorneys in the firm, might be disqualified from representing the adverse party, even if the disqualifying communication was made to only one of the firm's members. Rule 1.18 clarifies the circumstances under which an attorney who has reviewed information disclosed by a prospective client is disqualified from representing other parties with materially adverse interests. In many ways, the lawyer's duty to avoid conflicts of interest with a prospective client is similar to the duty owed to former clients. The lawyer cannot represent someone else in the same or substantially related

matter if that person's interests are materially adverse to the prospective client's. In addition, any conflict can be waived by the prospective client. There are important distinctions, however, that take into account the prospective nature of the relationship formalized in Rule 1.18. Since there is no prior representation to trigger the duty, the conflict arises only if the lawyer received and reviewed information that could be significantly harmful to the prospective client. Knowledge of disqualifying information is not presumed from the prior prospective relationship the way it is from the relationship between a lawyer and a former client. In addition, because the lawyer's review of a prospective client's confidential information may have been fleeting and superficial, as compared to the lawyer's familiarity with the confidences of a current or former client, Rule 1.18(d) endorses reliance on screening procedures, in appropriate circumstances, to avoid imputed disqualification of the entire firm. This is a major departure from existing New Hampshire law on conflicts which recognized the effectiveness of a screen against imputed disqualification only when conflicts arose from the firm's association with lawyers formerly employed by the government. (Rule 1.11). Though the opportunity to screen an otherwise disqualified attorney helps protect clients' freedom to choose their own counsel, law firms cannot casually rely on after-the-fact screening procedures to limit their obligations to good faith prospective clients. Screening is available to avoid imputed disqualification only if the lawyer took reasonable measures to limit his review of information from the prospective client to that which was reasonably necessary to determine whether to offer representation. The firm, therefore, should maintain and reinforce clear procedures to be followed during initial interactions with potential clients so that its lawyers gather only that information needed to rule out any conflict with existing clients and determine whether the matter is one that the firm is willing to undertake. The firm's lawyers should obviously know to stop reviewing materials as soon as they discern that the information contained in them exceed these limits. Rule 1.0(k) defines "screening" as:

> the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

To be effective against imputed disqualification, in the context of the prospective client or the former government lawyer for that matter, any screen must be implemented in a timely fashion, or "as soon as practical after a lawyer or firm knows or reasonably should know that there is a need for screening." ABA Model Rule 1.0, Comment 10. The comments to Rule 1.0 provide further guidance to ensure implementation of an effective screen, including acknowledgment by the disqualified lawyer of the obligation not to communicate with respect to the matter, notice to the lawyers and staff working on the matter about the existence of the screen, denial of access by the screened lawyer to files or materials in the firm's possession that are related to the matter, and periodic reminders to all concerned. Furthermore, it is a precondition of any effective screening program that the disqualified lawyer may not be apportioned any part of the fee from the

engagement. Rule 1.18(d)(2)a. See also ABA Model Rule 1.18, Comment 7 ("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.").

Finally, the firm must promptly provide written notice to the prospective client of the firm's representation of the adverse party. Rule 1.18(d)(2)b. The Rule is silent as to the content of the written notice to be provided. The commentary accompanying the Rule provides that the notice should include a general description of the subject matter about which the lawyer was consulted, and the screening procedures employed. See ABA Model Rule 1.18, comment 8.

To protect its clients' rights to counsel of their choice, law firms should be alert to the risks posed by the messages in their lawyers' email inboxes. By exercising due care, lawyers can avoid exposure to disqualifying information. Momentary lapses, and even unavoidable contamination, are still correctable if the lawyer stops his or her review as soon as can be reasonably expected under the circumstances and alerts the other lawyers in the firm of the need to implement a timely screen.

IV. Informed Consent

Screening of a lawyer tainted by exposure to disqualifying information is not the only way Rule 1.18 balances the interests of prospective clients against the interests of others to retain their counsel of choice. The prospective client that never engages the lawyer is treated as a former client. Like any former client, a prospective client under Rule 1.18(d)(1) can grant effective consent to the representation of another by the attorney or law firm, even in the same (or a substantially related) matter about which the prospective client sought representation, and even if the information received and reviewed by the attorney could be significantly harmful. This consent must be "informed," as that term is defined in Rule 1.0(e), as to the material risks of and reasonably available alternatives to the proposed representation in order to be effective. Clearly, consent is not the favored method for accommodating the confidentiality and choice of counsel interests implicated by communications from prospective clients. However, the ABA comments to the Model Rule 1.18 provide that a lawyer may obtain a prospective client's prior written and informed consent as a precondition to consulting about potential representation.

> A lawyer may condition conversations 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. . . . 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.

ABA Model Rule 1.18, comment 5. The Ethics Committee of the Massachusetts Bar Association has also suggested that a lawyer could obtain informed consent electronically, and thereby avoid the loyalty and confidentiality obligations that would otherwise be owed to a prospective client who utilized a link found on the law firm's website to send an otherwise unsolicited email seeking legal representation.[1]

> Using readily available technology, the firm may require a prospective client to review and "click" his assent to terms of use before using an e-mail link. Such terms of use might include a provision that any information communicated before the firm agrees to represent the prospective client will not be treated as confidential. Or the terms of use could provide that receipt of information from a prospective client will not prevent the firm from representing someone else in the matter.

Massachusetts Opinion 2007-1, p. 5.[1] In theory, this reasserts the lawyer's ability to set conditions on the flow of information the way a lawyer can when talking to a potential client in person or over the telephone. In practice, however, a waiver of confidentiality designed to prevent disqualification may jeopardize the subsequent assertion of privilege over matters communicated by a prospective client.

In this context, consideration should be given to the decision in *Barton v. United States Dist. Ct.* for the Cent. Dist. of Cal., 410 F.3d 1104 (9th Cir. 2005). In that case, the law firm had posted a questionnaire on the internet to gather information about potential class members who might have claims arising from the use of a prescription medication. The plaintiffs had answered the questions before retaining the law firm to represent them in a class action. The district court ordered production of their answers in discovery. The appellate court blocked the disclosure, finding that, while the law firm carefully designed the questionnaire to avoid forming attorney-client relationships upon mere submission of answers, the disclaimer accompanying the questionnaire did not discuss confidentiality. The people who answered the questionnaire were treated as prospective clients whose disclosures were covered by the attorney-client privilege. The result in *Barton* may well have been different had the law firm used the kind of "clicked" waiver endorsed in the Massachusetts opinion to avoid imputed disqualification resulting from unilateral disclosures of confidential information by a prospective client.

New Hampshire, for its part, is a bit more skeptical of the effectiveness of consent to conflicts of interest that is sought and obtained before the actual consultation. Comment #3 to Rule 1.18 expresses concern about lawyers and law firms relying on this kind of prior informed consent. New Hampshire perceives a distinction between the detailed analysis contemplated by the Rules and commentary when informed consent to a conflict is sought from a current client, see Rule 1.7,

[1] The Supreme Judicial Court of Massachusetts has not adopted Model Rule 1.18, so the Massachusetts opinion concerning confidentiality obligations owed to prospective clients is derived from Rule 1.6 and the potential client's reasonable expectation of confidentiality. See Massachusetts Opinion 2007-1, pp. 3, 5.

comment 22, and the prior consent obtained from a prospective client that likely will be less deliberate, and less informed as to its potential adverse consequences. These concerns are only heightened when the prior consent is informed only by an electronic disclaimer on the website, which may or may not be read and considered carefully before consent is "clicked."

Rule 1.18 unequivocally permits law firms to avoid disqualification by seeking and obtaining from the prospective client a waiver of confidentiality or consent to conflicts of interest that would be unwaivable in the current client context. Keep in mind, however, that all clients were prospective clients at one time. Before relying on automated methods of securing waivers of confidentiality and/or consent to conflicts of interest before the prospective clients make their disclosures, law firms must consider the effect such prior consent and waiver may have on the prospective client's attorney-client privilege.

CONCLUSION:

When people or entities seek legal representation, the interest in protecting confidences can conflict with the interest in choosing one's counsel. In accommodating these conflicting interests, Rule 1.18 provides important clarification regarding the status of prospective clients, the protection that must be given to information received from them, and the circumstances under which such information can disqualify a lawyer or law firm from representing another client with adverse interests.

Rule 1.18 encourages law firms to limit the exchange of information during initial consultations with those seeking legal representation. This minimizes the risk of exposure to the kind of significantly harmful information that results in disqualification. At the same time, it maximizes the chance that efforts to screen the lawyer who might inadvertently review disqualifying information will be effective to ward off imputed disqualification of the rest of the firm. Disqualification is best avoided, then, by having procedures in place that are reasonably designed to limit the prospective client to disclosing only that information that is necessary to determine whether to offer representation.

The ability to effectively limit unwanted, disqualifying disclosure, however, is compromised when a law firm's website invites any web surfer to click on a link to email a lawyer in the firm. The firm will have to prove that prior consent – which the prospective client indicated by "clicking" acceptance of the terms of a website disclaimer purporting to waive confidentiality and potential conflicts of interest – was sufficiently "informed" to be effective. After one of the firm's lawyers has received and reviewed the prospective client's confidential information, informed consent to representation of an adverse party will not be easily obtained. The firm's ability to continue to represent even a longstanding client, if it has interests adverse to the prospective client, will likely depend on the reasonableness of the measures taken to avoid disqualifying disclosures, and the effectiveness and timeliness of any screening procedures.

NH RULES OF PROFESSIONAL CONDUCT:

Rule 1.0(k)
Rule 1.7
Rule 1.9
Rule 1.11
Rule 1.18

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

SUBJECTS:

Definition – screening
Conflicts of Interest
Duties to Former Clients
Special Conflicts of Interest for Former and Current Government Officers and Employees
Duties to Prospective Client

- **By the NHBA Ethics Committee**
  This opinion was submitted for publication to the NHBA Board of Governors at its June 17, 2010 meeting.

NEW HAMPSHIRE BAR ASSOCIATION

Joint Representation of Clients in Estate Planning

Ethics Committee Advisory Opinion #2014-15/10

ABSTRACT: Joint representation of clients in estate planning requires informed consent and that the lawyer be from those clients and that the lawyer be on guard for impermissible conflicts arising during the course of the representation which require withdrawal.

ANNOTATIONS:

Joint representation of client requires informed consent.

A lawyer must keep both clients reasonably informed about the representation.

A lawyer must be vigilant to detect if a concurrent conflict of interest arises between the clients which requires the lawyer's withdrawal.

RULE REFERENCES:
Rule 1.0(e)
Rule 1.4
Rule 1.6
Rule 1.7
Rule 1.16

Issues Presented:
What ethical guidelines apply when an attorney is asked to represent two clients jointly in the preparation of estate planning documents? What type of informed consent, if any, must the lawyer obtain before proceeding?

Factual Background:
Lawyer is asked to meet with Mr. and Mrs. Smith, a married couple, to discuss preparing estate planning documents designed to manage the couple's healthcare and financial decisions. The couple has been married for thirty years and wants to create a joint revocable trust that benefits each other during life, followed by their mutual children after the second spouse's death. Mrs. Smith discloses during the initial meeting that, in addition to planning for shared marital assets, she wants to direct that a modest financial asset owned by her individually be made payable on her death to a charity. Nothing during the initial fact-gathering raises a concern for the lawyer that the interests of either spouse might limit the lawyer's ability to prepare a joint estate plan for the couple. At the end of the meeting, the couple wants to engage the lawyer to draft their documents.

Analysis:
One of the most challenging aspects of an estate planning practice involves the joint representation of clients. Before entering into joint representation, a lawyer must identify any

potential conflicts of interest between the clients, and clearly communicate the nature of the client relationship and the lawyer's ethical obligations. Evaluating potential conflicts of interests requires the lawyer to assess the type of representation, the confidentiality protection afforded to information received by the lawyer, the duty of loyalty owed to each client, and either the existence or risk of adversity between the clients or a material limitation on the lawyer's ability to represent all clients involved. The lawyer must ensure the clients understand the confidentiality considerations and the fact that potential conflicts may arise which could change the lawyer-client relationship. Furthermore, the lawyer should obtain the clients' informed consent to share information at the outset of the representation.

Joint Representation Requires Informed Consent. The New Hampshire Rules of Professional Conduct (referred to collectively as the "Rules" and individually as a "Rule") are written as pertaining to a single client and the only discussion of "common representation" is contained in the ABA comments to Rule 1.7 [*see* comments 29 – 33]. Embarking on the joint representation of two clients in connection with the same subject matter, especially in an estate planning context, requires a careful analysis of the lawyer's obligations to each client.

The majority of estate planning cases that involve document preparation for new clients with common objectives are free of conflicts of interest. In this factual scenario, there is nothing present that creates a direct adversity between the clients, nor any significant risk that the lawyer's representation of a client will be materially limited by the other client's objectives. Accordingly, at least at the outset, there is no Rule 1.7(a) concurrent conflict of interest of which the lawyer must be concerned, and no informed consent is required under Rule 1.7(b). However, informed consent should be obtained under Rule 1.6(a) before proceeding with the joint representation.

Preserving the confidentiality of client information is a cornerstone of the lawyer-client relationship. It is critical that clients involved in joint representation, such as spouses engaging one lawyer for estate planning, understand the lawyer's duties with respect to disclosure and non-disclosure of client-related information.

Since the lawyer must preserve the confidentiality of two clients involved in common representation, it is paramount that the lawyer's duties be communicated clearly to both clients. While neither the New Hampshire Supreme Court, nor this Committee, has opined on the issue of implied consent to share confidential information in a joint representation context, authority exists in other jurisdictions for the proposition that jointly represented clients do not impliedly relinquish the protections afforded under Rule 1.6 merely by agreeing to engage one lawyer to provide joint representation in the same matter. See Georgia Bar Assoc. Formal Advisory Op. 03-2 (Sept. 11, 2003); and Professional Ethics of the Florida Bar, Op. 95-4 (May 20, 1997). Accordingly, we conclude that until the New Hampshire Supreme Court opines on the issue, a lawyer should obtain the "informed consent" of both clients to allow all information protected under Rule 1.6(a) to be shared between the clients in order to continue with the joint representation of clients in estate planning matters.[1] While this Rule does not require the clients' informed consent to be "confirmed in writing," as does Rule 1.7(b), it certainly is recommended that written confirmation be obtained.

Given the importance of having all requisite information available to effectuate the clients' goals when preparing estate planning documents for a couple, a free flow of information among the lawyer and the clients is essential to ensure the clients' objectives are accomplished and the lawyer complies with the Rules throughout the course of the representation. The best practice for estate planning practitioners is to require clients to acknowledge, in writing, that information will be shared freely between the clients and lawyer during the joint representation. Such written acknowledgement establishes an unambiguous understanding, at the outset, as to whom disclosure of information is permitted and when.

Compliance with Rule 1.4. The lawyer must keep both clients reasonably informed about the representation under Rule 1.4(a)(3). A client's failure to authorize a free exchange of information with a joint client could place the lawyer in the difficult position of being in possession of information that cannot be used to further the other joint client's interests. In fact, the interplay between the need to obtain informed consent under Rule 1.6(a) and compliance with Rule 1.4 is emphasized in the ABA Comment [31] to Rule 1.7:

- 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.

Rule 1.7 Concerns. It is not a per se conflict to represent two clients in connection with a joint estate plan. Concurrent representation of spouses in estate planning generally is non-adversarial and it often is more efficient and economical for spouses to engage one lawyer to assist with all aspects of a common plan. An alignment of interests may not always be the case. Sometimes joint clients involved in estate planning have common, but not identical goals, and it is important for the lawyer to determine at the outset of the representation whether (1) any such divergent goals exist and, if so (2) does the divergence rise to the level of a conflict of interest under Rule 1.7(a) that may or may not be waived through written informed consent under Rule 1.7(b).

A concurrent conflict of interest exists under Rule 1.7(a) 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." When evaluating at the outset whether joint representation of spouses in estate planning triggers a conflict under Rule 1.7(a), the lawyer must gauge the likelihood that the clients' interests currently differ or reasonably may diverge during the course of joint representation. If so, the lawyer must decide whether such difference or divergence materially would interfere with the lawyer's independent judgment and evaluation of estate planning alternatives that otherwise could be pursued for any one spouse. *See* Rule 1.7(a)(2) and ABA Model Rule Cmt. 8; *see also generally* N.H. Bar Assoc. Ethics Comm. Advisory Op. No. 1988-89/6 (Nov. 10, 1988) (advising a lawyer to weigh all factors carefully in order to determine whether a lawyer's independent professional judgment

would be compromised by the dual representation of a husband and wife who plan to live separately but not divorce).

When assessing joint representation of clients, the lawyer should keep in mind that the failure to identify a concurrent conflict of interest under Rule 1.7 or obtaining informed consent to what later is determined to be a non-waivable conflict, is evaluated under New Hampshire's "harsh reality" test. The harsh reality test is based on an objective standard under which the lawyer should inquire "whether, if a disinterested lawyer were to look back at the inception of the 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." *See generally* N.H. Bar Assoc. Ethics Comm. Formal Op. No. 1988-89/24 (Aug. 10, 1989).

Additionally, the existence of a conflict of interest must be evaluated throughout the entire course of any joint representation. For example, informed consent would be needed if (1) the interests of the clients diverge, and they now want to benefit different people with different plans, (2) each client disagrees as to the other's choices of people to act in various fiduciary capacities, (3) the clients no longer wish to use a joint revocable trust or (4) one party asks for information to be withheld from the other party. When new facts develop, the lawyer must assess whether a conflict exists under Rule 1.7(a), whether lawyer may continue to represent both and, if so, whether a consent is required and able to be provided under Rule 1.7(b). Under the facts described in this opinion, there are no conflict of interest concerns that would trigger the need for a detailed analysis under Rule 1.7. The fact that Mrs. Smith wishes to make a separate, modest charitable bequest, which was disclosed to the other spouse raises no adversity of interests and does not constitute a planning nuance that would materially limit the lawyer's ability to represent Mr. Smith.

Potential Withdrawal from Joint Representation. If the jointly represented clients later develop significantly divergent goals or become estranged during the joint representation, then the lawyer may need to terminate the representation of both clients if effective informed consent is not feasible under Rule 1.7(b). Notwithstanding the clients' clear agreement to share all client-related information at the outset of the representation, if one spouse communicates information to the lawyer that is relevant to the overall estate plan, but refuses to allow the lawyer to disclose the information to the co-client, withdrawal will be mandated if the inability to disclose information would impair the lawyer's duties under Rule 1.4(a)(3) to the co-client (See ABA Comment [31] to Rule 1.7). If withdrawal from joint representation is deemed necessary, the withdrawal must be accomplished in a manner that protects both clients' interests, and the lawyer must continue to protect client-related information even after termination of the representation. Rule 1.16. Additionally, if one joint client asks that material information be withheld from the other client, the lawyer who reached an agreement with the clients, and obtained informed consent in conformance with Rule 1.6(a) to share information, has a duty to disclose the information to the fellow client.

Alternatively, if a lawyer fails to obtain the requisite informed consent under Rule 1.6(a) at the outset of the joint representation, the lawyer is prohibited from sharing any information that a

client has requested be kept secret. In this latter scenario, the lawyer should attempt to obtain permission from the disclosing client to share information and explain the ramification of any resulting denial, specifically that a withdrawal from representation of both clients would be necessary. If disclosure was not authorized at the outset of the joint representation, the lawyer also should consider whether a "noisy withdrawal" will be warranted, after evaluating the nature of the confidence and the harm that could result if the confidence is not disclosed.[2]

Best Practices for Obtaining Consent. It is essential that the lawyer develop procedures to ensure clear and unequivocal client expectations as to how the lawyer will handle joint representation of clients. Best practices dictate that, at minimum, several issues must be discussed at the initial meeting before the lawyer prepares documents for a joint estate plan, including the following: (1) there will be full disclosure of all client-related information between the lawyer and the joint clients; (2) no secrets shall be kept by the lawyer from either client; (3) throughout the course of the joint representation, both clients must concur with the overall planning goals, despite the fact that each could, with consent of the other and consistent with the Rules, deviate from original objectives; (4) should differences arise between the clients' objectives that reasonably cannot be resolved, the lawyer may be forced to withdraw from representing both clients; and (5) each client has the right to request a copy of the client file following termination of the joint representation. Although not mandated by the Rules, from a risk management standpoint and to ensure client expectations are clear, the best practice is to obtain the clients' informed written consent to the disclosure of all information to both clients involved in the joint estate plan and what will be communicated by the lawyer between the joint clients.

ENDNOTES:

[1] To obtain "informed consent," the lawyer must share "adequate information and explanation" with both clients of the "material risks of and reasonably available alternatives to the proposed course of conduct." *See* Rule 1.0(e).

[2] For example, a "noisy withdrawal" might involve the attorney disclosing to the wife that information was disclosed by the husband with specific instructions not to share it with the wife, and the attorney is thereby forced to withdraw from representing either husband or wife. See for example *A v. B*, 726 A.2d 924, 158 N.J. 51 (1999).

SUBJECTS:

Joint Representation

Estate Planning

Concurrent conflicts of interest.

- **By the NHBA Ethics Committee**
  This opinion was submitted for publication to the NHBA Board of Governors at its June 18, 2015 meeting.

95 Ill. B.J. 440

Illinois Bar Journal
August, 2007

Column

Loss Prevention
Karen Erger [a1]

ARE YOU A CLIENT-SAVVY COUNSELOR?
Sometimes the Best Client Is the One You Turn Away

The unexamined life is not worth living

--Socrates

Readers of *Cosmopolitan* magazine--I know, you only skim it in the dentist's office, and then only when *Reader's Digest* is unavailable--are familiar with the Cosmo Quiz. Through the scientific device of a multiple-choice quiz, a *Cosmo* reader can discover key truths about her personality and relationships: “Are You a True Friend?” “Are You Ready to Settle Down?” “Is He Only After Your Bod?” [1] The reader marks her answers, tallies her points, and thus learns whether “He Wants Only One Thing” or “He Loves the Real You.”

So, just in time for some light summer beach reading, let's take stock of one of the *other* important relationships in your life--your lawyer/client relationship. Are you looking for clients in all the wrong places, or are you choosing clients for all the right reasons? Pull up your deck chair, grab an icy beverage and a pencil, and mark your responses to the following scenarios to find out if you are a client-savvy counselor, or trolling for trouble.

1. You are *swamped* [2] with work and so is everyone else at your firm, with no light at the end of the tunnel. As luck would have it, a potential client you have been courting for *years* has decided that *this* is the right time to try out your services. He asks you to handle a complex litigation that would be a strain on your firm's resources at the *best* of times. Your response?

(a) Decline the representation. There's no point in taking on a case if you can't handle it in a competent manner--and there's that ethics rule, as well.

(b) Are you kidding? If we turn down this opportunity we may not get another one, ever. Everyone will just have to buck up and work a little harder.

(c) Consider whether you might be able to handle the matter as co-counsel with another qualified firm--of course, with the written consent of the client.

2. Your *favorite* client has asked you to draw up wills for him and his wife. There's just *one* problem. You are a litigator and so is everyone else at your firm. You ...

(a) Explain to your client that the matter is outside your firm's expertise.

(b) Are Super Lawyer and can handle any matter! *Now, let's see ... I think I still have my Trusts and Estates “Nutshell” somewhere* ...

(c) Engage qualified co-counsel with the written consent of your client.

3. A prospective client appears in your office with a flattering tale to tell. He has only *just* heard of your firm and its expertise in the area of construction litigation. His lawsuit currently is being *bungled* by a firm of lawyers who rival Larry, Curly, Moe (and possibly Shemp) for incompetence, errors, and hijinks that would almost be funny if they didn't involve a matter *so* important to the client. Trial is rapidly approaching, and they are nowhere *near* ready. Please, will you take the case? Your reply:

(a) Sorry, but I don't think I'd have time to properly prepare for trial.

(b) You've (finally) come to the right place!

(c) I'd like to talk to your current lawyers before deciding--and if I do take the case, I'm going to need a retainer.

4. It's 3 p.m. on a *beautiful* summer afternoon. You're looking forward to taking off a bit early to catch your daughter's softball game--she's pitching and you've *promised* to be there. The phone rings--it's a former client, and she's talking a mile a minute. She would like your help with a business ***441** transaction, but she just needs you to "paper the deal." She swears that it will *just* take an hour of your time, and it *can't* take any longer than that, anyway, because everything *has* to be done by 5 p.m. today. You say:

(a) I wish I could help you, but I'm already booked this afternoon. *After all, it's true*.

(b) Come on over--we'll get it done by 5 for sure. *My daughter won't notice if I miss a few innings. If she does, treating the team to pizza should put me back in her good graces*.

(c) Ms. Client, I'm not sure that would give me enough time to do a good job for you. If it turns out that your deadline gets pushed back, I would be glad to help you.

5. Your Aunt Sue wants your help. Her homeowners' association wants to sue their former management company. They can't afford to pay much, but she doesn't think it will take much time at all, and perhaps you could just work on it in your spare time? This should be a cakewalk for a brilliant trial lawyer like you, she says with an endearing smile. You give her your best "aw shucks" grin and tell her:

(a) Sorry, Aunt Sue, but if I handle this, I'd have to give it the same time and attention as I would give any other case in our office. I don't think I can do that within your budget.

(b) Okay. *I'll just work on this in my spare time, and not bother with an engagement letter or opening a file. It's not like Aunt Sue's going to sue me for malpractice or anything*.

(c) Aunt Sue, there's no *way* I would handle a matter for my *favorite* aunt in my "spare time." Let's talk a little more what a suit like this would entail. I think you'll see that it would be more expensive than you think. If you still want to work with me, I'll need to run a conflicts check and have you sign an engagement letter.

Time to score your test: Give yourself one point for any (a) or (c) answer, and no points for any (b) answer.

4-5 points: You are a client-savvy counselor! You're looking for more than a warm checking account in a client--you want to make sure that this lawyer/client relationship has all (or most, anyway) of the right stuff.

• You're confident enough in your abilities to say "no" to work when you simply don't have time to handle it competently. You figure that *mishandling* a matter that you didn't have time for in the first place is *much* more likely to dry up the flow of new business than declining a matter because you are just too busy.

• You know if you handle a matter outside of your areas of expertise, you're all too likely to end up with disappointed clients, damage to your reputation, and maybe even malpractice claims. You wouldn't want a brain surgeon, no matter how brilliant, operating on your knee, would you? Neither would your clients.

• You're wary of clients “on the rebound” from other lawyers. You don't allow your ego to cloud your judgment: you know that a client who is dissatisfied with other lawyers' performance may be dissatisfied with yours, too. And even if the prior lawyers did in fact perform poorly, once you take the case you have a duty to mitigate their errors--a task that may prove costly at best, and impossible at worst.

• You steer clear of the 11th hour representation. If you don't have time to do a proper job, you don't undertake a matter.

• You know that friends and family can and do sue lawyers. It happens all the time. If you take on a matter for Aunt Sue or your golfing buddy, you treat it just like a *real* matter--because it is. And you're well aware that the standard of care does not change when the fee is inadequate, so if you can't perform competently within the client's budget, you don't take the matter in the first place. Otherwise, you'd be tempted to cut corners and give the matter short shrift--and that's just not your style.

0-3 points: You're a lawyer with some *dangerous* liaisons. Yes, you have to earn a living, but that does *not* mean that every client is a good client. Some are simply not a match with your firm's expertise or its resources. Some have expectations that you cannot meet, whether in terms of the result to be attained or the time and money necessary to achieve it.

At a bare minimum, the wrong clients will waste your time, make you crazy, stiff you for fees, and perhaps sue you in the bargain. Don't let bad client choices take all the fun and profit out of your practice of law. Sometimes the *best* client is the one you turn away.

Footnotes

a1 *Attorney Karen Erger, former vice president and director of loss prevention with ISBA Mutual in Chicago, now works with Holmes, Murphy & Associates in Cedar Rapids, Iowa*.

1 I am not making these topics up. *See* www.cosmopolitan.com/archive/you/quiz.

2 This just won't read like a *Cosmo* quiz unless I use *plenty* of italics in the scenarios.

95 ILBJ 440

NEW HAMPSHIRE BAR ASSOCIATION

The Prospective Client: Confidentiality and Withdrawal Considerations

Ethics Committee Opinion #2019-20/02

ABSTRACT

When a lawyer receives information from a prospective client which is materially adverse to the interests of the lawyer's current client, is the lawyer authorized to reveal any information regarding the prospective client to his/her current client, and/or is the lawyer required to withdraw from representing the current client?

ANNOTATIONS

In short, a lawyer is not authorized to reveal information from a prospective client to a current client, unless the prospective client provides the lawyer with informed consent, confirmed in writing, to disclose the information. N.H. R. Prof. Conduct 1.18(b). Moreover, unless one of the exceptions in Rule 1.18 is satisfied, a lawyer may be required to withdraw from representing the current client with interests materially adverse to a prospective client if the information received from the prospective client could be significantly harmful to the prospective client in the same or substantially related matter. N.H. R. Prof. Conduct 1.18(c). As a result, lawyers must be mindful of how they conduct the initial interviews with prospective clients to avoid conflicts which could be fatal to an existing client-lawyer relationship.

DISCUSSION

A. Protecting Prospective Client Information

In 2007, New Hampshire adopted New Hampshire Rule of Professional Conduct 1.18, entitled "Duties to Prospective Clients," following the American Bar Association's ("ABA") adoption of Model Rule 1.18 in 2002.[1] Under New Hampshire Rule 1.18 (a), a "prospective

[1]New Hampshire Rule 1.18, provides as follows:
(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).

client" is a "person who provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter. . . ."[2] When a lawyer consults with a prospective client, the lawyer is required to protect the information that the lawyer receives or reviews from the prospective client under the same protections that are afforded to a former client of the lawyer under Rule 1.9. Consistent with this premise, Rule 1.18(b) creates the protection for the prospective client, and states as follows:

> 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.

Under Rule 1.9(c), a lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

As set forth in Rule 1.18(b), this Rule applies to a lawyer's consultation with a prospective client. Thus, when a lawyer receives or reviews information from a prospective client, the lawyer is not authorized to use or reveal this information with the current client, unless the prospective client gives informed consent for such use, *see* N.H. R. Prof. Conduct 1.6(a)[3], or the information has "become generally known." N.H. R. Prof. Conduct 1.9 (c). This of course, creates a significant problem for the lawyer with respect to their duty to disclose information to their current client under Rule 1.4 and their duty to competently represent the current client as required under Rule 1.1. Depending on the nature of the protected information from the prospective client, a lawyer may be required to withdraw from continuing to represent the current client.

(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.

[2] By way of reference, this Rule is consistent with New Hampshire Rule of Evidence 502(a)(1) which defines "client" as one "who consults a lawyer with a view to obtaining professional legal services from him."

[3] Rule 1.6(a) provides: "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)."

Lawyers should note that the term "information" in Rule 1.18(b) and Rule 1.9(c) is not limited to "confidential" information, but to information "relating to the representation of a client." N.H. R. Prof. Conduct 1.6(a). Thus, the term information should be broadly construed as it is rooted in the principle of the client-lawyer relationship, which 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." ABA Model Rule 1.6 comt 3. Significantly, the confidentiality of information rule is the same for prospective clients as it is for current and former clients and "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *Id*.

B. When the Prospective Client-Lawyer Relationship Triggers the Duty to Withdraw from Representing A Current Client

Rule 1.18(c) requires withdrawal of representing a current client when the lawyer's current client's interests are "materially adverse to those of a prospective client in the same or a substantially related matter [and] the lawyer received and reviewed information from the prospective client that could be 'significantly harmful' to that person in the matter," unless the exceptions in Rule 1.18(d) are satisfied. The "significantly harmful" element is unique to prospective clients under Rule 1.18 and does not apply to former clients under Rule 1.9. Thus, the protections afforded to former clients under Rule 1.9 are broader than the protections afforded to prospective clients under Rule 1.18.

To highlight the distinction between Rule 1.9 and Rule 1.18, it is appropriate to review the New Hampshire Supreme Court's interpretation of disqualification under Rule 1.9. In *Sullivan County Regional Refuse Disposal Dist. v. Town of Acworth*, 141 N.H. 479, 482 (1996), the Court reversed and remanded the trial court's holding that because the lawyer did not actually receive any confidential information in his representation of the former client that could be used to the former client's disadvantage, the lawyer need not be disqualified. *Id*. The Supreme Court disagreed, stating that the trial court's approach was in error, as it "would require the former client, in order to show prejudice, to disclose the very confidences Rule 1.9 was intended to shelter." *Id*. (citation omitted). The Court reasoned that a Rule 1.9 violation requires proof of the following four elements: (1) a valid attorney-client relationship between the attorney and the former client; (2) the interests of the present and former clients must be materially adverse; (3) the former client must not have consented, in an informed manner, to the new representation; and (4) the current matter and the former matter must be the same or substantially related. *Id.* at 482-83. The Court held that a "former client need never prove that the attorney actually misused confidences." *Id*. at 483 (citation omitted). Instead, the Court concluded that "upon a finding that all of the elements of Rule 1.9 have been satisfied, a court must irrebuttably presume that the attorney acquired confidential information in the former representation." *Id*. When this occurs, the Court concluded, "disqualification is required." *Id*.

Unlike the former client in *Sullivan County*, the prospective client under Rule 1.18 would be required to show that the lawyer actually received information that could be "significantly harmful" to the prospective client. This fundamental difference between Rule 1.9 and Rule 1.18 is that representation is not barred under Rule 1.18 "unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter." ABA Model Rule 1.18 comment 6. Accordingly, disqualification under Rule 1.18 would require the prospective client to show that: (1) a prospective client-lawyer relationship existed; (2) the current representation is materially adverse to the prospective client, (3) the current matter and the prospective client matter are the same or substantially related; and (4) the lawyer received information from the prospective client that could be "significantly harmful" to the prospective client.[4]

Although the New Hampshire Supreme Court has not addressed disqualification under Rule 1.18, other jurisdictions have found that disqualification is required when a prospective client consults a lawyer who ultimately represents a party adverse to the prospective client in matters that are substantially related to the consultation, and the information related in the consultation "could be significantly harmful" to the prospective client in the same or substantially similar matter. *Richman v. Eight Judicial Dist. Court of State ex rel. County of Clark*, 2013 WL 3357115 (Nevada, May 31, 2013) (disqualification required as information lawyer received from prospective client could be significantly harmful to prospective client if used in substantially related matter); *Sturdivant v. Sturdivant*, 241 S.W.3d 740 (Ark. 2006) (meeting with prospective client about child custody matter gave lawyer information that potentially was "significantly harmful" and thus warranted disqualification of lawyer and his firm from representing adverse party in same matter); *In re Carpenter*, 863 N.W.2d 223 (N.D. 2015) (disqualification warranted when prospective client provided significantly harmful information to lawyer in former consultation in substantially related matter); *compare with Mayers v. Stone Castle Partners, LLC*, 126 A.D. 3d 1 (N.Y App. 2015) (disqualification not warranted because the conveyed information did not have the potential to be significantly harmful to prospective client in the substantially related matter); *Bernacki v. Bernacki,* 1 N.Y.S. 3d 761 (New York Supreme Court, 2015) (plaintiff's conclusory statements are insufficient to show that he conveyed information that had the potential to be significantly harmful to him in the matter from which he seeks to disqualify counsel).

The crux of these decisions rests on whether the lawyer received information from the prospective client that could be "significantly harmful" to the prospective client in the substantially related matter. ABA Model Rule 1.18 comment 6 states that "a lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or substantially related matter unless the lawyer has received from the prospective client information that could be 'significantly harmful' if used in the matter."

[4] For purposes of this analysis, it is assumed that neither consent nor screening to the current representation has been provided or is otherwise applicable to the current representation.

It is important however, for lawyers to be mindful that notwithstanding this Rule, they are prohibited from disclosing information obtained from a prospective client to their current clients, as that information remains protected.

In an action to disqualify a lawyer under Rule 1.18, the prospective client may request the significantly harmful information be provided to the court under seal, *ex parte* and/or *in camera*. This would avoid disclosure of this confidential information.

C. Recommendations for Communicating with Prospective Clients

In practice, lawyers should have sufficient safeguards in place relative to their initial communications and interview procedures with prospective clients (both electronic and in-person) to avoid reviewing and/or receiving confidential information from the client which could be significantly harmful to the prospective client in a subsequent adverse matter. A lawyer receiving this type of information could create conflicts for the lawyer which could undue an existing or future client-lawyer relationship. In addition, ABA Model Rule 1.18 comment 4 recommends as follows:

> 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.

ABA Model Rule 1.18 comment 5 further recommends that the lawyer may have an agreement with the prospective client that conditions the consultation "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." The agreement could further require that the prospective client "consent to the lawyer's subsequent use of information received from the prospective client." *Id*.

Rule 1.18 should also be construed with some reasonably applied limitations concerning the protections afforded to prospective clients, which are not all encompassing. The Ethics Committee comment 2 to Rule 1.18 explains the scope of these limitations as follows:

> 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).

In addition, lawyers should review New Hampshire Ethics Committee Opinion #2009-10-01, entitled, *Duties to Prospective Clients*, for further guidance on a lawyers ethical obligations to prospective clients and specifically the disqualification and screening procedures to avoid imputed disqualification.

N.H. RULES OF PROFESSIONAL CONDUCT

N.H. R. Prof. Conduct 1.18
N.H. R. Prof. Conduct 1.9
N.H. R. Prof. Conduct 1.6
N.H. R. Prof. Conduct 1.4
N.H. R. Prof. Conduct 1.1

NH ETHICS COMMITTEE OPINIONS AND ARTICLES

"Duties to Prospective Clients," Formal Opinion #2009-10-01.

SUBJECTS

Duties to Prospective Clients

Duties to Former Clients

Conflict of Interest

Confidentiality

BY THE NHBA ETHICS COMMITTEE

- *This opinion was submitted for publication to the NHBA Board of Governors at its May 4, 2020 meeting.*

Revised Statutes Annotated of the State of New Hampshire
New Hampshire Court Rules
New Hampshire Rules of Professional Conduct

Rules of Prof.Conduct, Rule 1.18

Rule 1.18. Duties To Prospective Client

Currentness

(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.

Credits
[Adopted July 25, 2007, effective January 1, 2008. Comment amended November 10, 2015, effective January 1, 2016.]

Editors' Notes

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 THE MODEL RULESRULE 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.

Rules of Prof. Conduct, Rule 1.18, NH R RPC Rule 1.18
State court rules are current with amendments received through January 1, 2024. Some rules may be more current; see credits for details.

End of Document

VCFJ0713 ALI-CLE 1

The American Law Institute Continuing Legal Education
ALI-CLE Course Materials
July 13, 2023

Who Is Your Client? The First Ethics Question for Counsel

THE FIRST QUESTION: WHO IS YOUR CLIENT?

Thomas E. Spahn
McGuireWoods LLP
Tysons, Virginia

Image 1 within document in PDF format.

McGuireWoods LLP
T. Spahn (1/1/23)

Hypotheticals and Analyses [FNa1]

Thomas E. Spahn

McGuireWoods LLP

TABLE OF CONTENTS

Hypo No. Description

Identifying the Client Outside a Corporate Setting

1. Government Entities
2. Partnerships, LLCs and Joint Ventures
3. Associations
4. Insured/Insurance Company
5. Estates
6. Bond Counsel

Identifying the Client in a Corporate Entity

7. Fiduciary Exception: The Garner Doctrine
8. Identifying the Client in a Corporate Entity
9. Resolving Intra-Corporate Disputes
10. Identifying the Client in a Closely-Held Corporation

Identifying the Client in a Corporate Family

11. Identifying the Client Within a Corporate Family: Outside Lawyers' Issues
12. Identifying the Client Within a Corporate Family: In House Lawyers' Issues

Identifying the Client in a Corporate Stock or Asset Sale

13. Ownership of the Attorney Client Relationship after Corporate Transactions
14. Effect of a Joint Representation in Corporate Transactions

Identifying the Client When Dealing With Employees

15. Intentional Joint Representation of Corporate Employees
16. Accidental Creation of a Joint Representation of a Corporate Employee

Introduction

Because all ethics duties and in most situations privilege ownership depends on properly identifying the "client," it should come as no surprise that lawyers must always know their clients' identity at all times.

With corporate clients, this can be easier said than done. To at least a certain extent, corporations are usually treated in the law as if they were "persons" -- although there are limits to that legal approach.

• Justin Berton, Corporation Not A Person In Carpool Lanes, S.F. Chronicle, Jan. 8, 2013 ("Some people will do anything to get out of a traffic ticket."; "It is the rare motorist, however, who hopes his explanation will overturn more than 100 years of Supreme Court rulings and challenge the legal notion of corporate personhood."; "Jonathan Frieman, a 56-year-old San Rafael resident and self-described social entrepreneur, failed to convince a Marin County Superior Court jurist Monday after he argued that he was not alone when a California Highway Patrol officer pulled him over in October while driving in the carpool lane."; "Instead, Frieman admitted that he had reached onto the passenger's seat and handed the officer papers of incorporation connected to his family's charity foundation."; "By Frieman's estimation, if corporations are indeed persons as was first established in the 1886 Supreme Court case Santa Clara County vs. Southern Pacific Railroad Company, and he offered evidence that a corporation was traveling inside his vehicle -- riding shotgun, of course -- then two people were in his car."; "'The question of personhood is a very poignant one,' Frieman said before he entered the courtroom. 'This is designed to bring a very strong point to bear upon the legal system. Corporations have grown into large, huge, fictional entities. Now I am taking their power and using it in order to drive in the carpool.'"; "The issue of corporate personhood rocketed to public consciousness in 2010, when the United States Supreme Court ruled in the Citizens United case that the First Amendment barred the government from limiting companies' independent political expenditures. But Frieman says he's been driving stretches of carpool lanes along Highway 101 for the past decade with his papers in the front seat, waiting to get pulled over and set his legal battle in motion."; "He noted, though, he had not buckled in the corporation papers."; "Ford Greene, Frieman's attorney, pointed to California vehicle code section 470, which says the definition of a person includes 'natural persons and corporations.' The signs on the freeways ask carpoolers to carry '2 or more persons' which, Greene said, 'is constitutionally vague.'").

To make matters more complicated, properly identifying the "client" sometimes can be independent of such formal legal status, and counter-intuitive. A 2017 example shows how difficult the analysis can be.

• Clemens v. NCAA (In re Estate of Paterno), 168 A.3d 187, 196-97, 197 (Pa. Super. Ct. 2017) ("In summary, the Engagement Letter consistently draws a distinction between Penn State's board of trustees and the Task Force. The letter consistently identifies the Task Force as the party for whom FSS was performing services. Appellants do not cite any legal authority precluding an entity such as Penn State from hiring and paying a law firm to represent a task force of the entity's creation. Nor do Appellants cite any authority precluding the parties from limiting the attorney-client relationship to the law firm and the task force, if desired. Furthermore, Appellants cite no authority to support their contention that the Task Force, in order to become a client of FSS, needed to be a distinct legal entity. The signature on the Engagement Letter Steve A. Garban, chair of Penn State's board of trustees was necessary, given that the trustees were paying FSS's bills. We therefore do not view Garban's signature as 'fatally inconsistent' with a conclusion that the Task Force was the client, as Appellants claim." (footnote omitted) (emphasis added); "In summary, Appellants have failed to offer any authority upon which we can conclude that the trial court erred, as a matter of law, in finding that FSS confined its representation to the

Task Force. We will not disturb the trial court's finding, supported by the record, that Penn State cannot assert attorney-client privilege because it was not the client of FSS." (footnote omitted) (emphases added)).

And sloppy client identification can result in awkward if not disastrous consequences.

• JAE Properties, Inc. v. AMTAX Holdings 2001-XX, LLC, No. 19cv2075-JAH-LL, 2020 U.S. Dist. LEXIS 80797, at *7, *8, *24 (S.D. Cal. May 7, 2020) (addressing a situation in which Investor Limited Partner Amtax sought communications between co-General Partner JAE and lawyer Hartman; noting that Hartman claimed that he only represented JAE -- and not the limited partnership itself; explaining that "JAE has produced documents in this litigation where Hartman identified himself in writing in at least three instances as legal counsel for both the Partnership and the General Partners (including JAE)"; further explaining that Hartman admitted representing the limited partnership "in certain limited capacities," but argued that language mentioning a more general representation was merely "boilerplate language" resulting from "my unintentional failure to remove such language left over from prior correspondence" and "essentially an inadvertent oversight on my behalf"; rejecting Hartman's excuses -- concluding that "it was reasonable for [Investor Limited Partner] Amtax to believe that Hartman would protect Amtax's individual interests as a member of the Partnership"; requiring General Partner JAE and Hartman to produce their otherwise privileged communications).

Whether or not corporations or other legal entities themselves can be treated as "persons," lawyers who represent such incorporeal entities must communicate with and ultimately take direction from actual persons. Those persons might also be clients, but not necessarily.

So the bottom line is that lawyers should always explicitly indicate whom (or what) they are representing at all times and in every situation.

In some situations, it is as important or even more important to explicitly disclaim an attorney-client relationship than it is to affirm one.

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

Two very troubling 2016 decisions highlighted the importance of clarity about the clients' identity.

• Naturalock Solutions, LLC v. Baxter Healthcare Corp., No. 14-cv-10113, 2016 U.S. Dist. LEXIS 66982, at *4, *6, *6 n.1, *7-8, *9, *9-10 (N.D. Ill. May 20, 2016) (analyzing a product inventor's efforts to obtain the files of K&L Gates, which were obtained by Baxter, but which also assisted the inventor in prosecuting a patent; ultimately concluding that K&L Gates jointly represented Baxter and the inventor, which meant that the inventor could obtain the law firm's files in connection with its later dispute with Baxter; "The parties have submitted numerous exhibits that they claim support their respective positions as to whether Naturalock was a client of K&L Gates." (emphasis added); "Given the extensive nature of Baxter's involvement in the patent prosecution, this Court does not find persuasive Naturalock's attempt to cast itself as K&L Gates's sole client. Thus, the question is whether Naturalock was a joint client along with Baxter." (emphasis added); "Baxter asserts that Delaware, not federal, law applies to this privilege dispute. Baxter does not, however, show that the privilege analysis would be different under Delaware and federal law. . . . In fact, Baxter itself cites federal law in support of its arguments."; "Here, based on the record before the Court, it is clear that K&L Gates provided legal advice

and services to Naturalock and acted at the direction of Naturalock in addition to Baxter. This is not a situation where there is no evidence of the nature of communications between the licensor and licensee's counsel. . . . It does not matter what K&L Gates or Baxter perceived the relationship to be." (emphasis added); "Baxter focuses on the facts that Naturalock had separate counsel and that all of the parties involved referred to K&L Gates as Baxter's counsel. But those facts do not lead to the conclusion that K&L Gates's representation of Baxter was to the exclusion of Naturalock. Furthermore, Baxter does not contend that Naturalock was ever explicitly informed that K&L Gates represented only Baxter. To the contrary, the record makes clear that K&L Gates had a professional relationship with both Naturalock and Baxter, and that both Naturalock and Baxter manifested an intention to seek professional legal advice from K&L." (second emphasis added); "In sum, it appears that Naturalock and Baxter were joint clients of K&L Gates, and thus there is no basis for Baxter to assert the attorney-client privilege to deny Naturalock discovery regarding correspondence regarding the prosecution of patents for Naturalock's technology. This is true even if Naturalock is correct that Baxter, unbeknownst to Naturalock at the time, was actually acting in a manner that was adverse to Naturalock's interests and even if K&L Gates was complicit in Baxter's scheming." (emphasis added)).

• DePuy Orthopaedics, Inc. v. Orthopaedic Hospital, Cause No. 3:12-cv-299-JVB-MGG, 2016 U.S. Dist. LEXIS 166537, at *12-13, *13 (N.D. Ind. Dec. 1, 2016) (addressing a situation in which plaintiff DePuy and defendant Hospital had worked together on patent prosecutions -- but later become litigation adversaries; noting that DePuy resisted the Hospital's attempt to discover communications to and from DePuy's in-house counsel, which was based on the Hospital's contention that DePuy's in-house lawyer jointly represented her employer/client DuPuy and the Hospital; further noting that DuPuy's in-house counsel claimed that DePuy and the Hospital had only entered into a common interest agreement -- noting that O'Melveny & Myers had acted as patent "prosecution counsel" on behalf of both companies; reciting facts that could have proven either a common interest agreement or a joint representation: DePuy and the Hospital shared confidential information and cooperated on a common legal strategy; DePuy's in-house counsel communicated with and gave direction to O'Melveny, etc.; ultimately concluding that DePuy's in-house counsel had jointly represented DePuy and the Hospital -- rather than represented just DePuy in a common interest arrangement with the separately represented Hospital; emphasizing that "the evidence does not show that DePuy's in-house counsel . . . provided any kind of disclaimer about representation when answering the Hospital's questions with legal information or consequence regarding the patent prosecution" (emphasis added); delivering the punchline impact -- because DePuy's in-house counsel had jointly represented DePuy and the Hospital, the former joint client Hospital could discover "DePuy's internal communications related to the [patent] prosecution").

• 33 Laws. Man. on Prof. Conduct (ABA/BLAW) No. 12, at 347 (June 14, 2017) ("For a government lawyer, the key to complying with ethics rules is knowing who the client actually is, according to a June 2 panel discussion at the 43rd National Conference on Professional Responsibility in St. Louis."; "'[G]overnment lawyers must have a clear understanding of who their client is and who speaks for their client,' moderator Stacy Ludwig said. She is director of the Department of Justice's Professional Responsibility Advisory Office." (alteration in original); "The answers to those questions determine who holds authority to direct litigation and approve settlements, and what information is confidential, the panelists agreed."; "But most of the Rules of Professional Conduct, Ludwig noted, were drafted with private lawyers in mind. And a multitude of other laws governing disclosure can further complicate the government lawyer's duties, panelists said.").

Government Entities

Hypothetical 1

You have developed an interesting practice representing state-operated colleges. One of your college clients just asked for your help in pursuing a matter adverse to another state entity (which funds and processes state employee health care claims). You have never worked for that state health care agency.

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

YES (PROBABLY)

Analysis

Defining the "client" in the governmental setting can be extremely difficult.

• William H. Simon, Duties to Organizational Clients, 29 Geo. J. Legal Ethics 489, 514 (Summer 2016) ("The Managerialist Fallacy operates in the public sector as well as the private. However, the public sector seems uniquely susceptible to an opposed tendency in which the client is defined so generally and abstractly that practical interests are obscured. Rule 1.13's comment states, 'Although the [government lawyer's] 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.' Such grandiose conceptions of the client are encouraged by customary practices in which lawyers appear on behalf of the 'United States' or the 'State of Iowa' or the 'People' of California, implying that the [sic] represent the entire nation or state. Such rhetoric is useful to the extent that it undermines the tendency to identify the client with managers, but it can be troublesome. We can see this by considering issues that arise, first, about authority to instruct the lawyer, and second, about the scope of confidentiality and conflicts protection." (first alteration in original) (emphasis added) (footnote omitted)).

• Kathleen Clark, Government Lawyers and Confidentiality Norms, 85 Wash. U.L. Rev. 1033, 1037-38, 1050-51, 1052-54, 1054-55, 1056 (2007) ("This Article makes several significant contributions to the literature on government lawyers. First, it provides a theoretical basis for identifying the client of a government lawyer. There is no single answer to the question of client identity for government lawyers. Instead, one must examine the structure of authority within government to identify which of several possible entities is actually the client." (emphasis added); "Government officials, courts, and commentators have identified a wide variety of possible clients that the government lawyer might represent. One can find some support for the following as clients: the 'public interest,' the public at large, the entire government, the branch of government employing the lawyer, the particular agency employing the lawyer, and a particular government official (such as the head of a government organization) in his official or individual capacity." (emphasis added) (footnotes omitted); "In most situations, the government lawyer represents a government entity rather than an individual government employee. While the professional rules provide guidance for entity representation, they generally leave open the key question for government lawyers: which government entity does the lawyer represent? The identity of the client has important implications for lawyer confidentiality. If a government lawyer represents 'the people,' then presumably she could disclose information to anyone who is one of 'the people.' If a government lawyer represents an agency, then the entity exception to confidentiality will apply, but if she is representing the agency head, then it will not. If a Justice Department lawyer represents the entire government, then she can reveal information to a member of Congress, but if she represents the executive branch, she cannot.

If a state natural resources department lawyer represents her agency, then she cannot reveal information about wrongdoing at the department to anyone outside of the department, including the state attorney general. If a lawyer in the California Insurance Department (such as Cindy Ossias) represents the entire government of California, then she can reveal information to state legislators. But if she represents only the Insurance Department, then she cannot--unless an exception to confidentiality applies." (emphasis added) (footnotes omitted); "Some have attempted to provide a universal answer to the question of the identity of the government lawyer's client. Politicians often claim that the government lawyer's client is 'the public,' and a few commentators assert that government lawyers should pursue 'the public interest.' But these formulations fail to identify who can give direction to the lawyer on behalf of the client. Some assert that the government lawyer represents the government as a whole, but Geoffrey Miller persuasively rebuts that notion as it pertains to a government with separated powers. Miller notes that lawyers in the executive branch do not generally represent Congress or the judiciary. Many assert that the client is the particular agency that employs the lawyer, but this approach is singularly inappropriate for the hundreds of Justice Department lawyers who represent other government agencies and departments in court." (footnotes omitted); "There are problems with each of these formulations. Given the wide variety of roles that government lawyers play, it is no wonder that a universal definition of the government lawyer's client evades us. The next section develops an alternative approach. It identifies the government lawyer's client by examining the specific context in which the government lawyer works, paying particular attention to the structure of government authority." (emphasis added)).

ABA Model Rule 1.13 cmt. [9] acknowledges that it "may be more difficult in the government context" to "precisely" identify the client. ABA Model Rule 1.13 cmt. [9] refers to ABA Model Rule Scope cmt. [18]. ABA Model Rule 1.13 cmt. [9] indicates that the government lawyer's client might be: (1) "a specific agency;" (2) "a branch of government, such as the executive branch;" or (3) "the government as a whole."

ABA Model Rule 1.13 cmt. [9] then gives an example that introduces two other entities: "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." ABA Model Rule 1.13 cmt. [9] notes that either the "department" or "the relevant branch of government" may be the "client."

The ABA addressed this issue in ABA LEO 405 (4/19/97). [FN1] The ABA explained that determining whether a lawyer may represent one government entity while being adverse to another depends upon "whether the two government entities involved must be regarded as the same client" or whether one representation may be "materially limited" by the other, in which case the conflict might be curable with consent. The ABA also explained that determining if governmental entities are the same client is a "matter of common sense and sensibility" including such factors as: entities' understandings and expectations; any understanding between the entities and the lawyers; whether the government entities have "independent legal authority with respect to the matter for which the lawyer has been retained"; the entities' stake in the substantive issues or shared concerns about the outcome. In discussing adversity, the ABA explained that determining if one representation would be "materially limited" by another representation depends on whether the matter would affect the "financial well-being or programmatic purposes" of either client. In some situations, a lawyer's representation of a government entity "on an important issue of public policy so identifies her with an official public position" that the lawyer could not oppose the government, even on an entirely unrelated matter.

ABA Model Rule Scope [18] adds more complexity.

- ABA Model Rule Scope Comment [18] ("Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.").

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

One Illinois LEO took exactly the same approach.

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

A New York City LEO provided less guidance.

- New York City LEO 2004-03 (9/17/04) ("Government lawyers are subject to the rules that ordinarily govern the attorney-client relationship, including those governing conflicts of interest and entity representation. This opinion addresses various questions relating to government lawyers' conflicts of interest in civil litigation. The questions may ultimately

be analyzed differently for government lawyers than for lawyers who represent private entity clients because of the legal framework within which government lawyers function. Questions such as who the lawyer represents, who has authority to make particular decisions in the representation, and whether the lawyer may represent multiple agencies with differing interests are largely determined by the applicable law. In dealing with government officers and employees, the government lawyer must comply with DR 5-109 and DR 5-105, as informed by applicable law. If the agency constituents are unrepresented, DR 5-109 requires the lawyer to clarify his or her role, as well as to report any discovered wrongdoing, as described in this opinion. When the government lawyer proposes to represent the constituent, a threshold question is whether the representation will be in the constituent's official or personal capacity. If the constituent would be represented personally, the lawyer must first determine whether the representation is permissible under the conflict of interest rule, DR 5-105, and the lawyer must comply with the rule's procedural requirements in light of the framework described in this opinion.").

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

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

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

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

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

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

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.
B 6/14

Partnerships, LLCs and Joint Ventures

Hypothetical 2

You occasionally represent a law firm in your city on labor and employment matters. The firm has ten partners and thirty associates. You have met all of the firm's lawyers at social functions, but deal primarily with one of the partners. One of your collegues just told you that the wife of another partner at that firm wants to hire your firm to file a divorce action against her husband.

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

YES (PROBABLY)

Analysis

Partnerships

Absent a retainer provision, it can be different to identify the "client" in the partnership setting.

• James M. Fischer, Representing Partnerships: Who Is/Are the Client(s)?, 26 Pac. L.J. 961, 961, 961-62, 962-63 (July 1995) ("One of the more difficult and perplexing legal questions confronting California lawyers is the issue of client identity when a lawyer represents a partnership. Resolution of client identity issues is critical because those determinations have a fundamental impact on conflict of interest, confidentiality, and duty questions. A lawyer who mistakenly believes that a person is not a client, and acts according to that assumption, may likely find that the mistake has cost him or her dearly. Client misidentification is a frequent causal link in malpractice awards since it often results in the lawyer ignoring or even hindering the interests of a person or entity the lawyer is duty bound to protect and advance. Client misidentification may also result in attorney disqualification or fee forfeiture." (emphasis added) (footnotes omitted); "California courts have held that the lawyer who is employed by a partnership represents (1) the partnership, or alternatively (2) the partnership *and* the general partners, or alternatively (3) the partnership, the general partners and the limited partners. The decisions are difficult to reconcile. Reconciliation has been attempted by courts on an issue by issue basis with the lawyer's client base fluctuating as the issue changes. Thus, a lawyer may have one set of 'clients' if the issue involves conflict of interest, but another set of 'clients' if the issue involves confidentiality. This uncertainty over the fundamental issue of 'who is the client' is unhelpful since the lawyer must necessarily guess ex ante to whom and to what extent he owes duties of loyalty and due care. After all, the attorney does not know ahead of time whether a 'client' will sue him for malpractice; move for his disqualification, or claim access to confidential communications under the joint client or common representation arguments. It is hard to be an effective advocate when the identity of the client will be determined after the fact based on issues yet to be determined." (emphases added) (footnotes omitted); "The question 'who is the client' is fundamentally one to be resolved in the retainer agreement. A separate 'ethics' rule serves only as a default rule, a rule to be applied when the retainer is silent. In this setting the question for the rule draftsmen is what rule serves the public interest when the retainer agreement is silent. It is the thesis of this paper that an ethical 'rule' that a lawyer represents only a partnership as an entity is a trap for the unwary lawyer who may lose sight of the larger context in which she acts and in which she creates objectively reasonable expectations by others that she is their lawyer. When representing a partnership the lawyer should draft the retainer so that it identifies not only who are the clients but who are not clients, where failure to do so might engender confusion or ambiguity. Similarly, an ethical rule should not encourage confusion by suggesting that a lawyer has only the partnership entity for a client; rather, the ethical rule should reaffirm that, in the absence of a retainer expressly identifying the client(s), the lawyer's clients are determined by the relationship the lawyer has in fact with the putative clients and the reasonable expectations which arise out of that relationship." (emphases added) (footnote omitted)) (emphases added).

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

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

Id. [FN2]

Most courts and bars take the ABA Model Rules approach.

- Lynn v. George, 223 Cal. Rptr. 3d 407, 417 (Cal. Ct. App. 2017) ("'[A]n attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying the conflict of interest rules. Whether such a relationship exists turns on finding an agreement, express or implied, that the attorney also represents the partner.' (Responsible Citizens v. Superior Court, supra, 16 Cal. App. 4th at p. 1721.)").
- Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756, 758 (Cal. Ct. App. 1993) ("an attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying the conflict of interest rules;" rejecting the "bright line rule that an attorney representing a partnership automatically represents each individual partner." Id. at 765.
- Eurycleia Partners, LP v. Seward & Kissel, LLP, 910 N.E.2d 976, 981 (N.Y. 2009) ("We therefore hold that S&K's representation of this limited partnership, without more, did not give rise to a fiduciary duty to the limited partners. Hence, plaintiffs' breach of fiduciary duty claim against S&K was properly dismissed.").
- Kline Hotel Partners v. AIRCOA Equity Interests, Inc., 708 F. Supp. 1193 (D. Colo. 1989) (holding that a general partnership's lawyer did not have an attorney-client relationship with the partnership's 50% general partner).

But not all courts agree.

- Hydrogen Master Rights, Ltd. v. Weston, Civ. No. 16-474-RGA, 2016 U.S. Dist. LEXIS 177230 (D. Del. Dec. 22, 2016) (holding that an in-house lawyer represented partners in a partnership rather than the entity; also holding that the prospective consent obtained by the lawyer was too open-ended and therefore was ineffective; "The engagement letter states that McDonald Hopkins was retained 'to represent all of you in the formation and operation of a new legal entity.'. . . Because the new entity did not yet legally exist, it was not named as the client for the purposes of the engagement letter. In addition, the partners apparently decided that the engagement letter should not be addressed to any of their pre-existing entities, including HMR. Instead, the engagement letter, dated October 28, 2011, is addressed to the four individual partners 'as a group.'. . . Specifically, it states: 'The scope of this engagement initially involves representation of the four Owners as a group in the formation of the Entity. Once the Entity has been formed, we will no longer represent the Owners individually with respect to any Entity matters.'"; "The engagement letter reiterated that the client was the individual owners as a group until after an entity was formed. Specifically, it stated: '[W]e will initially represent the four Owners as a group and will later represent the Entity once it has been formed. Each of you hereby consents to our initial representation of the four Owners and later representation of the Entity following formation.'"; "The engagement letter also contained several warnings regarding potential conflicts of interest between the individual partners. Specifically, the letter warned that: "'When representing the four Owners as a group, we will not be in a position to advocate the interests of any one Owner as against the others. If your interests begin to diverge and these points of divergence become too significant, we may be required to cease our representation of the Owners as a group and each of you may then need to retain new counsel.'"; "The engagement letter reiterated: 'we will not be representing or otherwise serving as an advocate for any Owner in matters involving the Entity.'. . .

  Finally, the engagement letter contained a broad waiver of conflict, stating: 'Each of you hereby waive forever each and every conflict of interest, which now exists, due to, or hereafter may arise out of, this firm's representation of the Entity and any Owners (or affiliates).'"; "Here, specific circumstances suggest that McDonald Hopkins did not have an attorney-client relationship with a partnership entity. As conceded at oral argument, the partners never formalized the legal existence of the partnership by, among other things, executing a partnership agreement, obtaining a business license from the state, filing a certificate of formation with the state, or obtaining an employer identification number from the IRS. In forming its opinion, the ABA relied on the fact a partnership, as a separate legal entity, is 'capable . . . of entering into contracts and either bringing suit or being sued in its own name.' ABA Formal Op. 91-361 (1991). But Plaintiffs' partnership has not exercised any rights or duties in its own name by, for example, entering into contracts and bringing suit. . . . Indeed, the partnership does not even have a name."; "Under Model Rule 1.9, a lawyer may represent a current client in a substantially

related matter if 'the former client gives informed consent, confirmed in writing.' Plaintiffs argue that Coats have informed consent in advance by signing the engagement letter which states": 'Each of you hereby waive forever each and every conflict of interest, which now exists, due to, or hereafter may arise out of, this firm's representation of the Entity and any Owners (or affiliates).'"; "Here, Coats gave general and open-ended consent. Although Coats may be an experienced user of the legal services involved, particularly considering that he is the one who found Movius and recommended him to the other partners, Coats was not independently represented when he gave his advance consent and the advance consent was not limited to future conflicts unrelated to the subject of the representation. Indeed, the court has already concluded that this matter and the prior matter are substantially related. For all of these reasons, the court finds that Coats did not give informed consent under Model Rule 1.9. Accordingly, Movius and McDonald Hopkins are disqualified from representing Plaintiffs in this matter.") (emphases added).

Limited Liability Companies (LLCs)

LLCs share some characterization of both partnerships and corporations, and thus predictably implicate client identity issues.

• Baker v. Wilmer Cutler Pickering Hale & Dorr LLP, 81 N.E.3d 782, 785, 785-86 (Mass. App. Ct. 2017) (allowing minority shareholders in a limited liability company to sue Wilmer Hale for representing the majority shareholders in not protecting their duty to the minority owners; "Minority members of a Massachusetts limited liability company seek to hold the company's attorneys liable for their involvement in an alleged 'freeze-out' orchestrated by and on behalf of the majority members. According to the minority members, the majority members secretly retained the attorneys, one of whom is the daughter of a majority member, to, at least ostensibly, represent the closely held company. The attorneys then worked behind the scenes to assist the majority in merging the company with and into a newly created Delaware limited liability company, all for the purpose of eliminating significant protections afforded minority members under the Massachusetts company's operating agreement. By the time the attorneys' involvement came to light, the majority members had unfettered control of the resulting entity, with a new operating agreement that extinguished the minority's rights to, among other things, participate in management, access the company's records, and prevent dilution of their interests. The minority members, the plaintiffs in this action, responded by asserting claims against the attorneys and their respective law firms for breach of fiduciary duty, aiding and abetting tortious conduct, civil conspiracy, and violation of G.L. c. 93A."; "The Supreme Judicial Court has stated that counsel for a close corporation can owe a fiduciary duty to individual shareholders. Whether such a fiduciary relationship exists in a particular case is largely a question of fact. Here, taking the facts alleged as true, and drawing all reasonable inferences therefrom in favor of the plaintiffs as nonmoving parties, we conclude that they have alleged enough to plausibly suggest that the defendants, acting as counsel for a limited liability company governed by an operating agreement providing significant minority protections, owed them a fiduciary duty. As the plaintiffs further allege that the defendants secretly worked to eliminate those protections, we conclude that they have done 'enough to raise a right to relief [on their claim for breach of fiduciary duty] above the speculative level.' We reach the same conclusion as to the claims alleging that, by their actions, the defendant attorneys knowingly aided and abetted and conspired with the majority members in breaching the majority fiduciary duties to the plaintiffs. We also conclude that the G.L. c. 93A claim was dismissed prematurely." (alteration in original) (citations omitted) (emphases added)).

• Order and Memorandum, Saumure v. Cathcart, Case No. 161202534, slip op. at 3, 4, 5 (Pa. Ct. C.P. Phila Cty. Oct. 19, 2017) (disqualifying the Drinker Biddle law firm from representing a defendant LLC and its majority owner in a dispute about the LLC's ownership; "Rule 1.13 governs the relationship between an attorney and an organization as a client: 'A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.' Because a lawyer retained by an organization represents that organization, a lawyer's dual representation of an organization and a majority member who controls that organization may pose a conflict of interest. A conflict of interest arises if corporate counsel endeavors to defend an organizational client and defend an individual who controls that organization together in a derivative action involving serious charges of wrongdoing by those in control of the organization. This conflict arises because the interests of those who control the company (and with whom the attorney has had a preexisting relationship) may diverge from the interests of the company itself. '[E]xcept in patently frivolous cases -- allegations of directors' fraud misconduct, or self-dealing require separate counsel.'" (alteration in original) (footnotes omitted); "Drinker is also ethically precluded from representing Cathcart [majority owner] or EHS separately."; "In this case, if Drinker were to represent

Cathcart but EHS retains new counsel, Drinker's duty of loyalty remain [sic]. This is because Drinker represents EHS as a current client in other corporate work. Alternatively, it is because EHS has becomes [sic] a former client."; "Either way, it is foreseeable that further discovery may prompt cross claims between Cathcart and EHS. If this were to happen, Drinker is in a conflict situation which EHS may not waive in a derivative action. Indeed, the very decision whether to file cross claims between two clients is untenable for Drinker. The firm cannot reasonably 'provide competent and diligent representation to each affected client' under these circumstances.") (emphases added).

• H-D Transport v. Pogue, 374 P.3d 591, 593, 596, 598 (Idaho 2016) (analyzing a situation in which one owner of a 50-50 partnership hired a lawyer to represent him in preparing an agreement with the other owner; granting summary judgment against the other owner in a malpractice action that he filed against the lawyer; concluding that the defendant lawyer had represented the owner who hired him, and not the PLLC; "In August of 2011, Hughes and Andrew Diges entered into a 50-50 partnership, under the name H-D Transport, to haul hydraulic fracturing fluid. Hughes contributed money to the partnership and Diges contributed his experience. The partners did not create a written partnership agreement. Sometime prior to October 21, 2011, disagreements arose between the partners concerning the operation and finances of the partnership. On October 21, 2011, Diges hired Michael D. Pogue, an attorney with Lawson, Laski, Clark & Pogue, PLLC, to draft a formal partnership agreement. Diges told Hughes that he had hired an attorney to prepare a partnership agreement, and on November 21, 2011, Pogue, Hughes and Diane Baker, the partnership bookkeeper, participated in a conference call regarding the partnership."; "[T]he district court noted that Hughes himself admitted that on November 21, 2011, the same day as the telephone conference, Hughes 'became aware that Pogue only represented the interests of Diges . . . .' The district court concluded that it was not 'subjectively or objectively reasonable for Hughes to believe the Pogue was his attorney or representing his interest under the circumstances . . . .'"; "There is no evidence in the record of an express agreement between Hughes and Pogue. The question then becomes whether Pogue engaged in conduct that Hughes could have reasonably construed as an agreement to form an attorney-client relationship."; "The district court considered evidence that Diges initially paid Pogue with $1,500 of H-D Transport funds; however, the district court determined that the characterization of those payments as personal payments in the Dissolution Action collaterally estopped Hughes and H-D Transport from relying on that evidence to support their claims. The district court further noted that, because Hughes was unaware that Pogue was paid with H-D Transport's money, the source of the funds could not have been a basis for a reasonable belief that Pogue represented H-D Transport. Despite the fact that Pogue identified H-D Transport as a plaintiff in the Dissolution Action, the district court concluded: '[T]he mere fact that Pogue named the Partnership as a plaintiff in the dissolution action does not suggest that Pogue was the attorney for the Partnership on or before November 21, 2011 when Hughes learned that Pogue was only representing Diges. In the dissolution action all parties agreed that the Partnership was a nominal party and further, Hughes had his own attorney, Ben Worst, who named the Partnership as a counterclaimant in the dissolution action. On or before November 21, 2011 it was not reasonable for Hughes to believe that Pogue was the Partnership attorney.'"; "Based on the above discussion of whether it was reasonable for Hughes to believe Pogue was hired to represent Hughes and H-D Transport, Hughes is wrong in this assertion. The district court did not err when it concluded that it was not reasonable for Hughes to believe that Pogue represented H-D Transport.").

• Rahmani v. Venture Capital Props. LLC, No. 650655/2015, 2016 NY Slip Op 31976(U), at 2, 2-3 (N.Y. Sup. Ct. Oct. 17, 2016) (disqualifying a lawyer from representing a plaintiff in an arbitration adverse to an LLC and two of the LLC's members, because the lawyer was representing the LLC in other matters; "In this case, Mr. Castro seeks to represent plaintiffs in the JAMS arbitration against defendant VCP while simultaneously representing VCP in three litigations in this court. When an attorney represents a limited liability company, he is deemed as a matter of law to represent each of its members (see Flores v. Williard j. Price Assocs, LLC, 20 AD 3d 343, 344, 799 N.Y.S.2d 43 [1st Dept 2005]; see also Steven's Distribs., Inc., 2010 NY Slip Op 31839[U], 2010 NY Misc LEXIS 336 at *16). Accordingly, by virtue of Castro's representation of VCP, Castro also represents the individual defendants Ebi Khalili and Josh Ramani because they are members of VCP. Thus, by representing plaintiffs in the arbitration against defendants, he is effectively 'suing his client,' in violation of Rule 1.7.").

• Sprengel v. Zbylut, No. B256761, 2015 Cal. App. LEXIS 971 (Cal. Ct. App. Oct. 29, 2015) (adding a footnote to a previous opinion; "'Defendants contend that, in this particular case, we may reject Sprengel's claim of an implied attorney-client relationship under the first prong of the section 425.16 test because (1) the undisputed evidence shows they 'were

hired only to represent the LLC [Purposeful Press], not Sprengel and (2) under 'settled,' 'black letter law,' an attorney for an LLC owes no professional dues to the LLC's individual members. Even if we were to assume that defendants' evidence established they were properly retained to represent the LLC only (a fact Sprengel disputes), defendants have cited no authority holding that an attorney for an LLC has no obligations to the LLC's individual members. Instead, defendants rely solely on cases holding that an attorney for a corporation generally does not represent the corporation's officers or shareholders in their individual capacities. . . . Our courts have applied a different rule in the context of partnerships, explaining that a five-part factual inquiry is used to 'determine whether in a particular case the partnership attorney has established an attorney-client relationship with the individual partners.'" (citation omitted)).

Joint Ventures

Lawyers representing joint ventures face their own set of challenges. A "contract" joint venture is not a separate legal entity, but instead involves the joint venture partners each contributing some of their own employees to work on a cooperative effort alongside employees from the other partner. It is not difficult to imagine both the conflicts and the privilege implications of that scenario.

In contrast, an "entity" joint venture is essentially a closely-held corporation or other entity.

But it is worth noting the malpractice risk that those lawyers face.

- Nelson Bros. Prof'l Real Estate, LLC v. Freeborn & Peters, LLP, 773 F.3d 853, 855, 857-58 (7th Cir. 2014) (upholding a $1,000,000 jury award against a law firm for favoring one member of a joint venture over another member; "Representing as he did a joint venture of Alliance Equities and Nelson Brothers, Hannon was obligated to be loyal to both. The plaintiffs argue that he breached his duty to them in a variety of respects, for example by favoring Alilance Equities, his original client, over Nelson Brothers."; "Freeborn & Peters argued at trial that it didn't represent the plaintiffs at all, but that is wrong. It represented both parties to the joint venture, Alliance Equities and Nelson Brothers, and Nelson Brothers and the Nelsons are inter-changeable. A reasonable jury could find that the law firm violated its ethical obligations to the plaintiffs by not warning them of the firm's conflicts of interest, by drafting agreements that reflected favoritism toward Alliance Equities and concealing the favoritism from the plaintiffs (as by not revealing that Alliance Equities would be controlling the below-$50,000 expenditures -- which later resulted in the decision to pay the law firm $49,999 owed to the gap lender), and by failing to advise the plaintiffs of the risks to them created by the badboy guarantees and the mechanics' liens on the shopping center, and finally by closing the deal for the shopping center without providing for an escrow to cover the liens.") (emphases added).

Best Answer

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

B 6/14

Associations

Hypothetical 3

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

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

YES (PROBABLY)

Analysis

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

In 1992, the ABA issued an opinion explaining that a trade association's lawyer "generally" does not represent any association members, but might be precluded from adversity to one of the members if a lawyer acquires confidential information from that member as part of the trade association representation. [FN3]

The Restatement takes essentially the same approach.

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

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

State legal ethics opinions also generally hold that a lawyer representing a trade association does not automatically represent its members, but might face a conflict if the lawyer acquires confidential information from a member.

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

Case law tends to apply the same standard.

- E2Interactive, Inc. v. Blackhawk Network, Inc., No. 09-cv-629-s/c, 2010 U.S. Dist. LEXIS 48333, at *19, *24 (W.D. Wis. May 16, 2010) (refusing to disqualify Alston & Bird from handling a matter adverse to a Safeway subsidiary while simultaneously representing Safeway itself in another matter; "Defendant's final argument is that it became a client of Alston's in connection with Alston's representation of the Consumer Choice Prepaid Card Coalition. A lawyer who represents a trade association does not have a conflict of interest with an individual member of the association if the lawyer 'neither has undertaken representation of the member nor otherwise stands in a lawyer-client relationship with that member.' ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-365 (1992)." (emphasis added); noting that Alston had stopped representing the Coalition at some point, which made the Coalition a past client; "[B]oth this lawsuit and the lobby efforts related in one way or another to 'gift cards,' which is defendant's business. But there must be something more to the phrase 'substantially related' than merely involving the client's business or its products in some general sense; otherwise, no lawyer could ever be adverse to a corporation that was a former client.").

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

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

- District of Columbia LEO 305 (1/16/01) ("a lawyer who represents a trade association does not, without more, represent the members of the association").

This standard can present logistical problems for law firms which represent trade associations. Those law firms presumably would have to run conflicts checks before answering any specific questions from any trade association members -- because the law firms might be representing other clients adverse to those members in unrelated matters. Fortunately, the members probably would be considered the law firm's "client" only during the telephone call or other communication -- after which the member would become a former client. If courts and bars take that approach, the law firm could immediately become adverse

to that association member in an unrelated matter, as long as that matter did not involve any of the information that the law firm received from the association member during the communication.

The client identity issue can also arise in a typical homeowners association setting.

• Legacy Villas at La Quinta Homeowners Ass'n v. Centex Homes, 626 F. App'x 679, 682, 683 (9th Cir. 2015) (holding that the company placed a representative on the owners association board did not establish that the association's law firm represented the company; "The evidence offered by Centex and relied upon by the district court does not support the finding of an implied attorney-client relationship between Peters & Freedman and Centex. The letter addressed to Sandy Duff and the Developer Transition Checklist sent to Jayne Carilo provide advice to the recipients in their capacities as Homeowners Association Board members, not in their capacities as Centex employees. The declaration by Jayne Carilo, stating that she understood Peters & Freedman to be providing her advice in her capacity as a Centex employee, is also not persuasive evidence of an implied attorney-client relationship. Centex, as an experienced developer, could not have reasonably believed that Peters & Freedman represented Centex. See Sky Valley Ltd. P'ship v. A.T.X. Sky Valley Ltd., 150 F.R.D. 648, 655 (N.D. Cal. 1993) ('We question whether a commercially sophisticated party that allegedly has a multimillion dollar interest in a project would form an attorney-client relationship without a shred of paper memorializing even the most basic terms of that alleged relationship.'"; "The advocate-witness rule does not prohibit attorneys from serving as trial counsel in a trial where an attorney from the same firm will testify.").

Best Answer

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

B 6/14

Insured/Insurance Company

Hypothetical 4

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

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

MAYBE

Analysis

Introduction

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

• Nathan M. Crystal, Solving the Problem of the Insurance Defense Triangle, 25 S.C. Law. 9, 9 (Nov. 2013) ("The beginning point for dealing with these issues is client identification. Who does defense counsel represent -- the insured, the insurer, or both? The traditional view, still followed by many courts, has been that defense counsel represents both the insured and the insurer. See Juneau County Star-Times v. Juneau County, 824 N.W.2d 457, 467 (Wis. 2013). Some states take a nuanced approach in which both the insured and the insurer are clients, but the insured is the 'primary' client. See Lifestar Response of Ala., Inc. v. Admiral Ins. Co., 17 So.3d 200, 217 (Ala. 2009). Other states have decided on a one-client approach in which the insured is the only client. See Feliberty v. Damon, 527 N.E.2d 261, 265 (N.Y. 1988)." (emphases added); "In a surprising number of states, including South Carolina, however, the issue is unresolved. The S.C. Rules of Professional Conduct (like the ABA Model Rules) are unclear about the issue of who is the client in insurance defense practice. Comment 11 to Rule 1.8 seems to characterize an insurance company as a third-party payor rather than a client. The comment refers to situations in which lawyers are asked to represent clients when someone else is

paying the lawyer's legal fees. One of the situations mentioned in the comment is that of 'an indemnitor (such as a liability insurance company).' However, the comment also recognizes that a third-party payor may be a co-client. See SCRPC 1.7, cmt. 11. I have been unable to locate any South Carolina cases or opinions on point." (emphasis added)).

• Michael S. Quinn, Whom Does The Insurance Defense Lawyer Represent?, ALI-ABA Course of Study Materials, 64 ALI-ABA 171, 173, 174, 175 (Jan. 13, 2000) ("A recurrent question concerns whom insurer-appointed defense counsel for the insured represents. Everyone agrees that such a lawyer represents the insured. The interesting question is whether such a lawyer also represents the insurer, and, if so, when, for what purpose, subject to what limitations, and under what circumstances. It is the thesis of this essay that the insurance defense lawyer -- the lawyer paid by the insurance company to defend the insured -- will, as a general rule, also have an attorney-client relationship with the insurance company." (emphases added); "As everyone knows, this is a hotly debated topic. Frankly, I can't see why. The conclusion I am proposing here seems obvious and unassailable. A much more interesting question is why so many people and institutions resist it. For the most part, courts have not adopted the one-client view. There are, of course, a few exceptions. Perhaps it is the paucity of decisions of courts of last resort which has contributed to the debate. After all, state supreme courts have had many opportunities to resolve this issue. Another possible answer is that the lawyers who are thinking about the problem are taking the wrong approach. Some cast this issue entirely in pragmatic terms, perhaps taking their cue from the resurgence of philosophical pragmatism in American thought and jurisprudence." (emphasis added) (footnotes omitted); "This approach to solving the tripartite problem is quite mistaken. Alas, proponents of the one-client view are not the only ones to make this mistake.").

• Nancy J. Moore, The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?, 4 Conn. Ins. L.J. 259, 261-62, 262-64 (1997/1998) ("There has been much debate, both historically and recently, whether the insurance defense attorney represents one client or two, or perhaps even 'one and-a-half.' Most of the debate concerns the difficulty of resolving the conflicts of interest issues that arise under these scenarios. However, Professor Silver now suggests that this entire debate is misguided because it mistakenly ignores fundamental law regarding the formation of the attorney-client relationship.' Thus, Professor Silver notes that under contract law these relationships are determined by the agreement of the parties themselves, not by ethics committees or (even worse) ethics scholars indicating their own preference as to what those relationships should be." (emphasis added) (footnotes omitted); "As a result, Professor Silver's answer to the age-old question is quite simple: 'Because attorney-client relationships arise consensually, whether defense counsel has one client or two depends upon the agreement that counsel enters into when retained.'" Of course, Professor Silver is absolutely right. At one level, whether the insurer is a client of the attorney is a decision for the insurer (and the attorney) to make. The attorney-client relationship, like other agency relationships, generally arises by agreement, and '[a] defense lawyer who undertakes to represent both a company and an insured has two clients and is a fiduciary with respect to both parties.'" I have no doubt that most proponents of the 'one client' view would be happy to acknowledge this point, so long as it is clearly understood that it does not entail a view as to the ethical propriety of any joint representation. Thus, they would probably agree that an attorney-client relationship can exist *even when the relationship blatantly violates conflict of interest rules*. Moreover, it is important to acknowledge this fact because such attorneys would owe duties to both their clients, each of whom would then be in a position to sue the attorney for legal malpractice if these duties are breached." (alteration in original) (underscored emphasis added) (footnotes omitted)).

In 2013, the Southern District of Indiana similarly noted that

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

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

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

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

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

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

Florida Ethics Rule 4-1.7(e). An accompanying comment provides a further explanation. [FN4]

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

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

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

Bars understandably defer to courts' conclusion about such relationships.

> • District of Columbia LEO 290 (4/20/99) ("The Committee concludes that the law firm ethically may submit an insured's detailed bills that contain protected information to the insurer only after the lawyer has informed the insured about the nature and potential consequences of both the requested disclosure and non-disclosure and the insured has consented to the release of the information. Disclosure of such information to an independent auditing agency also may occur only with consent of the insured after disclosure. Consent to disclose confidences and secrets to the Insurer may not provide a basis to infer consent to disclose the same information to another entity who performs work for the insurer."; "It has been suggested that the existence of legal privilege provides a basis to infer consent to disclosure or implied authorization. Communications among the insurer, insured and lawyer may be privileged, at least in part, because the lawyer is representing both parties, because there is a joint defense agreement or because a legal doctrine governing the 'tripartite' relationship of insurer-insured-attorney applies. This is a matter of substantive law beyond the scope of the Committee's opinion. In any event, the mere existence of a possible privilege among insurer, insured and counsel does not in and of itself provide a basis to infer client consent to disclosure of confidences or secrets. Except as allowed by Rule 1.6, a lawyer may not release information relating to the representation of a client to anyone, including a co-client, unless the first client consents after disclosure or an exception is met. To the extent it is relevant, the existence of a joint privilege may bear on the consequences of disclosure of which the client must be apprised before consenting." (emphases added); "The inquirer has also asked whether it would be ethically permissible to provide the same detailed billing information and work product directly to the outside auditing agency. If the auditor is an independent entity from the insurance company, disclosure to the auditor is only permissible if the provisions of Rule 1.6 have been met. Even if disclosure to the insurance company has been consented to by the client, that consent should not be assumed to include consent to disclosure to a third party auditor. The Rule 1.6 considerations we have described with respect to insurance company disclosure should be separately addressed when disclosure to an

auditor is requested."; "The inquirer also asked whether the Rules of Professional Conduct apply if the lawyer provides the protected information to the insurer, who then sends it to the outside auditor. The Rules of Professional Conduct do not apply to an insurer and insurance companies are therefore not bound by this opinion. Prior to disclosure of protected information to the insurer, however, the lawyer should instruct the insurer not to release the protected information and should designate all such information clearly. If there is reason to believe that the insurer will not follow this instruction, the lawyer should so advise the client, prior to disclosure, explaining any additional risks that would result from disclosure by the insurer to a third party.").

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

ABA Model Rules

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

Restatement

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

> A lawyer might be designated by an insurer to represent the insured under a liability-insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The law governing the relationship between the insured and the insurer is, as stated in Comment a, beyond the scope of the Restatement. Certain practices of designated insurance-defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in noninsurance arrangements with significantly different characteristics.
>
> It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 14. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. Similarly, communications between counsel retained by an insurer to coordinate the efforts of multiple counsel for insureds in multiple suits and such coordinating counsel are subject to the privilege. Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer. . . .
>
> The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment d hereto. With respect to client consent (see Comment b hereto) in insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent in the form of the acquiescence of the client-insured to an informative letter to the client-insured at the outset of the representation should be all that is required. The lawyer should either withdraw or consult with the client-insured . . . when a substantial risk that the client-insured will not be fully covered becomes apparent.

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

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

> Insurer, a liability-insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of $5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the duty of

competent representation owed by Lawyer to Policyholder (see § 52), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

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

> Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured. If the lawyer knows or should be aware of such an excess claim, the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage. Such occasions for conflict may exist at the outset of the representation or may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent . . ., the lawyer may proceed after obtaining client consent under the limitations and conditions stated in § 122.
>
> When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question . . . without explicit informed consent of the insured . . . . That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured . . . .
>
> With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud . . . and, if applicable, consistent with the lawyer's duties to the insurer as co-client . . . . If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided in § 32 . . . . The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement.

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

States Recognizing an Attorney-Client Relationship only with the Insured

Some states explicitly or implicitly take the position that a lawyer hired by an insurance company to represent its insured represents only the insured.

- Sentry Selection Ins. Co. v. Maybank, Op. No. 27806, 2018 S.C. LEXIS 67 (S.C. Sup. May 30, 2018) (holding that an insurance company can file a malpractice case against the lawyer for the insured; "However, an insurance company that hires an attorney to represent its insured is in a unique position in relation to the resulting attorney-client relationship. Pursuant to the insurance contract, the insurer has a duty to defend its insured, and must compensate the attorney for his time in defense of his client. If the insured settles or has judgment imposed against him, the insurance contract ordinarily requires the insurer to pay the settlement or judgment. Many insurance contracts provide the insurer has a right to investigate and settle claims as a representative of its insured. Finally, the insurer's right to settle must be exercised in good faith, and that duty of good faith requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits."; "Because of the insurance company's unique position, we hold the answer to question one is yes, an insurer may bring a direct malpractice action against counsel hired to represent its insured. However, we will not place an attorney in a conflict between his client's interests and the interests of the insurer. Thus, the insurer may recover only for the attorney's breach of his duty to his client, when the insurer proves the breach is the proximate cause of damages to the insurer. If the interests of the client are the slightest bit inconsistent with the insurer's interests, there can be no liability of the attorney to the insurer, for we will not permit the attorney's duty to the client to be affected by the interests of the insurance company. Whether there is any inconsistency between the client's and the insurer's interests in the circumstances of an individual case is a question of law to be answered by the trial court."; "Our decision is also consistent with the rule adopted by the majority of states that have considered the issue.") (emphases added).

• Texas LEO 669 (3/2018) ("When a lawyer represents an insured at the request of an insurance company, the attorney and the insured have an attorney-client relationship, and the Texas Disciplinary Rules of Professional Conduct govern the attorney's conduct."; "Lawyer may not disclose Defendant's confidential information, including Defendant's lack of cooperation, to Company, regardless of whether such disclosure may lead to Company's withdrawing coverage. Moreover, of course, Lawyer may not use Defendant's lack of cooperation to Defendant's disadvantage."; "Furthermore, Lawyer may not reveal Defendant's failure to communicate in order to explain to Company the reason for Lawyer's withdrawal from the representation. With respect to the reasons for withdrawal, a statement to the court and to Company 'that professional considerations require termination of the representation ordinarily should be accepted as sufficient.'"; "Under the Texas Disciplinary Rules of Professional Conduct, if an insured fails to communicate with a lawyer who is retained to defend the insured, then the lawyer may withdraw from the representation. In that event, the lawyer must protect the insured's confidential information and may not, in the absence of the insured's consent, disclose to the insurance company the reason for the withdrawal. In connection with moving to withdraw from the suit, the lawyer should avoid disclosing, either to the court or to the insurance company, the specific reason for the withdrawal. The lawyer instead should provide only a general explanation that professional considerations require withdrawal, although there are circumstances in which a court may require that additional information be provided to the court.").

• Texas LEO 668 (11/2017) ("Under the Texas Disciplinary Rules of Professional Conduct, when an insurance company staff attorney undertakes the representation of a client who is insured by the staff attorney's employer, his duty is to that client and not to any other person insured by his employer. Like all lawyers, a staff attorney must zealously represent his client. Also, like all lawyers, a staff attorney has a duty of loyalty to his client and a duty to exercise independent judgment on behalf of his client, regardless of the fact that his employer is the client's insurance company. If, during the representation, a staff attorney's representation of the insured client becomes adversely limited by his own interests or the interests of his employer, the insurance company, the staff attorney must not continue the representation unless he is able to obtain consent from each affected or potentially affected client in accordance with the requirements of the Texas Disciplinary Rules of Professional Conduct. If, during the representation, a staff attorney cannot exercise independent professional judgment on behalf of his client, he must withdraw from the representation.").

• Evraz Inc. N.A. v. Riddell Williams P.S., Civ. No. 3:08-cv-00447-AC, 2013 U.S. Dist. LEXIS 165430, *4, *13-14, *22, *23 (D. Or. Nov. 21, 2013) (finding that a law firm which represented an insured did not also represent its insurance company; "The court finds that no attorney-client relationship existed between Continental [defendant insurance company] and Stoel Rives [law firm plaintiff wants to hire] under controlling Oregon Supreme Court precedent and, alternatively, under the Oregon State Bar ethics opinion upon which Continental relies. The court also finds no representational conflict would be created by allowing Stoel Rives to represent Evraz in its coverage litigation against Continental."; "The court finds that an attorney-client relationship did not exist between Continental and Stoel Rives. Resolution of this issue begins with Continental's assumption that legal ethics opinions are controlling of this court's determination. They are not. Several Oregon State Bar ethics opinions suggest that in some circumstances, an insurer retaining counsel pursuant to a duty to defend an insured gives rise to a tri-partite attorney-client relationship between the attorney and both the insurer and insured. . . . Continental overlooks well-established Oregon law that legal ethics are advisory only." (emphasis added); "Continental overlooks the absence of two crucial facts: it did not hire and did not pay Stoel Rives."; "Evraz, not Continental, hired Stoel Rives to represent it in the Portland Harbor Superfund litigation. Evraz hired Stoel Rives five years before Continental accepted Evraz's tender of defense under a reservation of rights in November 2004."; "Evraz, not Continental, paid Stoel Rives. Continental disputes this by stating it 'funded' Evraz's defense pursuant to the insurance contract, but undisputed is that Continental never paid Stoel Rives, a critical distinction here because of Continental's rigid reliance on the context-specific default rule. Here, Continental reimbursed Evraz who then paid Stoel Rives, which Evraz had directly retained and paid to represent it long before Continental accepted Evraz's tender of defense. The payment relationship between Evraz and Stoel Rives never changed after Continental appeared. Continental provides neither analysis nor authority to support its assertion that it should be found to have paid Stoel Rives as the default rule contemplates and, thus, trigger its application to the specific facts present here.").

• Larson v. One Beacon Ins. Co., Civ. A. No. 12-cv-03150-MSK-KLM, 2013 U.S. Dist. LEXIS 81181, at *15, *16 (D. Colo. June 10, 2013) ("In Colorado insurance cases, 'an attorney retained by the insurance carrier owes a duty to the insured only; there is no attorney-client relationship between an insurance carrier and the attorney it hires to represent

the insured.”’ (citation omitted) (emphasis added); “[T]he communications between Ms. Tester [Insured] and Mr. Thomas [Lawyer hired by the insurance carrier to represent the insured] are generally protected, but not when those communications are between Ms. Tester and/or Mr. Thomas on the one hand and Defendant and/or Defendant's legal counsel on the other.”).

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

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

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

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

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

• Norman v. Ins. Co. of N. Am., 239 S.E.2d 902, 907 (Va. 1978) (“[A]n insurer's attorney, employed to represent an insured, is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured.”).

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

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

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

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

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

• North Carolina LEO CPR 255 (1/18/80) (explaining that a lawyer hired by an insurance company to represent an insured has an attorney-client relationship with both the company and the insured -- meaning that "[i]f conflicts of interest develop between the insured and insurer, such conflicts should be frankly discussed with both, and each should be advised he/it has the right to seek advice from other, independent counsel"; also holding that a lawyer representing an insurance company can simultaneously represent a plaintiff seeking recovery from another insured).

Other states seem to take the same approach.

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

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

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

• State Farm Mut. Auto Ins. Co. v. Fed. Ins. Co., 86 Cal. Rptr. 2d 20, 22, 24, 26, 27, 29 (Cal. Ct. App. 1999) (holding that a lawyer who was hired an insurance company to represent its insured has an attorney-client relationship with the insurance

company, and can be disqualified from representing other clients adverse to the insurance company even on unrelated matters; explaining the issue: "The primary issue presented by this appeal is whether, for purposes of disqualification, the attorney representing an insured is also representing the insurance company. If the insurance company is a client, this case poses a secondary question regarding the applicable disqualification standard. The issue becomes whether the insurance company is a 'former' or a 'concurrent' client when the attorney files a complaint naming the insurance company as a defendant and then settles the insured's case."; explaining that the law firm McCormick was retained in 1996 to represent State Farm on coverage issues adverse to Federal, and also retained by Federal Insurance to represent its insured; noting that McCormick represented State Farm in February 4, 1998, declared to a judgment action against Federal, but continued to represent Federal's insured on the unrelated matter until that case settled on May 28, 1998; noting that under California law "it has been held that an insurance company is a client with respect to its ability to assert the attorney-client privilege. . . . Between the attorney and the insurer who retained the attorney and paid for the defense, there exists a separate attorney-client relationship endowed with confidentiality."; "In the absence of a conflict of interest between the insurer and the insured that would preclude an attorney from representing both, the attorney has a dual attorney-client relationship with insurer and insured."; "Here, McCormick was representing Federal in the Pinion matter [action in which McCormick represented Federal's insured] when McCormick filed the underlying complaint against Federal on behalf of State Farm.

Approximately three months later, the Pinion case settled. Thus, there existed a period of time during which McCormick was simultaneously representing clients with adverse interests. Further, before the settlement, Federal's counsel alerted McCormick to this alleged conflict. Nevertheless, the trial court analyzed the relationship as if it were a successive representation and applied the substantial relationship test on the ground that the Pinion case had concluded by the time the disqualification motion was heard."; "However, the fact that the Pinion case happened to settle before the disqualification motion was heard should not absolve McCormick from its ethical obligations toward Federal. McCormick knowingly undertook adverse concurrent representation when it filed the underlying complaint. Even if McCormick had initially been unaware of this adverse representation, Federal's counsel notified McCormick of the conflict on at least two occasions before the Pinion case settled. Nevertheless, McCormick took no action in response. Thus, the 'exceptions' noted above do not apply."; "Therefore, although this fortuitous settlement acted to sever McCormick's relationship with its preexisting client, it did not remove the taint of a three-month concurrent representation."; rejecting State Farm's argument that Federal consented to the adverse representation because it hired McCormick when it knew that McCormick was representing State Farm in its coverage dispute with Federal; finding that McCormick was responsible for the conflict; "[T]he burden was on McCormick to avoid creating a conflict. McCormick should not have accepted the cases referred by Federal when it was aware that it might be filing a lawsuit against Federal on behalf of another client. Consequently, there is not basis for finding that Federal impliedly consented to the adverse representation.").

States have continued to choose one approval or the other.

• Mark Dubois, Are We Ready To Join States Recognizing Dual Clients?, Connecticut Law Tribune, July 26, 2018 ("Mark Dubois, Are We Ready To Join States Recognizing Dual Clients?, Conn. L. Trib., July 26, 2018, 12:40 PM ("An issue on which I get a call now and then is whether or when we're going to recognize that an insurance defense lawyer has two clients--the insured and the insurer. My answer is always the same--even though there's clear law that says the only client is the insured, it's a minority approach; many states recognize the two-client approach as both permissible and practical."; "There's a rich body of case law, law reviews and scholarly articles on the problem one judge described as the 'iron triangle.' Others refer to it as the 'eternal triangle' and, more esoterically, the 'tripartite insurance defense relationship.' According to two experts in the field, William T. Barker and Charles Silver, who published an excellent treatise on the ethical duties of insurance defense lawyers, 39 or more states have embraced the notion."; "The idea, as explained by Barker in a series of emails he and I exchanged on the issue a few years back, is that the most common scenario is that the insured and the carrier have congruent interests; any potential conflict can simply be waived, or in the more modern parlance, consented to."; "Of course, there are a few speed bumps that might make the ability of the lawyer to serve two masters questionable. If there's a policy defense or coverage dispute, it's hard to imagine a lawyer representing both parties, but I suppose they could duke that issue out in a different forum with different lawyers."; "Apropos of that, I remember speaking with a now-deceased insurance defense fellow years ago who told me he routinely added a jury interrogatory about whether his client's conduct in the event in dispute had been intentional, thus vitiating coverage. He was surprised when a judge told him that might be a conflict. When I told him I agreed with the judge, he laughed and said he'd done it for years and no one had

questioned him. It'd surprise me if anyone does that today. Those courts that have ruled on it have found for the insured."; "There are also practical issues arising out of a one or two client approach. If the carrier is a client, communications the lawyer has with the carrier may be privileged. If a two-client approach is taken, what happens when something affecting coverage comes up during the trial? Because it's a big country and insurance is something governed by state law, there's a wealth of decisions covering these and many other issues.").

States Recognizing Some Other Arrangement

Some states seem to follow yet another approach.

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

• Mark Dubois, Are We Ready To Join States Recognizing Dual Clients?, Connecticut Law Tribune, July 26, 2018 ("Mark Dubois, Are We Ready To Join States Recognizing Dual Clients?, Conn. L. Trib., July 26, 2018, 12:40 PM ("An issue on which I get a call now and then is whether or when we're going to recognize that an insurance defense lawyer has two clients--the insured and the insurer. My answer is always the same--even though there's clear law that says the only client is the insured, it's a minority approach; many states recognize the two-client approach as both permissible and practical."; "There's a rich body of case law, law reviews and scholarly articles on the problem one judge described as the 'iron triangle.' Others refer to it as the 'eternal triangle' and, more esoterically, the 'tripartite insurance defense relationship.' According to two experts in the field, William T. Barker and Charles Silver, who published an excellent treatise on the ethical duties of insurance defense lawyers, 39 or more states have embraced the notion."; "The idea, as explained by Barker in a series of emails he and I exchanged on the issue a few years back, is that the most common scenario is that the insured and the carrier have congruent interests; any potential conflict can simply be waived, or in the more modern parlance, consented to."; "Of course, there are a few speed bumps that might make the ability of the lawyer to serve two masters questionable. If there's a policy defense or coverage dispute, it's hard to imagine a lawyer representing both parties, but I suppose they could duke that issue out in a different forum with different lawyers."; "Apropos of that, I remember speaking with a now-deceased insurance defense fellow years ago who told me he routinely added a jury interrogatory about whether his client's conduct in the event in dispute had been intentional, thus vitiating coverage. He was surprised when a judge told him that might be a conflict. When I told him I agreed with the judge, he laughed and said he'd done it for years and no one had questioned him. It'd surprise me if anyone does that today. Those courts that have ruled on it have found for the insured."; "There are also practical issues arising out of a one or two client approach. If the carrier is a client, communications the lawyer has with the carrier may be privileged. If a two-client approach is taken, what happens when something affecting coverage comes up during the trial? Because it's a big country and insurance is something governed by state law, there's a wealth of decisions covering these and many other issues.").

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

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

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

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

Implications for a Law Firm Representing Insureds

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

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

- Yellow Cab Corp. v. Eighth Judicial Dist. Court, 152 P.3d 737, 739, 740-741, 741, 742 (Nev. 2007) (noting that under Nevada law a lawyer retained by an insurance company that represented insured has an attorney-client relationship with both the insurance company and the insured; disqualifying the lawyer from representing the insured in an action against the insurance company in the same case in which the lawyer had earlier represented both them; "In concluding that writ relief is not warranted in this case, we expressly adopt the majority rule that counsel retained by an insurer to represent its insured represents both the insurer and the insured in the absence of a conflict. Thus, an attorney-client relationship existed between ICW and the associate who had previously defended Yellow Cab, who was now employed by Vannah's new firm."; "A threshold issue that must be addressed is whether ICW waived any conflict by waiting over two years into the litigation before filing its motion to disqualify counsel. Waiver requires the intentional relinquishment of known right. . . . If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention. . . . Thus, the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished. . . . However, delay alone is insufficient to establish a waiver. . . . Here, ICW identified VCVG's potential conflict almost immediately and asked Vannah to withdraw. He refused. When ICW and Yellow Cab decided to try mediation, ICW postponed any motion for disqualification, while stating that it reserved its right to file such a motion if mediation failed. When mediation failed, ICW promptly filed its motion. Thus, ICW's conduct does not demonstrate, as required for waiver, a clear intent to relinquish its right to challenge Vannah and his firm."; "With respect to the relationship between an insurer and counsel the insurer retains to defend its insured, the majority rule is that counsel represents both the insurer and the insured in the absence of a conflict. . . . This rule requires that the primary client remains the insured, but counsel in this situation has duties to the insurer as well. . . . Courts adopting this rule note that, while the insured is the primary client, counsel generally learns confidential information from both the insured and the insurer and thus owes both of them a duty to maintain this confidentiality; . . . and, since counsel generally offers legal advice to both the insured and the insurer, counsel owes a duty of care to both. . . . Finally, as most states, including Nevada, have a rule that permits joint representation when no actual conflict is present, . . . courts that have adopted a dual-representation principle in insurance defense cases reason that joint representation is permissible as long as any conflict remains speculative."; "While we have not directly addressed this issue in our prior opinions, we have implicitly recognized that an attorney-client relationship exists between a medical malpractice insurer and the lawyer it retains to defend its insured doctor. . . . Also, in considering whether the insurer can assert an attorney-client or work product privilege for documents prepared during the representation of an insured, we have presumed that an attorney-client relationship exists between the insurer and counsel it retained for its insured. . . . We now expressly adopt the majority rule concerning the relationship between an insurer and counsel retained by the insurer to defend its insured.").

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

In one interesting 2008 legal ethics opinion, the Philadelphia Bar dealt with a situation in which a lawyer selected by an insurance company was defending a driver after an accident in which the driver's family members were killed or injured. The

driver directed the lawyer selected to defend her "not to vigorously defend against my family's injuries." The Philadelphia Bar indicated that the lawyer "is bound to honor the client's decision in this regard." [FN5]

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

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

- Allendale Mut. Ins. Co. v. Excess Ins. Co., C.A. No. 94-0614B, 1995 U.S. Dist. LEXIS 19882, at *16 (D.R.I. June 1, 1995) (assessing the situation in which a law firm had represented many insurance companies and insureds on unrelated matters; disqualifying the law firm from representing plaintiffs in actions against the insurance companies because the law firm had represented the company in several matters; "Prudential's insureds were being represented by K&T at the time this instant complaint was filed. While K&T states it represented only the insureds and not Prudential directly, it has been held that where there is no dispute between an insurer and insured, 'as a fundamental proposition a defense lawyer is counsel to both the insurer and the insured. He owes to each a duty to preserve the confidences and secrets imparted to him during the course of representation.'" (citation omitted)).
- Sacca & Sons, Inc. v. E. Coast Excavators, Inc., 1992 Mass. App. Div. 6, 7 (Mass. Dist. Ct. 1992) (declining to disqualify a lawyer from adversity to an insurance carrier even though the lawyer had represented the insurance carrier, because the carrier was a "secondary" client, and the lawyer did not acquire any confidential information from it);
- Gray v. Commercial Union Ins. Co., 468 A.2d 721, 724-26 (N.J. Super. Ct. App. Div. 1983) (assessing the ability of a lawyer who under New Jersey law represented both the insurance company and the insured to take positions adverse to the insurance company in unrelated cases; ultimately holding that the lawyer could not be adverse to the insurance company because he had acquired pertinent information while representing the insured; "[I]t is evident that neither Colqujoun nor any members of the firm in which he is a member can properly represent Gray in this action against Commercial Union. First, there is no dispute that Colquhoun maintained an attorney-client relationship with Commercial Union. Colquhoun's argument, that he did not have a 'true' attorney-client relationship with Commercial Union because his professional duty ran to the latter's insureds and not the insurer itself[,] cannot withstand scrutiny. Concededly, it can be said that '[t]hese interrelationships among a liability insurer, its insured, and the attorney chosen by the insurer to represent the insured, are sui generis. The canons and disciplinary rules do not address themselves frankly and explicitly to this special set of relationships, and there is awkwardness in attempts to apply the canons and rules.' . . . Nonetheless, this ambiguity exists only as to instances of a conflict of interest between the insurer and the insured, which raise the question of the lawyer's primary allegiance. There is no dispute that a fundamental proposition a defense lawyer is counsel to both the insurer and the insured. . . . It may not be seriously disputed that as a result of his 20 years as one of Commercial Union's lawyers, Colquhoun has obtained confidential information and possesses knowledge of certain internal policies of Commercial Union that he will be able to use against it in the Gray litigation. According to Gray's complaint, (1) Commercial Union's management opposed certain changes he made in the operation of the New Jersey claims department and retaliated by forcing him out of his job and (2) Commercial Union determined to drive out all pre-merger personnel 'by making policies of personnel reduction and unwarranted increases in casualty reserves.' Both of these charges rest upon factual allegations regarding the operation of Commercial Union's New Jersey claims department. It is exactly these facts to which Colquhoun was privy during his 20 years of defending claims for Commercial Union. As one of Commercial Union's New Jersey counsel, it is difficult to conceive that Colquhoun would not have become familiar with the structure, operation and policies of its claims department. . . . Although this general information may not be specifically relevant to the merits of the Gray-Commercial Union dispute, it constitutes secrets or confidences of the former client that could be used against it to its substantial disadvantage.").

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

On a macro level, a small number of cases have found that an insurance company which hires a lawyer to represent its insured should be considered the lawyer's "client" not only in that matter (the "tripartite relationship"), but in all matters --

thus presumably precluding the lawyer from simultaneously representing other clients adverse to the insurance company, even in unrelated matters.

- Nationwide Mut. Fire Ins. Co. v. Bourlon, 617 S.E.2d 40, 46, 47, 48 (N.C. Ct. App. 2005) ("In construing the effect of the tripartite relationship between an attorney, an insurer, and an insured, several courts across the country have held that the 'common interest' or 'joint client' doctrine applies. Under this doctrine, communications between the insured and the retained attorney are not privileged to the extent that they relate to the defense for which the insurer has retained the attorney."; "In light of the foregoing, we are persuaded that the common interest or joint client doctrine applies to the context of insurance litigation in North Carolina. Therefore, where, as here, an insurance company retains counsel for the benefit of its insureds, those communications related to the representation and directed to the retained attorney by the insured are not privileged as between the insurer and the insured. Nevertheless, we note that application of the common interest or joint client doctrine does not lead to the conclusion that all of the communications between defendant and Patterson were unprivileged. Instead, the attorney-client privilege still attaches to those communications unrelated to the defense of the underlying action, as well as those communications regarding issues adverse between the insurer and the insured. Specifically, 'communications that relate to an issue of coverage . . . are not discoverable . . . because the interests of the insurer and its insured with respect to the issue of coverage are always adverse.'" (citation omitted); addressing the obligation of the lawyer (retained by the insurance company to represent the insured) to provide his file to the insurance carrier; "[W]e are not persuaded that the trial court erred by concluding that Patterson was prohibited from providing the file to plaintiff in a wholesale manner. As discussed above, some communications contained in the file may have been privileged, including those communications unrelated to the underlying action or defendant's counterclaims, those communications regarding coverage issues made prior to defendant's counterclaims, and those communications unrelated to the conduct forming the basis of defendant's counterclaims. Therefore, we agree that Patterson's file should not have been provided to plaintiff in a wholesale manner. Instead, the file should have been submitted to the trial court for in camera review aimed at determining which documents in the file were privileged. Accordingly, we conclude that the trial court did not err by ruling that Patterson breached his attorney-client relationship with defendant when he provided plaintiff with the entire file from the underlying action."), aff'd 625 S.E.2d 779 (N.C. 2006).

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

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

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

- New York County LEO 751 (9/20/17) ("[W]e conclude that selected panel counsel who, in the course of representing an insured, learns of confidential information that may be detrimental to the insured if disclosed, must maintain the confidentiality of that information and not disclose it to the insurance carrier. The lawyer cannot advise the client regarding disclosing the misrepresentation absent written consent by the client after full disclosure of the conflict, and even then only if the lawyer is not disabled from rendering competent representation by the lawyer's conflicting financial interest. If the client does not disclose the information to the insurance carrier, the lawyer may withdraw from the representation if the client persists in a course of action involving the lawyer's services that the lawyer believes is criminal or fraudulent or

has used the lawyer's services to perpetrate a crime or fraud, and should seek permission for withdrawal from the tribunal handling the underlying professional negligence claim if required by the rules of that tribunal.").

• Arden v. Forsberg & Umlauf PS, 373 P.3d 320, 323, 324, 324-25, 330 (Wash. Ct. App. 2016) (holding that a law firm representing an insurance company in coverage issues may simultaneously represent its insured in a matter in which the insurance company has reserved the right to deny coverage, and does not have to advise the insured of the law firm's simultaneous representation of the insurance company on other matters; "[T]he Ardens argue that Forsberg breached its fiduciary duty of loyalty to them by defending them in a reservation of rights context while also representing Hartford in other cases. We hold as a matter of law that Forsberg's representation of the Ardens while it also represented Hartford did not create a conflict of interest and that Forsberg had no obligation to notify the Ardens that they represented Hartford in other cases."; "Hartford retained Forsberg to represent the Ardens, and Forsberg assigned attorneys Hayes and Gibson to the case. Hartford was one of Forsberg's clients, and Hayes was one of the firm's partners who regularly worked on Hartford cases. Approximately 30 to 35 percent of Hayes's practice involved defending Hartford's insureds. He also had represented Hartford in coverage matters. A substantial part of Gibson's practice involved defending Hartford's insureds."; "On November 27, 2012, Forsberg sent a letter to the Ardens informing them that Hartford had retained Forsberg to defend the Duffy lawsuit. The letter stated that Forsberg's representation was limited to defending the Ardens in the lawsuit and that Forsberg would not provide any insurance coverage advice to either Hartford or the Ardens. The letter also stated, 'Unless instructed otherwise, we will assume that any settlement authority or instructions we receive from the Hartford to settle are given with your consent and will proceed accordingly.'. . . The letter did not inform the Ardens that Forsberg regularly defended Hartford's insureds and had also represented Hartford in coverage matters."; "The Ardens claim that Forsberg had a duty to inform them of its relationship with Hartford. Under RAP 1.7(b) (4), if a concurrent conflict of interest exists the attorney must obtain informed consent for continued representation, which necessarily would require disclosure of the conflict of interest. However, as discussed above, an attorney's undertaking of a reservation of rights defense even when the attorney represents the insurer in other cases does not automatically create a conflict of interest under RPC 1.7(a). Therefore, Forsberg had no obligation under RPC 1.7 to disclose to the Ardens its relationship with Hartford."; "The better practice for attorneys handling a reservation of rights defense may be to inform their clients if they have a long-standing relationship with the insurer and represent the insurer in other cases. But we hold that, as a matter of law, Forsberg had no fiduciary duty to provide such notice to the Ardens.").

Best Answer

The best answer to this hypothetical is **MAYBE**.
B 6/14

Estates

Hypothetical 5

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

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

The estate?

The executor?

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

Analysis

Identifying the "client" in the estate setting can be very difficult. The client identity issues can arise from the very start.

• Gaines B. Brake, Student Commentary, Ethical Issues in Dealing with Families of Elderly Clients, 30 J. Legal Prof. 103 (2005-2006) ("More than one scholar has suggested client identity be determined during the initial consultation by

observing who is in the room, who does the talking, and who pays the bill. Since the entire family often plays a part in estate-planning decisions, it is not uncommon for children to attend attorney consultations with their parents. The more family members attending the initial consultation, the more difficult it becomes for the attorney to identify the client. If the issues discussed during the consultation impact the interests of the parent and children, the lawyer must clarify the relationship with each party before proceeding with the representation. However, if the children appear to be simply speaking for the parent, then it may be difficult to determine whether the wishes expressed by the child are really those of the parent. Furthermore, such intense participation by the children may raise questions about the capacity of the parent." (emphasis added) (footnotes omitted)).

The dilemma can become even more acute in estate administration.

• Steven J. Christopher, Legal Profession, Professional Perspective -- Identifying the Client When Probating an Estate, Bloomberg Law Lawyers' Man. on Prof'l Conduct (BNA Sept. 2022), https://www.bloomberglaw.com/product/health/document/XD74SH10000000?resource_id=88977b9d4399e7b44389f427511e5d2c (last visited Nov. 28, 2022) ("It is crucial that an attorney be cognizant of the identity of their client whenever acting in a representative capacity. An attorney owes duties to clients that are not owed to third parties, such as the duty to provide zealous advocacy, to keep the client advised of the status of the representation, and to maintain confidentiality." (emphasis added); "In most fields of practice, the identity of the client is straightforward and obvious. When an attorney agrees to represent a competent adult in pursuing a civil claim, there is no question who that attorney represents. If the opposing party receives a settlement demand from the attorney, it is self-evident that the attorney does not represent the opposing party's interests. That being said, one area of practice where the identity of the client is not self-evident is when an attorney agrees to probate an estate." (emphasis added); "This article will provide an overview of the three primary theories articulated by legal authorities for defining the identity of a client, examples of the ways that these varied definitions impact an attorney's ethical analysis, and practical suggestions for probate lawyers in establishing and maintaining protocols that will clarify the identity of their client and otherwise fulfill their ethical responsibilities."; "There are three theories regarding the identity of the client when a lawyer is retained to administer a probate estate. While most jurisdictions have adopted one of these theories, there are jurisdictions where no controlling authority exists." (emphasis added); "The rule in most jurisdictions is that the attorney represents only the personal representative in their fiduciary capacity, and not the estate as a separate legal entity or the beneficiaries. The majority position was acknowledged in ABA Formal Op. 94-380.

See also Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996); The Estate of Fogelman v. Fegen, 3 P.3d 1172 (Ariz. 2000); In re Estate of Wagner, 386 N.W.2d 448, 450 (Neb. 1986)." (emphasis added); "This theory is premised on an understanding that the probate estate is not a legal person like a corporation or other business association. Instead, the probate estate is merely a collection of assets and liabilities, akin to a bankruptcy estate or marital estate."; "A second theory adopted in a minority of jurisdictions defines the client as the estate itself. See, e.g., Steinway v. Bolden, 460 N.W.2d 306, 307-308 (Mich. Ct. App. 1990); Grimes v. Saikley, 904 N.E.2d 183 (Ill. Ct. App. 2009). This theory is premised on the idea of the probate estate as a separate legal person distinct from the personal representative and beneficiaries. Legal authorities adopting this theory hold that the attorney should proceed in accordance with the jurisdiction's version of the American Bar Association Model Rule of Professional Conduct (Model Rule) 1.13, which governs the representation of organizations."; "According to this understanding, the lawyer's client is the estate itself, as the lawyer for an organization represents the organization acting through its duly authorized constituents. The personal representative acts as the sole agent of the estate. Consequently, while the probate estate is the client, the personal representative exercises decision making authority in their capacity as the estate's agent." (emphasis added); "A third understanding holds that the lawyer jointly represents the personal representative and beneficiaries of the estate. See, e.g., Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering, § 57.3-§ 57.4 (3d Ed. 2005); Riggs Nat'l Bank v Zimmer, 355 A.2d 709, 712-714 (Del. Ch. 1976)." (emphasis added); "Proponents of this theory have utilized the analogy of an attorney in insurance defense practice who represents the insured and the insurance carrier, with the insured as the client who is owed the principal duty. This perspective thereby acknowledges that while the attorney's representation is joint, the personal representative is owed a principal duty in contrast to the beneficiaries.").

• Ala. LEO 2010-03 (2010) (Question #1: "When a lawyer is retained to assist in the administration or probate of an estate, whom does the lawyer represent?"; "Answer #1: Generally, the lawyer represents the individual that hired him to

assist in the administration or probate of the estate. If that person has only one role and is not a fiduciary, the lawyer represents only that person, unless the client and lawyer agree otherwise. If the person is the Personal Representative, the lawyer represents the Personal Representative individually, unless the Personal Representative and lawyer agree otherwise. The lawyer must be careful not to, either by affirmative action or omission, give the impression that he also represents the beneficiaries of the estate. As a result, if the client is the Personal Representative only, the lawyer must advise the heirs and devisees ('beneficiaries') and other interested parties in the estate known to the lawyer that the lawyer's only client is the Personal Representative in order to avoid violating Rule 4.3. A lawyer must comply with certain duties upon undertaking representation of a fiduciary or risk violating certain rules of professional conduct. If the lawyer failed to give such notice, it could be found that he has undertaken to represent both the fiduciary and the beneficiaries of the estate." (emphases added) (footnotes omitted)).

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

The ABA Model Rules acknowledge differences in states' approach.

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

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

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

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

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

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

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

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

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

- Fried v. Sarunas, 61 N.E.3d 545, 549 (Ohio App. Ct. 2016) (holding that under Ohio law a lawyer retained by an estate executor represents the executor rather than the estate; "The issue is whether an attorney retained by the fiduciary of an estate to assist in the administration of the estate represents the estate itself. Sarunas claims the attorney does not. In support, he cites to New York case law that provides that an attorney retained by an estate fiduciary for the performance of estate duties is the attorney for the fiduciary, not for the estate."; "Under this statutory scheme, it is important to note that the attorney represents the fiduciary, not the estate."'; "Therefore, 'when attorneys state they are appearing on behalf of the estate, such a statement is technically incorrect because the attorney is representing the personal representative.'. . . Accordingly, when Sarunas was removed as executor of the estate, attorney Brady did not remain the 'attorney of the estate'; rather, her legal services were also removed.").

• Estate of Cabatit v. Canders, 105 A.3d 439, 440, 442-43, 446 (Me. 2014) ("Joseph N. Cabatit, as successor personal representative of the Estate of Thomas E. Cabatit, appeals from a summary judgment entered in the Superior Court (York County, O'Neil, J.) in favor of Stephen A. Canders and Maine Legal Associates, P.A. (collectively, MLA) on his claims of professional negligence and breach of fiduciary duty. Because we conclude that (1) no attorney-client relationship existed between MLA and Joseph in his role as successor personal representative of the Estate and (2) MLA did not owe any duty to Joseph as a nonclient, we affirm the judgment."; "Whether MLA, as the attorney for the predecessor personal representative, may be liable to the Estate turns on whether MLA owed the Estate a duty of care. Ordinarily, an attorney's duty runs only to his client, and only the client may claim that the attorney has breached that duty; in general, litigants cannot assert the claims of third parties. . . . In legal malpractice suits, therefore, except in egregious circumstances demonstrating such serious misdeeds as fraud, only a client with whom an attorney stands in privity of contract may bring a suit against the attorney."; "We reiterate that the general rule is that an attorney owes a duty of care to only his or her client. . . . Nevertheless, in limited and rare situations, when an attorney's actions are intended to benefit a third party and where policy considerations support it, we may recognize a duty of care by that attorney to a limited class of nonclients. . . . An attorney will never owe a duty of care to a nonclient, however, if that duty would conflict with the attorney's obligations to his or her clients."; "In light of our adoption of the multifactor third-party beneficiary test, we would normally remand the case to the trial court. In this case, however, no remand is necessary because there are no disputed facts to be decided, and applying the law to the facts leads to only one conclusion. The parties presented the following facts to the trial court: MLA represented only Julibel during the probate litigation; MLA had advised both Joseph and Jerediah that it represented the personal representative and not the Estate; Joseph and Jerediah retained their own non-MLA attorney in connection with the inventory of Thomas's house and for negotiating a caretaker agreement with Julibel for that house; and Joseph and Jerediah retained a different non-MLA attorney with regard to their petition to surcharge Julibel and remove her as personal representative. In short, Joseph and Jerediah were represented by non-MLA counsel for the entire probate proceeding. Even when viewing the stipulated facts in the light most favorable to Joseph, we cannot conclude that there is a genuine issue of material facts as to the existence of an attorney-client relationship between MLA and Joseph in his role as the successor personal representative."; "Although, in some unusual circumstances, an attorney hired by the original personal representative might owe a duty of care to the personal representative's successor, those circumstances are not present here.").

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

Other states adopt the "entity" approach.

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

Remarkably, the Florida Supreme Court did not provide any clear guidance on this critical issue until 2018.

• Carolina Bolado, Florida High Court Clarifies Privilege Question In Estates Cases, Law360, Jan. 29, 2018 ("The Florida Supreme Court on Thursday clarified that attorney-client privilege exists between a lawyer and the fiduciary of an estate, not the estate's beneficiary, clearing up confusion that trusts and estates attorneys say has plagued the practice for years."; "At the request of The Florida Bar, the high court formally adopted into the rules of evidence a 2011 law passed by the Florida Legislature stating that the attorney-client privilege rests with the fiduciary of an estate and not its beneficiaries. The justices had declined to adopt the law in 2014 to the extent that it was 'procedural' rather than 'substantive,' leaving attorneys unsettled about whether, and to what extent, it applied.").

Given the importance of defining the "client" for lawyers trying to assess their responsibilities, this uncertainty is remarkable. The same client identity issues can arise when lawyers represent trusts.

• Faulkner v. Klein, No. B265893, 2017 Cal. App. Unpub. LEXIS 5406, at *8-9, *9, *10, *12-3, *14 (Cal. Ct. App. Aug. 7, 2017) (not citable) (holding that a trustee had to turn over documents to a successor trustee; "When a trustee seeks advice on trust administration, the client is the office of the trustee, not the individual trustee, (Moeller v. Superior Court (1997) 16 Cal. 4th 1124, 1131, 1135, 69 Cal. Rptr. 2d 317, 947 P.2d 279 (Moeller) ['administrative' communications].) And when there is a change in trustees, the power to assert the attorney-client privilege passes with the office from the predecessor to the successor trustee. (Id. at p. 1133.) In such circumstances, the predecessor may not withhold from the successor privileged communications between the office of the trust and its counsel. This rule enables the successor trustee to fulfill their duty to inquire into the predecessor's administration of the trust and remedy any breaches. (Id. at pp. 1137-1138.) The current trustee is thus the present holder of the privilege with respect to any confidential communications between the former trustees and Miller, Williams, or Street that arose from their representation of the office of the trust. (Id. at 1131.)"; "On the other hand, a trustee may individually seek legal advice in their personal capacity to protect against personal liability. (Moeller, supra, 16 Cal. 4th at pp. 1134-1135 ['defense' communications].) If the trustee takes affirmative steps to segregate that personal representation from trust administration, they may withhold those communications arising from personal representation from the successor trustee. (Fiduciary Trust Internat. of California v. Klein (2017) 9 Cal. App. 5th 1184, 1199, 216 Cal. Rptr. 3d 61 (Fiduciary Trust).) For example, a trustee who seeks legal advice from personal counsel for their own protection 'may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of [his] personal funds.'

(Moeller, at p. 1134.)." (alteration in original); "There is no evidence in the record to support a finding that Klein and Reynolds sought legal advice in their personal capacity from Miller, Williams, or Street or that they took any steps to separate their requests for advice related to personal representation from that related to administrative representation prior to their removal."; "Here, too, Klein and Reynolds show counsel performed some work that related to removal, accounting objections, and matters for which they may be subject to surcharges, but they offer no evidence they retained Miller, Williams, or Street in their personal capacities for the purpose of protecting against personal liability. No lawyer declares they represented Klein or Reynolds in their personal capacities, and there are no retainer agreements or billing records to support such an inference. Williams and Street each declare they worked for the office of the trust and did not represent Klein or Reynolds in their personal capacities. Miller declares he never worked for the trustees directly in any capacity. His collection letter proves he had contact with the former trustees because he refers to a 'conversation' with Klein. But it does not support an inference that the firm represented Klein and Reynolds in their personal capacities. It is adversarial, and he wrote it in five months after the firm's representation ended."; "Retrospective segregation is insufficient to preserve the former trustees' right to withhold attorney-client communications from their successor. . . . There is no evidence of any other relationship imposing a duty of confidentiality owed to Klein and Reynolds personally. Klein and Reynolds did not meet their burden of demonstrating standing to seek disqualification of Miller Barondess."), opinion modified, 2017 Cal. Unpub. LEXIS 6109 (Cal. Ct. App. Sept. 5, 2017).

Best Answer

The best answer to this hypothetical is **THE EXECUTOR (BUT ONLY IN HIS OR HER FIDUCIARY CAPACITY)**.
B 6/14

Bond Counsel

Hypothetical 6

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

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

NO

Analysis

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

• Nat'l Ass'n of Bond Lawyers, The Function And Professional Responsibilities Of Bond Counsel 6-7, 7 (3d ed. 2011) ("The identity of bond counsel's client and the terms of the engagement may differ depending on the nature of the financing. Bond counsel are engaged in connection with (1) bond issues the proceeds of which are used to finance facilities owned and operated by, and other governmental activities of, the issuer or another governmental body, and (2) 'conduit financings,' in which proceeds are used to finance facilities that are owned by private entities or to finance other activities of such private entities (the 'conduit borrowers') and the financing of which is found by the issuer to serve a public purpose."; "The first type of issue is usually a two-party transaction between the issuer and the purchaser. In some transactions, however, there may be an intermediate state agency which issues bonds, the proceeds of which are used to purchase, and which are secured by, the obligation of a local government. The second type is a three party transaction involving the issuer, the purchaser, and the conduit borrower, which generally is liable for payment of the bonds. Either type of transaction may also involve an underwriter and a trustee for bondholders and may include other participants such as credit or liquidity enhancers (e.g., banks and bond insurers). Such additional participants in a municipal bond transaction will usually be represented by their own counsel, who may be paid either directly by the party retaining such counsel or from proceeds of the bond issue if and when it is delivered. In various circumstances and in various jurisdictions, it may not be unusual for a lawyer who serves as bond counsel to serve as issuer's counsel, conduit borrower's counsel, underwriter's counsel, disclosure counsel, special tax counsel or trustee's counsel in the same or other transactions involving some or all of the same parties. While this Third Edition discusses the roles of those other counsel in passing (and many of the principles it deals with are applicable to those roles), it is addressed specifically only to the role of bond counsel."; "As discussed in more detail throughout this Third Edition, the complexity of today's public finance practice suggests that the modern function of bond counsel should usually be defined by the identity of bond counsel's client in a particular transaction and the duties bond counsel undertakes in an engagement, whether identified by letter or otherwise." (emphasis added) (footnote omitted)).

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

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

Best Answer

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

B 6/14

Fiduciary Exception: The Garner Doctrine

Hypothetical 7

You are the General Counsel of a company owned by approximately 500 shareholders. You just learned that about 75 of the shareholders have filed a derivative case targeting several company executives who the shareholders claim to have engaged in wrongdoing. The lawyers filing the derivative case also notified you that they will be seeking access to your communications with your corporate client's upper management as part of their expedited discovery.

Will the shareholders successfully gain access to your communications with your corporate client's management?

MAYBE

Analysis

The “default” position is that a corporation's lawyer represents the institution rather than any of its constituents or employees. Because shareholders own the corporation, should they be seen as the ultimate client?

At first blush, the answer would seem to clearly be no. Surely one shareholder out of a million shareholders would not be able to gain access to highly confidential privileged communications between a corporation's management and the corporation's lawyers.

On the other hand, in certain limited circumstances it makes sense to consider the shareholders as the real “client.” Starting in the somewhat unusual context of shareholder derivative lawsuits, this concept has expanded to include several counterintuitive situations. In fact, this concept now exists outside of the corporate shareholder context, and has a much broader name -- the “fiduciary exception.”

If there was any situation in which a corporation's shareholders might be seen as the corporation's lawyer's “clients,” it would be in a shareholder derivative lawsuit.

In such a lawsuit, shareholders bring a claim on behalf of the corporation against some third party. They allege that the corporation's management has been delinquent in failing to pursue the claim, and the shareholders must step in to benefit the corporation. Starting in 1971, one court recognized that in that narrow context shareholders could be seen as the true “client,” and could sometimes be given access to communications between a corporation's management and its lawyers.

In Garner v. Wolfinbarger, [FN6] the Fifth Circuit held that to obtain access to such privileged communications, the shareholders must demonstrate “good cause” by satisfying several factors. The court listed the following indicia that might be used in this evaluation:

The number of shareholders;
The percentage of stock they own;
Their bona fides;
The nature of their claim;
The necessity or desirability of shareholders receiving the information;
The availability of the information from other sources;
Whether any alleged wrongdoing is illegal, criminal, or of doubtful legality;
Whether the alleged wrongdoing relates to past or prospective actions;
Whether the communication sought concerns the litigation itself;
The extent to which the information requested is identified and not just a “fishing expedition”;
The risk of revealing trade secrets or other information that is independently confidential. [FN7]

Most courts now follow this approach. [FN8]

The Garner doctrine has not been universally adopted, and a number of courts have explicitly rejected it. The commentators that question Garner do so because it is effectively an exception to the rule established by the United States Supreme Court in Upjohn that management exercises exclusive control over the privilege. Another concern is that the shareholders may not truly represent a legitimate interest if, as litigants, they are essentially just protecting their own investments. [FN9]

Another well-respected court criticized the Garner approach, although ultimately finding it applicable. [FN10]

Courts adoptings the Garner doctrine disagree about whether the doctrine applies to plaintiffs who were not shareholders at the time the privileged communications took place. Some courts require the shareholders to have been owners at that point, [FN11] while others take the position that later acquisition of the stock is sufficient. [FN12]

Because the traditional Garner analysis includes transitory factors, such as the shareholders' ability to obtain the necessary information elsewhere, courts adopting the Garner doctrine sometimes find that shareholders who have not satisfied the Garner test are able to try again later in the litigation. [FN13]

The theory underlying the Garner doctrine is that the shareholders are the actual “client” because they are suing derivatively, stepping into the shoes of corporate management to take some action that management refused to undertake on the corporation's behalf. In the derivative situation, this makes sense. But courts eventually began to expand the doctrine beyond this context.

The theory remained essentially the same -- that the shareholders were the real “client.” However, the rationale for applying the Garner doctrine shifted a bit. Even if the shareholders were no longer suing derivatively (and therefore stepping into the shoes of management), corporate management's fiduciary duties to the shareholders essentially made the shareholders the real “client.” This affected the analysis of the shareholders' right to access communications between the corporate management whom the shareholders elected and the corporate lawyers that the shareholders essentially pay.

Some courts have applied the Garner doctrine beyond the derivative context. For instance, in late 2006, the Northern District of Illinois applied the Garner doctrine to a non-derivative securities fraud case shareholders had filed against a corporation. [FN14]

However, other courts have criticized the expansion. [FN15] Just eight months later, another Northern District of Illinois judge disagreed with that expansion, explaining that

> [t]he fiduciary exception is most clearly applicable in a derivative suit. The rationale that supports the fiduciary exception -- that the directors and officers being suited in a derivative suit owe the plaintiffs fiduciary duties -- is strained in a non-derivative suit, where the plaintiff is suing on behalf of herself, not on behalf of the company.

Blau v. Harrison (In re JP Morgan Chase & Co. Sec. Litig.), MDL No. 1783, Master Dkt. No. 06 C 4674, 2007 U.S. Dist. LEXIS 60095, at *27-28 (N.D. Ill. Aug. 13, 2007).

About six months earlier, the Southern District of New York also questioned whether the Garner doctrine "should apply routinely in a securities-fraud lawsuit": [FN16]

> We question whether the fiduciary exception should apply routinely in a securities-fraud lawsuit. First, the plaintiffs in such a case are seeking personal benefit and are not seeking to benefit the company, which is the intended beneficiary of fiduciary obligations owed by corporate management. Second, plaintiffs are complaining of alleged misconduct injurious to them as members of the investing public rather than injurious to the corporation and its shareholders at the time of the misconduct. Third, in the typical class-action suit for securities fraud, there is no reason to assume that the class members will have been shareholders at the time of the targeted communications, and if not, they may not be in a position to claim any relevant fiduciary obligation on the part of corporate management in any event.

In re Omnicom Grp. Inc., Sec. Litig., 233 F.R.D. 400, 412 (S.D.N.Y. 2006).

Thus, courts have debated the Garner doctrine's expansion beyond derivative lawsuits; however, a number of courts have recognized the expansion, albeit reluctantly. [FN17]

In 2014, the Delaware Supreme Court explicitly recognized the Garner doctrine, and held that unions who owned Walmart stock could access otherwise privileged communications relating to Walmart's investigation into alleged corruption in Mexico.

- Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW, 95 A.3d 1264, 1278 (Del. 2014) (applying the Garner doctrine (Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970)) in a Delaware § 220 action, in which union shareholders sought privileged documents about Wal-Mart's alleged Mexican corruption investigation; "[T]he Garner doctrine fiduciary exception to the attorney-client privilege is narrow, exacting, and intended to be very difficult to satisfy. It achieves a proper balance between legitimate competing interests."; "We hold that the Garner doctrine should be applied in plenary stockholder/corporation proceedings. We also hold that the Garner doctrine is applicable in a Section 220 action. However, in a Section 220 proceeding, the necessary and essential inquiry must precede any privilege inquiry because the necessary and essential inquiry is dispositive of the threshold question -- the scope of document production to which the plaintiff is entitled under Section 220." (footnote omitted)).

One year later, a New York Supreme Court also recognized the Garner doctrine.

- NAMA Holdings, LLC v. Greenberg Traurig LLP, 18 N.Y.S.3d 1, 7, 7-8, 8, 9, 9-10, 10, 10-11 (N.Y. App. Div. 2015) (applying the fiduciary exception; holding that an investor which owned seventy percent of an LLC did not automatically deserve access to the LLC's privileged documents, and remanding for an in camera review; "In the corporate context, where a shareholder (or, as here, an investor in a company) brings suit against corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a 'fiduciary exception' to the privilege that otherwise attaches to communications between management and corporate counsel. This Court has not previously defined the parameters of the exception, so we take the opportunity to do so here."; "The fiduciary exception has its origins in English trust law, which long ago recognized that the fiduciary nature of the relationship between a trustee and a beneficiary of a trust provides an exception to the privilege with respect to communications between the trustee and the trust's attorney . . . . The theory is that when a trustee seeks legal advice in executing his or her fiduciary duties, he or she is acting ultimately on behalf of the beneficiaries of the trust and, accordingly, cannot cloak his or her actions from them, the attorney's 'real clients.'" (citation omitted); "In 1970, the U.S. Court of Appeals for the Fifth Circuit extended the fiduciary exception to the corporate environment in Garner v Wolfinbarger (430 F2d 1093 [5th Cir 1970], cert denied 401 U.S. 974, 91 S. Ct. 1191, 28 L. Ed. 2d 323 [1971])."; "Despite its critics,[4] the fiduciary exception has been widely accepted throughout

most of the United States in trustee-beneficiary and corporation-shareholder cases." (footnote omitted); "Several New York courts have also recognized the fiduciary exception -- both in corporation-shareholder and trustee-beneficiary cases -- and we are not aware of any that have rejected it outright."; "In extending the fiduciary exception to the corporate sphere, the Garner court set forth a non-exhaustive list of factors that should be considered to determine whether a party has shown good cause for applying the exception in a given case.";

"The Garner test remains viable, and it strikes the appropriate balance between respect for the privilege and the need for disclosure; therefore, we adopt it here."; "Here, the motion court determined that NAMA demonstrated good cause to apply the fiduciary exception to the withheld communications without considering the factors set forth in either Garner or Hoopes [Hoopes v. Carota (531 N.Y.S.2d 407 [N.Y. App. Div. 1988])]. . . . For example, we do not know whether the approximately 3,000 communications on the Privilege Log pertain to past or prospective actions, whether the information sought is available from other sources, or whether any of the communications concern advice regarding the instant litigation."; "Thus, although defendants do not take issue with the motion court's finding of good cause -- they focus on the determination that there never was an adversarial relationship between NAMA and Alliance -- we conclude that the case must be remanded for the court to conduct a comprehensive good-cause analysis."; "While some factors in the Garner test are relevant to a determination of adversity, Garner did not create a categorical adversity limitation. Thus, adversity is not a threshold inquiry but a component of the broader good-cause inquiry. Moreover, of the Garner factors that pertain to adversity, some will indicate whether the parties are generally adverse, while others will require a review of the communications in dispute; the relevant factors may weigh against finding good cause to apply the fiduciary exception with respect to those communications that reveal adversity. Accordingly, a court may find that the party seeking disclosure has shown good cause to be given access to some communications but not others."; "That NAMA is a 70% majority investor in Alliance and is suing the managers derivatively suggests that it is not, in this action, generally adverse to Alliance. However, while the derivative nature of a shareholder's claim tends to support a finding of good cause, it is not dispositive.").

Presumably every court would agree that the Garner doctrine does not apply in certain obvious circumstances. For instance, in 2007 the Eastern District of Louisiana rejected efforts by two members of a hospital management committee to obtain access to the management committee's communications with the lawyer defending it from the two members' lawsuit. [FN18] The court confirmed that "[n]othing in Garner suggests that plaintiff-shareholders who are actively involved in litigation against the corporation are entitled to access opposing counsel's litigation file." [FN19] Even if Garner could theoretically apply to such a situation, shareholders in that situation clearly would fall short of satisfying the Garner factors. Thus, as a practical matter, they would never be given access to privileged communications.

Best Answer

The best answer to this hypothetical is **MAYBE**.
B 8/16

Identifying the Client in a Corporate Entity

Hypothetical 8

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

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

(A) The board member who called you?
(B) The Audit Committee?
(C) The Board of Directors?
(D) The corporation?
(E) The corporation's shareholders?

(D) THE CORPORATION (ACTING THROUGH THE BOARD OF DIRECTORS)

Analysis

As in so many other contexts involving ethics, the attorney-client privilege and other doctrines, the key to beginning the analysis involves properly defining the client.

> • Susanna M. Kim, Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representations, 68 Tenn. L. Rev. 179, 180-81 (Winter 2001) ("The lawyer who is retained to represent an organizational entity, such as a large public corporation, faces many challenges. In order to fulfill the lawyer's professional responsibilities, the lawyer must determine not only who the client is, but also who speaks for the client when the client is a nonhuman entity. Rule 1.13 of the Model Rules of Professional Conduct, as promulgated by the American Bar Association (ABA), specifies that the 'lawyer [who is] employed or retained by an organization represents the organization acting through its duly authorized constituents.' Based on the entity theory of representation, Rule 1.13 makes clear that the corporate entity itself is the client, although the entity acts through its authorized constituents including 'officers, directors, employees, and shareholders.'" (emphasis added) (footnotes omitted)).

One noted professor suggested abandoning the traditional approach of trying to identify the client.

> • William H. Simon, Whom (Or What) Does the Organization's Lawyer Represent? An Anatomy of Intraclient Conflict, 91 Calif. L. Rev. 57, 59 (Jan. 2003) ("Professional responsibility issues involving organizational clients are distinctively difficult because organizations consist of constituents with conflicting interests. Legal doctrine has only recently begun to address the effect of internal conflict on a lawyer's responsibilities to an organizational client. Under current doctrine, the lawyer's responsibilities differ strongly depending on whether the representation is characterized as 'joint' representation of the organization's constituents or 'entity' representation. This Article argues that the choice between the two characterizations often has been arbitrary and that the underlying differences between them have been misunderstood. With respect to entity representation, it criticizes a prominent tendency in the case to conflate the interests of the organization with the goals of its controlling management. It also criticizes the approaches of the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers, which identify the entity with its authority structure. These approaches suffer from the influence of anachronistic corporate law doctrine that defines the interests of an organization largely in terms of maximizing aggregate benefits and ignores norms of fair distribution among constituents. An adequate understanding of organizational representation requires a view of the corporation as a 'Framework of Dealing' that includes both control or authority norms and distributive norms. The analysis focuses on corporations, but a concluding Part VII shows that it also applies to other organizational forms." (emphases added)).

There are many constituencies inside a corporation that could establish a separate attorney-client relationship with an outside or an in-house lawyer.

"Default" Position: Corporation as the Client

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

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

ABA Model Rule 1.13(a).

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

For instance, one court held that WilmerHale represented "the entire corporation, and not just the Audit Committee" (meaning that the firm's communications with corporate employees deserved privilege protection). [FN20] An earlier New York state court case held that a lawyer providing advice to a company's Special Litigation Committee represented both the committee "and the corporation as a whole" -- which the court equated as representing "the plaintiff shareholders." [FN21]

Not surprisingly, the "duly authorized constituents" from whom a corporation's lawyer takes direction normally is the board of directors. Absent unusual circumstances (some of which are discussed below), the board has the power to hire lawyers to represent the corporation's interests. Some lawyers have learned to their regret that the majority of a board makes the final decisions.

• Eagle Forum v. Phyllis Schlafly's American Eagles, Case No. 3:16-cv-946-DRH-RJD, 2018 U.S. Dist. LEXIS 53284 at *3, *3-4, *5, *7, *9, *9-10 (S.D. Ill. Mar. 29, 2018) (addressing a situation in which two Eagle Forum board members retained lawyer Rohlf on behalf of that corporation "to provide ... 'representation and counsel with respect to governance matters, Board disputes and litigation as necessary'" (internal citation omitted); noting that Rohlf's firm entered an appearance on Eagle Forum's behalf in an Illinois state court action filed by other Board members (which named Eagle Forum as a nominal defendant); explaining that those other Board members soon exercised their power "as the majority of the Eagle Forum Board of Directors" to suspend Eagle Forum's President and Treasurer -- and sought to depose Rohlf; further explaining that Plaintiffs (having a Board majority) argued that "Eagle Forum, not Joel Rohlf, controls its privilege and can waive it" and that Eagle Forum's privilege "did not, and could not, pass to the individual Plaintiffs from the control group . . . who retained [Rohlf] for the purpose of preventing the individual Plaintiffs from taking control of the organization"; rejecting Rohlf's argument that the "clear fissure in Eagle Forum's Board and management" was "an occurrence akin to an acquisition"; ultimately concluding that "at all relevant times hereto [Plaintiffs] constituted the majority of Eagle Forum's Board of Directors" -- and therefore "have had control over Eagle Forum, and ultimately its privilege").

Representation of Corporate Constituents Rather than the Corporation

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

Perhaps most significantly in the corporate governance context, lawyers may represent a subset of a board of directors -- rather than the entire board.

• In re Sampedro, No. 3:18-MC-47 (JBA), 2020 U.S. Dist. LEXIS 24114, at *6 (D. Conn. Feb. 11, 2020) (relying on a corporation board member's declaration "affirming that '[i]n February 2018, the subset of the [corporate] board of directors engaged [a law firm] to provide advice on the appropriate structure'" of an engagement (first alteration in original); noting that this meant that "the attorney from [that law firm] was not a third party to an attorney-client relationship, and no waiver occurred by virtue of her inclusion in the email communication").

• Gilmore v. Turvo, Inc., C.A. No. 2019-0472-JRS, 2019 Del. Ch. LEXIS 316, at *3, *7 (Del. Ch. Aug. 19, 2019) (unpublished opinion) (addressing a situation in which several Turvo directors met on May 21, 2019 to investigate another director's (also the CEO) expense account misconduct; noting that those directors retained Latham & Watkins to advise them and adopted a resolution retaining Latham & Watkins "effective as of May 10, 2019" -- explaining that "the resolution's retroactive language was intended to allow Turvo to pay [Latham's] legal fees"; explaining that the ousted director/CEO pointed to Delaware law in seeking privileged communications between the other directors and Latham between May 10 and May 21; denying the effort, and explaining that "it was entirely within [the board's] business judgment to determine that the company should pay the Preferred Directors' fees by deeming Latham to have been working on behalf of the company prior to May 21").

In that situation, lawyers representing a subset of the board may withhold from the other board members their privileged documents and communications.

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

This somewhat counterintuitive scenario also carries serious privilege waiver risks if those lawyers lose sight of their client's identity.

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

> The court notes that not only is the Board not Howrey's client such that the attorney-client privilege does not attach, the Board also does not have a common interest with the Special Committee since it was the Special Committee's mandate to ascertain whether members of the Board . . . may have engaged in wrongdoing.

SEC v. Roberts, 254 F.R.D. 371, 378 n.4 (N.D. Cal. 2008). [FN22]

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

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

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

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

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

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

In 2008, a Delaware state court handling a derivative case assessed a similar situation, in which Orrick Herrington was hired by a single-member Special Committee of its client's board of directors -- to investigate possible options backdating. [FN23] That court also found that Orrick Herrington waived the attorney-client privilege protection by orally reporting on its investigation to the full board, which included several directors who themselves were targets of the investigation (and who were accompanied at the board meeting by their personal lawyers from Quinn Emanuel). [FN24]

When lawyers represent a corporate constituent such as a subset of the board of directors, a change in control of the corporation obviously triggers several issues —— including ownership of those lawyers' files.

Several courts have dealt with this issue in the bankruptcy context. That situation also includes the complicating factor of bankruptcy trustees' duties.

In 2006, the Alabama Supreme Court held that a bankrupt company's trustee could not gain access to documents created by Skadden, Arps -- because that law firm represented just the company's outside directors, not the company.

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

> form their own attorney-client relationship, to which JFF was not a party, regarding the directors' individual personal rights and liabilities stemming from 'various matters relative to the Company.'").

In 2015, Southern District of New York Judge Abrams also dealt with privileged communications' ownership after a bankruptcy. Krys v. Paul, Weiss, Rifkind, Wharton, & Garrison LLP (In re China Med. Techs., Inc.), 539 B.R. 643 (S.D.N.Y. 2015). [FN25]

China Medical's Audit Committee had hired Paul Weiss to conduct an internal investigation into the company's possible financial improprieties. After the company declared bankruptcy, the Bankruptcy Court held that Paul Weiss's privileged communications and work product belonged to the Audit Committee -- which meant that the company's Liquidator could not waive those protections and access or disclose the communications or the documents. In re China Med. Techs., Inc., 522 B.R. 28 (Bankr. S.D.N.Y. 2014).

The Southern District of New York reversed the Bankruptcy Court's decision about privilege ownership, but not about work product protection ownership.

Although "recogniz[ing] that this is a difficult issue in a largely ill-defined area of the law," the Southern District of New York reversed the Bankruptcy Court's privilege ownership determination -- holding that the company's Liquidator "now owns and can thus waive the Audit Committee's attorney-client privilege." Id. at 658.

The court formulated the key question in a way that presaged its holding -- emphasizing the nature of post-bankruptcy proceedings.

> The issue now before the Court is whether the capacity of the Audit Committee to retain independent counsel and to conduct unfettered internal investigations that implicate corporate management should thwart the statutory obligation of a trustee in bankruptcy to maximize the value of the estate by conducting investigations into a corporation's prebankruptcy affairs.

Krys, 529 B.R. at 654.

The court acknowledged the Audit Committee's independence, but also noted that the Committee was necessarily part of the company's "management infrastructure."

> It is true that the Audit Committee was "independent" in some sense. It could retain counsel, and it legitimately expected that its communications with counsel would be protected against intrusion by management. But the Audit Committee is not an individual, nor is its status analogous to that of an individual. Instead, it was a committee constituted by CMED's Board of Directors, and thus a critical component of CMED's management infrastructure.

Id. at 655.

The court also acknowledged that the Audit Committee's sole ownership of the privilege might make sense pre-bankruptcy, but that bankruptcy changed the analysis -- because after bankruptcy

> there is no longer a need to insulate committee-counsel communications from managerial intrusion. Without a legitimate fear of managerial intrusion or retaliation in bankruptcy, Appellee's assertions as to a potential chilling effect ring hollow. . . . If anything, the prebankruptcy interests of an audit committee are aligned with the interests of a trustee or liquidator in bankruptcy.

Id. at 656-57.

The court came to a different conclusion about the work product-protected documents at issue. The court cited one Southern District of New York decision [FN26] indicating that the work product protection belonged to the Audit Committee's lawyer and not to the Audit Committee itself. The court also quoted from a more recent Southern District of New York decision indicating that both the lawyer and the client own work product, and therefore the client alone cannot waive that protection. [FN27]

Interestingly, the China Medical decision did not cite or deal with several other recent decisions (discussed above) addressing privilege ownership in the context of a corporation's constituent such as an audit committee or its independent directors.

Not all law firms representing a subset of a board of directors have been successful in resisting discovery sought by a bankruptcy trustee now in control of the corporation. Not surprisingly, those law firms' failure sometimes rests in part on their inconsistency in properly identifying their "client."

In Kirschner v. K&L Gates LLP, 46 A.3d 737 (Pa. Super. Ct. 2012), [FN28] a Pennsylvania appellate court held that the liquidation trustee for Le-Nature could pursue malpractice, negligence, breach of fiduciary duty and other claims against the

law firm of K&L Gates -- despite an explicit provision in the firm's retainer letter disclaiming any representation of the company itself, and instead indicating that the company board's Special Committee was the firm's sole client.

After a number of Le-Nature's senior financial executives left the company and alleged that CEO Podlucky was engaging in financial improprieties, Le-Nature's board of directors unanimously passed a resolution indicating that it was "in the best interest of the Company to appoint a special committee of the independent directors to conduct an investigation" into the executives' resignations. [FN29] The board appointed three independent directors to serve on the Special Committee, who then determined that "it was critical to retain on behalf of the company, legal counsel with experience in conducting such investigations." [FN30] (emphases added)).

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

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

Id. at 743.

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

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

Id. at 744 (alterations in original) (emphasis added). Thus, someone at K&L Gates probably used an off-the-shelf retainer letter when the firm hired a forensic accountant to assist in its investigation. But the retainer agreement identified the client as the company, -- which was inconsistent with K&L Gates's own retainer letter specifying that the firm represented the Special Committee and explicitly disclaiming representation of the company.

K&L Gates later sent a draft of its report to Podlucky, even though he was not a member of the Special Committee. The firm found no widespread fraud, and was later retained by Podlucky on behalf of the company to help with an initial IPO.

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

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

The appellate court nevertheless reversed, concluding that

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

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

> "As a committee of the Board, the Special Committee had the fiduciary duty to act in the best interests of not only the shareholders, but also the corporation." [FN31]
>
> "Contrary to the arguments of K&L Gates and Ferguson, no conflict of interest existed between Le-Nature's and the Special Committee as the Special Committee owed a fiduciary duty to act in the best interests of the company." [FN32]
>
> "By its Resolution, the Board authorized the Special Committee to retain counsel to conduct an investigation 'on behalf of the company.'" [FN33]
>
> "Under Delaware law, the Board could not authorize the Special Committee to act solely on behalf of investors. Such authorization would violate the Board's fiduciary duty to Le-Nature's. . . . [U]nder Delaware law, the Special Committee only could act in the best interests of Le-Nature's and its shareholders." [FN34] (emphasis added)).
>
> "K&L Gates retained P&W to provide, inter alia, consulting, financial and investigative advice to K&L Gates 'to assist it in rendering legal advice to Le [-]Nature's.'" [FN35] (emphasis added)).

"In addition to the foregoing, the Amended Complaint asserts that K&L Gates provided a draft of its Report not only to the Special Committee, but also to Podlucky. . . . Podlucky was not a member of the Special Committee." [FN36]

The appellate court also concluded that that liquidation trustee was seeking traditional tort damages from the law firm, which negated the relevance of whether or not the company was insolvent at the time K&L Gates provides its report. [FN37]

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

• Gina Passarella, K&L Gates' Appeal of Le-Nature's Trustee $500 Mil. Suit Denied, Legal Intelligencer, Apr. 25, 2013 ("The Pennsylvania Supreme Court has declined to take a case in which K&L Gates was appealing the reinstatement of a $500 million lawsuit against the firm by the trustee of bankrupt bottling company Le-Nature's."; "K&L Gates and co-defendant accounting firm Pascarella & Wiker had asked the justices to review the Superior Court decision to reinstate the professional negligence and breach of fiduciary duty case against them. The high court denied that request in a one-page order late Wednesday."; "K&L Gates and Pascarella & Wiker had argued the firms only had a duty to the special committee of Le-Nature's that hired them in 2003, and not to a trustee of the now-bankrupt company. Allegheny County Court of Common Pleas Senior Judge R. Stanton Wettick Jr. agreed, finding they had no obligation beyond the special committee and that the trustee could not claim damages for deepening insolvency of the company between the 2003 internal investigation and the 2006 collapse of the company."; "But Superior Court Judge John L. Musmanno said in his May 2012 opinion that the special committee had a duty to the company and K&L Gates was providing legal services to Le-Nature's through the special committee."; "'K&L Gates was retained to investigate the exact type of injury being inflicted upon Le-Nature's,' Musmanno said. 'By negligently conducting its investigation, K&L Gates affirmatively caused harm to Le-Nature's by concealing the looting of the company and wrongdoing by [former chief executive officer Gregory J.] Podlucky, and affirmatively representing that no evidence of fraud or misconduct existed.'"; "The amici law firms had argued in their brief to the Superior Court that 'for the first time,' the court ruled 'an implied attorney-client relationship could be inferred from circumstantial evidence even where two sophisticated parties have entered into a representation agreement that expressly disavows that such a relationship exists.' They argued the engagement letter between K&L Gates and the special committee expressly disavowed any relationship between the law firm and Le-Nature's.").

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

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

Best Answer

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

B 8/16

Resolving Intra-Corporate Disputes

Hypothetical 9

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

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

(A) YES

(b) If the head of one corporate division gives your roommate direction that is contrary to the direction from the head of another corporate division, must she follow it?

(B) NO (SHE SHOULD SEEK DIRECTION FROM A CORPORATE SUPERIOR)

(c) If the head of a wholly-owned subsidiary gives her direction that is contrary to that given by the CEO of the corporate parent (her employer), must she follow it?

(B) NO

(d) If the head of a partially owned (but controlled) subsidiary gives her direction that is contrary to that given by the CEO of the majority - owning corporation (her employer), must she follow it?

MAYBE

Analysis

Lawyers representing corporations owe their duty to the corporation as an entity, not to any of its constituents. ABA Model Rule 1.13(a).

This basic rule seems easy to understand in the abstract, but can result in enormously difficult ethics situations for in-house and outside lawyers representing corporations.

Among other things, there might be some question about the identity of the client of a corporation's law department. ABA Model Rule 1.0 cmt. [3] explains that "[w]ith respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed."

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

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

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

Lawyers ignoring these principles can face serious consequences.

- Eagle Forum v. Phyllis Schlafly's American Eagles, Case No. 3:16-cv-946-DRH-RJD, 2018 U.S. Dist. LEXIS 53284 at *3, *3-4, *5, *7, *9, *9-10 (S.D. Ill. Mar. 29, 2018) (addressing a situation in which two Eagle Forum board members retained lawyer Rohlf on behalf of that corporation "to provide ... 'representation and counsel with respect to governance matters, Board disputes and litigation as necessary"'; noting that Rohlf's firm entered an appearance on Eagle Forum's behalf in an Illinois state court action filed by other Board members (which named Eagle Forum as a nominal defendant); explaining that those other Board members soon exercised their power "as the majority of the Eagle Forum Board of Directors" to suspend Eagle Forum's President and Treasurer -- and sought to depose Rohlf; further explaining that Plaintiffs (having a Board majority) argued that "Eagle Forum, not Joel Rohlf, controls its privilege and can waive it" and that Eagle Forum's privilege "did not, and could not, pass to the individual Plaintiffs from the control group . . . who retained [Rohlf] for the purpose of preventing the individual Plaintiffs from taking control of the organization"; rejecting Rohlf's argument that the "clear fissure in Eagle Forum's Board and management" was "an occurrence akin to an acquisition"; ultimately concluding that "at all relevant times hereto [Plaintiffs] constituted the majority of Eagle Forum's Board of Directors" -- and therefore "have had control over Eagle Forum, and ultimately its privilege").

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

to side with them and presume they were the lawful controllers of the company, and then to file suit directly on behalf of the corporation."; "In fact, the decision whether to pursue litigation directly on behalf of the corporation is lodged solely with the board of directors." (emphasis added)).

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

The Restatement explains that lawyers representing corporate clients with separate divisions must follow the corporate client's decision-making process. This gives the corporation ultimate authority.

> Whether a lawyer represents affiliated organizations as clients is a question of fact. . . When a lawyer represents two or more organizations with some common ownership or membership, whether a conflict exists is determined primarily on the basis of formal organizational distinctions. If a single business corporation has established two divisions within the corporate structure, for example, conflicting interests or objectives of those divisions do not create a conflict of interest for a lawyer representing the corporation. Differences within the organization are to be resolved through the organization's decision-making procedures.

Restatement (Third) of Law Governing Lawyers § 131 cmt. d (emphasis added).

(c) Unlike corporate divisions, corporate subsidiaries are separate incorporeal entities.

But wholly- owned subsidiaries implicate essentially the same principle as that applicable in the context of divisions. That is because the subsidiaries and their employees (as well as their lawyers) all owe a fiduciary duty to the ultimate corporate parent.

The Restatement recognizes this basic approach.

> If an enterprise consists of two or more organizations and ownership of the organizations is identical, the lawyer's obligation is ordinarily to respond according to the decision-making procedures of the enterprise, subject to any special limitations that might be validly imposed by regulatory regimes such as those governing financial institutions and insurance companies.

Id.

A lengthy and thoughtful 2008 New York City LEO explained the same principle in more detail.

> • New York City LEO 2008-02 (2/1/08) ("In analyzing the conflicts facing inside counsel who represent corporate affiliates, this Opinion describes two distinct scenarios. The first is when inside counsel represent a parent corporation and one or more of the parent's wholly owned affiliates. This Opinion assumes that inside counsel for the parent provide legal services to the entire corporate 'family.' But the analysis in this Opinion holds equally true when affiliates within the corporate family have their own legal departments that in turn report to a single lawyer, typically the general counsel of the parent. Under this circumstance, the conflicts of the parent's legal department become those of each affiliate's legal department, and vice versa. See, e.g., ABCNY Formal Op. 2007-2; N.Y. State 793 (2006). The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent."; "In the first scenario, inside counsel's representation is not of entities whose interests may differ, as a matter of corporate law. In the second scenario, inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests. In the second scenario, when inside counsel determine that a conflict may exist between corporate affiliates that they jointly represent, or intend to jointly represent, inside counsel should consider whether joint representation comports with the requirements of DR 5-105(C), or whether independent counsel should be engaged to represent at least some of the clients. If inside counsel conclude that joint representation may pass muster, they may also conclude in some circumstances that they should engage independent counsel to help satisfy the 'disinterested lawyer' and 'informed consent' tests required by DR 5-105(C). In all events, a robust consent process should be employed, emphasizing a full explanation of the advantages and disadvantages of joint representation.
>
> The propriety of joint representation should be revisited as circumstances change."; "Two potentially useful mechanisms that can help inside counsel navigate conflicts are an advance conflict waiver and limiting their representation to avoid conflicts."; "Sensitivity to conflicts between represented affiliates will help forestall judicial criticism and avoid unnecessary curtailment of inside counsel's continued functioning in their expected capacity."; "It is inevitable that on occasion parents and subsidiaries will see their interests diverge, particularly in spin-off, sale, and insolvency situations. When this happens, it is wise for the parent to secure for the subsidiary outside representation. Maintaining a joint representation for the spin-off transaction too long risks the outcome of Polycast [Tech. Corp. v. Uniroyal, Inc.], 125

F.R.D. [47, 49 (S.D.N.Y. 1989)], and Medcom Holding Co. v. Baxter Travenol Lab.], 689 F. Supp. [842, 844 (N.D. Ill. 1988)] -- both cases in which parent companies were forced to turn over documents to their former subsidiaries in adverse litigation -- not to mention the attorneys' potential for running afoul of conflict rules."; "In analyzing the conflicts facing inside counsel that represent corporate affiliates, it is important to divide the discussion into two distinct scenarios. The first is when inside counsel represent a parent corporation and one or more of the parent's wholly owned affiliates. The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent."; "In the first scenario, inside counsel's representation is not of entities whose interests may differ because the parent's interests completely preempt those of its wholly owned affiliates. As a matter of corporate law, 'in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.'

Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988)."; "The analysis changes in the second scenario. In that scenario, inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests.

Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1983) (when the parent does not wholly own the affiliate, the joint directors of both parent and affiliate, 'owe the same duty of good management to both' companies, and 'this duty is to be exercised in light of what is best for both companies.') This is so even when the parent 'has sufficient ownership or influence to exercise working control of the [affiliate]' Restatement (Third) of the Law Governing Lawyers. §131, cmt. d. (2000)."; "Inside counsel should consider carefully these conflict-of-interest rules. Sometimes, a potential conflict will be apparent from the outset of the representation. At other times, the conflict may not become apparent until after the joint representation has begun. To pick just one example, at the outset of a litigation in which a parent and a majority-owned affiliate have been sued, their positions may appear identical and they may choose to be jointly represented by inside counsel. Then discovery may unexpectedly reveal that there is a basis for the parent to offload responsibility onto the affiliate."; "Once it has been determined that a conflict of interest exists between represented corporate clients, inside counsel must withdraw from the representation, unless the Code otherwise permits. If the Code does not, the entire corporate legal department is barred from the representation because DR 5-105(D) provides that conflicts are imputed in a law firm."; "Two useful mechanisms that a corporate legal department may employ in navigating conflicts between represented affiliates are an advance conflict waiver and limiting the joint representation to avoid conflicts."; "Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises."; "Alternatively, inside counsel can limit the representation of one or more affiliates to avoid conflicts."; "Limiting the representation of an affiliate is at times accompanied by retaining other counsel -- for example, outside counsel -- to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients." (emphases added)).

There may also be attorney-client privilege protection implications. One would think that communications between a corporate parent's in-house or outside lawyer with wholly-owned subsidiaries' employees would automatically deserve privilege protection if they otherwise meet the required content standard.

But at least one court required the corporate affiliates even in this setting to establish that the affiliates had a common legal interest.

- Au New Haven, LLC v. YKK Corp., No. 15-CV-03411 (GHW)(SN), 2016 U.S. Dist. LEXIS 160602, at *10, *20 (S.D.N.Y. Nov. 18, 2016) (rejecting defendants' argument that "entities under common ownership sharing privileged information are always considered to be a single entity for the purpose of attorney-client privilege" protection; instead holding that "[e]ntities that are under common ownership must still demonstrate that [the common interest doctrine] applies, such as by making a showing that a common attorney was representing both corporate entities or that they otherwise shared a common legal interest"; ultimately finding the privilege applicable).

This may seem more complicated than it really is -- because essentially by definition a corporate parent and its wholly-owned subsidiary must always share a common legal interest (the parent's).

(d) In the context of subsidiaries that are only partially owned (but still controlled) by the corporate parent, lawyers must bear in mind that the subsidiary has other owners whose interests must be protected (and which may differ from that of the majority-owning corporate parent).

The Restatement recognizes this key distinction.

Under the Restatement's analysis, the issue becomes complicated in the case of subsidiaries that are less than wholly-owned.

> On the other hand, when ownership or membership of two or more organizations is not identical, the lawyer must respect the organizational boundaries of each and analyze possible conflicts of interest on the basis that the organizations are separate entities. That is true even when a single individual or organization has sufficient ownership or influence to exercise working control of the organizations. . . .

Restatement (Third) of Law Governing Lawyers § 131 cmt. d. An illustration provides additional guidance.

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

Id. illus. 2.

The extensive 2008 New York City LEO explains the implications of this very different scenario involving partially-owned but controlled subsidiaries.

> • New York City LEO 2008-02 (2/1/08) ("In analyzing the conflicts facing inside counsel who represent corporate affiliates, this Opinion describes two distinct scenarios. The first is when inside counsel represent a parent corporation and one or more of the parent's wholly owned affiliates. This Opinion assumes that inside counsel for the parent provide legal services to the entire corporate 'family.' But the analysis in this Opinion holds equally true when affiliates within the corporate family have their own legal departments that in turn report to a single lawyer, typically the general counsel of the parent. Under this circumstance, the conflicts of the parent's legal department become those of each affiliate's legal department, and vice versa. See, e.g., ABCNY Formal Op. 2007-2; N.Y. State 793 (2006). The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent."; "In the first scenario, inside counsel's representation is not of entities whose interests may differ, as a matter of corporate law. In the second scenario, inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests. In the second scenario, when inside counsel determine that a conflict may exist between corporate affiliates that they jointly represent, or intend to jointly represent, inside counsel should consider whether joint representation comports with the requirements of DR 5-105(C), or whether independent counsel should be engaged to represent at least some of the clients. If inside counsel conclude that joint representation may pass muster, they may also conclude in some circumstances that they should engage independent counsel to help satisfy the 'disinterested lawyer' and 'informed consent' tests required by DR 5-105(C). In all events, a robust consent process should be employed, emphasizing a full explanation of the advantages and disadvantages of joint representation.
>
> The propriety of joint representation should be revisited as circumstances change."; "Two potentially useful mechanisms that can help inside counsel navigate conflicts are an advance conflict waiver and limiting their representation to avoid conflicts."; "Sensitivity to conflicts between represented affiliates will help forestall judicial criticism and avoid unnecessary curtailment of inside counsel's continued functioning in their expected capacity."; "It is inevitable that on occasion parents and subsidiaries will see their interests diverge, particularly in spin-off, sale, and insolvency situations. When this happens, it is wise for the parent to secure for the subsidiary outside representation. Maintaining a joint representation for the spin-off transaction too long risks the outcome of Polycast [Tech. Corp. v. Uniroyal, Inc.], 125 F.R.D. [47, 49 (S.D.N.Y. 1989)], and Medcom [Holding Co. v. Baxter Travenol Lab.], 689 F. Supp. [842, 844 (N.D. Ill. 1988)] -- both cases in which parent companies were forced to turn over documents to their former subsidiaries in adverse litigation -- not to mention the attorneys' potential for running afoul of conflict rules."; "In analyzing the conflicts facing inside counsel that represent corporate affiliates, it is important to divide the discussion into two distinct scenarios. The first is when inside counsel represent a parent corporation and one or more of the parent's wholly owned affiliates. The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent."; "In the first scenario, inside counsel's representation is not of entities whose interests may differ because the parent's interests completely preempt those of its

wholly owned affiliates. As a matter of corporate law, 'in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.'

Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988).''; "The analysis changes in the second scenario. In that scenario, inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests.

Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1983) (when the parent does not wholly own the affiliate, the joint directors of both parent and affiliate, 'owe the same duty of good management to both' companies, and 'this duty is to be exercised in light of what is best for both companies.') This is so even when the parent 'has sufficient ownership or influence to exercise working control of the [affiliate]' Restatement (Third) of the Law Governing Lawyers. §131, cmt. d. (2000).''; "Inside counsel should consider carefully these conflict-of-interest rules. Sometimes, a potential conflict will be apparent from the outset of the representation. At other times, the conflict may not become apparent until after the joint representation has begun. To pick just one example, at the outset of a litigation in which a parent and a majority-owned affiliate have been sued, their positions may appear identical and they may choose to be jointly represented by inside counsel. Then discovery may unexpectedly reveal that there is a basis for the parent to offload responsibility onto the affiliate.''; "Once it has been determined that a conflict of interest exists between represented corporate clients, inside counsel must withdraw from the representation, unless the Code otherwise permits. If the Code does not, the entire corporate legal department is barred from the representation because DR 5-105(D) provides that conflicts are imputed in a law firm.''; "Two useful mechanisms that a corporate legal department may employ in navigating conflicts between represented affiliates are an advance conflict waiver and limiting the joint representation to avoid conflicts.''; "Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises.''; "Alternatively, inside counsel can limit the representation of one or more affiliates to avoid conflicts.''; "Limiting the representation of an affiliate is at times accompanied by retaining other counsel -- for example, outside counsel -- to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients." (emphases added)).

A 2017 Illinois LEO provided cautious and probably rarely -- followed advice about in- house lawyers best practices. Although apparently not limited to this partially - owned subsidiary context, the Illinois LEO's guidance is most appropriate there.

• Illinois LEO 17-05 (5/2017) (analyzing the loyalty (conflicts) and confidentiality implications of parent company's in-house lawyer's dealings with corporate subsidiaries of the lawyer's client/employer; recommending: (1) that lawyer treat subsidiaries as separate clients for loyalty/conflicts purposes, including even obtaining consents or prospective consents in the event of any "competing interests"; and (2) also treat subsidiaries as separate clients for confidentiality purposes, including even analyzing how confidential information will be shared among the corporate affiliates; "For the in-house lawyer, there is no one size fits all test for identifying the client. It may change depending on the circumstances of the representation. Is it the single corporate parent (whose interests may be considered to preempt the interests of any subsidiary, or in any case, be able to provide informed consent to any conflict waiver or disclosure of confidential information)? Or is it the legally distinct individual subsidiaries? Recognizing subsidiaries as separate clients seems to be acknowledged in the IRPC noted above, particularly IRPC 1.13. For practical purposes, treating subsidiaries as distinct clients would seem the better practice if for no other purpose than to focus the in-house lawyer's attention on identifying and addressing problematic legal and ethical issues.''; "With respect to conflicts of interests, when an in-house lawyers is called upon to provide legal services to a related corporate entity that is not the lawyer's direct employer, the lawyer must be careful to recognize the potential for competing interests. . . . As with any representation, the in-house lawyer must consider and, if applicable, apply IRPC 1.7. Although impacted by client identification, the interests of intra-family corporate entities may or may not be considered aligned. If the interests are determined to conflict, an in-house lawyer can consider a number of actions to address and resolve the conflict. First and foremost is to obtain, if possible, the subsidiary's and parent's consent to the representation as permitted by IRPC 1.7(b). Counsel may also consider obtaining advance conflict waivers, limiting the scope of the representation to eliminate the potential conflict, or retaining outside counsel.''; "Perhaps even thornier issues than conflicts arise with respect to confidentiality under IRPC Rule 1.6. Virginia State Bar Opinion 1838 provides that an in-house lawyer must maintain a subsidiary's confidences unless the subsidiary consents to disclosure. In most corporate contexts, maintaining this confidentiality from the corporate parent, and perhaps other subsidiaries, is

likely unworkable and doesn't reflect the work of an in-house legal department. . . . Attempting to maintain confidentiality between related corporate entities, but particularly between a subsidiary and a parent, tends to disregard corporate ownership and hierarchy. . . . In these situations, as with conflicts of interest, a prudent course for the in-house lawyer may be to memorialize in writing how confidential information will be treated, obtain advance consent for disclosure, or retain outside counsel.") (emphases added)).

Thus, a subsidiary that is less than wholly-owned by its controlling parent must be considered a separate entity for conflicts, ethics and legal purposes. Of course, the controlling parent's lawyer may also represent the subsidiary. That normally would be a joint representation, with all the ethics, privilege and other implications of such representations. Among the most important implication is such lawyer's duty to avoid representing the corporate parent in oppressing or otherwise harming minority shareholders. This duty does not make those minority shareholders the lawyer's clients -- it means that the lawyer must take the minority shareholders' interest into account when representing the corporation of which the shareholders are partial owners.

Best Answer

The best answer to **(a)** is **(A) YES**; the best answer to **(b)** is **(B) NO (SHE SHOULD SEEK DIRECTION FROM A CORPORATE SUPERVISOR)**; the best answer to **(c)** is **(B) NO**; the best answer to **(d)** is **MAYBE**.
B 8/16

Identifying the Client in a Closely-Held Corporation

Hypothetical 10

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

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

MAYBE

Analysis

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

This corporate context differs from the perhaps even more difficult analysis facing lawyers who represent partnerships or LLCs (which share some of the characteristics of both corporations and partnerships).

• Darian M. Ibrahim, Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses, 56 Ala. L. Rev. 181, 187, 189-90, 192-93, 194 (Fall 2004) ("The entity theory--that the lawyer represents the entity itself and not its individual constituents--is the most widely accepted theory of entity representation. It is also the theory adopted by both the Model Rules and the Model Code. Model Rule 1.13(a), titled 'Organization as Client,' provides that 'a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.'" (footnote omitted); "Closely held businesses can operate as corporations, partnerships, or limited liability companies. Several states allow closely held corporations, or 'close corporations,' to opt-in to special statutory treatment. These statutory schemes treat close corporations more like partnerships or limited liability companies than like traditional corporations. Although Model Rule 1.13 may work well for traditional corporations, it has limited application to closely held business forms. There are two important differences between closely held businesses and traditional corporations that explain why applicability is limited: the frequency with which owners and lawyers interact, and the nature of the representation that the lawyer is hired to provide. Owners of closely held businesses have frequent interactions with lawyers either in their capacities as owners or managers of the entity. One of them most likely hired the lawyer based on a pre-existing lawyer-client relationship, a friendship, or a referral. These personal interactions and history give owners the impression--usually reasonable--that the lawyer represents them individually. These owners view the entity not as a separate creature, but merely as an extension of

themselves. Indeed, the owners have often been operating their businesses as sole proprietorships or general partnerships and have incorporated simply for liability protection.

Therefore, any rule addressing representation of closely held businesses must adequately differentiate between the entity and its owners and provide guidance to lawyers when handling matters on behalf of each. Model Rule 1.13, which only addresses representation of the entity, is only half of the equation." (emphasis added) (footnotes omitted); "Courts and commentators have noted the unique relationships between lawyers and shareholders of closely held businesses, and that Model Rule 1.13 does not take this into account. Some have gone to the other extreme, finding that instead of representing no owners individually, the lawyer represents all of the owners individually (in addition to the entity). This approach is sometimes called the 'aggregate theory' because the lawyer represents the aggregate of the entity and its constituents. It should be noted that the drafters of the Model Rules rejected the aggregate theory in favor of the entity theory." (emphases added) (footnotes omitted); "Commentators have also advocated the aggregate theory, often arguing that reasons of economy and efficiency justify multiple representation when representing closely held businesses. For example, Professor Mitchell suggests that '(b)ecause counsel's conduct will . . . directly affect each of these shareholders, it should be recognized that counsel owes a duty to each of them.', Another commentator suggests that the aggregate theory 'realistically balances and protects the interests of clients, the legal system, and the public.'" (alterations in original) (footnotes omitted); "Under the aggregate theory, there are no confidentiality or attorney-client protections between co-clients, and one co-client may waive these protections for all co-clients. Confidential information may also pass from one co-client to another via the laws of confidentiality applicable to organizations." (footnote omitted)).

• Rahmani v. Venture Capital Properties LLC, No. 650655/2015, 2016 NY Slip Op 31976(U), at 2-3 (N.Y. Sup. Ct. Oct. 17, 2016) (disqualifying a lawyer from representing a plaintiff in an arbitration adverse to an LLC and two of the LLC's members, because the lawyer was representing the LLC in other matters; "In this case, Mr. Castro seeks to represent plaintiffs in the JAMS arbitration against defendant VCP while simultaneously representing VCP in three litigations in this court. When an attorney represents a limited liability company, he is deemed as a matter of law to represent each of its members (see Flores v. Williard j. Price Assocs, LLC, 20 AD 3d 343, 344, 799 N.Y.S.2d 43 [1st Dept 2005]; see also Steven's Distribs., Inc., 2010 NY Slip Op 31839[U], 2010 NY Misc LEXIS 336 at *16). Accordingly, by virtue of Castro's representation of VCP, Castro also represents the individual defendants Ebi Khalili and Josh Ramani because they are members of VCP. Thus, by representing plaintiffs in the arbitration against defendants, he is effectively 'suing his client,' in violation of Rule 1.7.").

The client identity issue can arise before the closely-held corporation even exists.

• Nancy J. Moore, Corporate Lawyers: Forming Start-Up Companies: Who's My Client?, 88 Fordham L. Rev. 1699, 1699, 1699-1700, 1700, 1700-01 (Apr. 2020) ("Consider the following scenario: three individuals--a magician, a baker, and a puppeteer--want to start a business that will run birthday parties for children. The magician will put up most of the money, the baker has extensive experience with children's birthday parties, and the puppeteer, who has an MBA, will manage the business. They meet with a lawyer to help them form a company, including advising them on such issues as choice of entity and allocation of ownership and control. Before the lawyer agrees to the representation, she must ask herself: 'who will I represent?'" (emphases added);"The author of this hypothetical, legal ethics expert Stephen Gillers, suggests that the issue is whether conflicts of interest prevent the lawyer from representing all three founders, in which case the lawyer would presumably represent only one of them. Addressing a similar hypothetical, another legal ethics expert, Paul Tremblay, agrees that the only plausible alternatives are 'represent[ing] the founders as joint clients, most often with an explicit understanding that the firm would later represent any resulting business entity' or 'represent[ing] only one of the founders.' However, Tremblay also suggests that, in some circumstances, the founders will already have formed a partnership by operation of law, or a 'default partnership.' In these cases, the lawyer will likely represent the existing partnership entity in choosing to form an entirely new entity. Tremblay also notes that under 'the rather quirky Jesse v. Danforth doctrine,' recognized in a few jurisdictions, the founders, 'while apparently individual joint clients during the formation stage, retroactively convert to constituents of the entity -- instead of former clients of the firm -- after the entity has been established.' Whatever that means. And, to offer yet another option, mentioned by neither Gillers nor Tremblay, a State Bar of Arizona ethics opinion advises that a lawyer may form a business entity for multiple founders 'and be counsel only for the yet-to-be-formed entity'-- describing entity representation that is prospective rather than retrospective. What's a lawyer to do?" (alterations in original) (emphases added) (footnotes omitted); "Most jurisdictions have not yet addressed

the question of whether some form of 'entity' representation is available before a business entity has been created. As a result, one of this Article's goals is to explore the advantages and disadvantages of doing so by considering both the 'retroactive' and 'prospective' options.

In my view, courts should reject both of these options and insist on representation of one or more of the individual founders. But if some form of entity representation is deemed desirable, then I argue that it is the 'prospective' rather than the 'retroactive' option that should be recognized. As for "default partnerships,' I agree that representation of the existing entity appears to be at least a theoretical option, but I argue that such representation may raise more problems than it solves. As a result, I urge lawyers to choose to represent the partners jointly as individuals rather than the default partnership entity."; "Part I of this Article examines early views of client identity in forming a start-up company. Although most courts and commentators assumed that entity representation was impossible because the entity had not yet been formed, one prominent commentator proposed reforming the ethics rules to permit lawyers to represent an incipient entity -- but only when it was sufficiently 'formed up' such that the group was the functional equivalent of a legally recognized entity. Part II addresses the formal adoption of a retroactive entity approach to preformation representation, including the lack of persuasive precedent for such an approach, as well as the weakness of the stated policy rationales. Part III discusses the concept of prospectively representing a yet-to-be-formed entity, concluding that while this is more attractive than a retroactive approach, it presents many of the same difficulties. Part IV directly addresses the policy concerns in answering the question of whether courts should permit lawyers to represent a yet-to-be formed entity. It concludes that the disadvantages of doing so outweigh any benefits to the founders and that any such benefits can just as easily be accomplished through joint representation of some or all of the founders. Finally, Part V acknowledges that, under certain circumstances, founders who have begun the process of developing a business become default partners. When this happens, there is indeed an entity that qualifies for client status; nevertheless, here, too, there are difficulties in determining both the identification of the appropriate decision makers and the need to keep all the partners informed. As a result, this Article concludes that the partners are better off when the lawyer represents them individually in a joint representation, where appropriate.").

Explicit Representations in the Context of Closely-Held Corporations

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

Before turning to the majority "default" rule and the minority rule applying to lawyers who represent closely-held corporations, it is worth noting an obvious point.

Lawyers can intentionally represent a closely-held corporation and/or its constituents. Those representations can be sole representations, or joint representations. Importantly, any intentionally represented corporation or constituent deserves all the rights that clients possess, absent some contractual limitation in a retainer agreement or elsewhere.

It should go without saying that a lawyer representing a closely-held corporation or similar entity must follow that entity's governing documents in her retention and representation.

- Morristown Heart Consultants, PLLC v. Patel, No. E2018-01590-COA-R9-CV, 2019 Tenn. App. LEXIS 362, at *18-19, *19-22 (Tenn. Ct. App. July 24, 2019) (addressing a situation in which two doctors owned a PLLC; noting that the doctor who owned 50 percent of the financial rights and 66 percent of the governing rights hired a lawyer to represent the PLLC in advising it about the doctors' memorandum of understanding and the effect of the other doctor's suspension by a hospital; noting that the other doctor, with 50 percent financial ownership but only 33 percent of the governing rights, sought access to the lawyer's files; acknowledging that the doctor who hired the lawyer had the majority of governing rights, but explaining the operating agreement required actions such as retaining counsel to be discussed and voted on at an official PLLC meeting; also pointing to the "at issue" waiver doctrine; finding no reversible error in the trial court's granting the 33 percent owner doctor access to the lawyer's files; noting that the trial court had found that the managing member doctor had not followed the proper procedure for voting on the lawyer's retention or arranging for the other doctor's written consent under the Operating Agreement -- meaning that PLLC "had not properly authorized" the lawyer's hiring).

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

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

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

Id.

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

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

Id.

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

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

Id.

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

Although the lawyer obviously could discuss the pertinent information with the company's executives, the lawyer could not give advice adverse to her other client (the CFO) -- even though the lawyer's representation of the CFO on personal matters bore no relationship to the company.

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

Id.

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

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

Id.

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

In 2014, a New Jersey court dealt with conflicts within a closely-held corporation. Comando v. Nugiel, 93 A.3d 377 (N.J. Super. Ct. App. Div. 2014). In that case, a law firm representing a closely-held corporation and one of its two owners faced a disqualification motion filed by the other owner. She claimed that the law firm had also represented her on related matters. The court described the law firm's work for the closely-held corporation.

> In early 2011, Comando [owner seeking the law firm's disqualification] and Nugiel [other owner] formed 10 Centre [closely-held corporation] as a holding company to acquire and manage real property that would become RCP's [tenant owned by Nugiel] headquarters. According to Nash [lawyer], Nugiel requested [Nash] and NMM [Nash's law firm] to provide legal representation in "(1) the formation of the limited liability company, (2) preparation of the RCP lease for the property, (3) preparation of an operating agreement for [10 Centre], and (4) [assistance] with legal issues surrounding obtaining the financing needed by [10 Centre] to purchase the new headquarters" for RCP. There is no mention of the preparation or existence of a new engagement letter for these new legal services and nothing to explain what role Comando had in engaging NMM.
>
> NMM incorporated 10 Centre and served as its registered agent. In preparation of 10 Centre's operating agreement, Nash acknowledged he conducted conference calls with Nugiel and Comando, summarized provisions of the drafted documents, and emailed a memo to both Nugiel and Comando regarding modifications of the agreement terms.
>
> Nash also assisted with the preparation, modification and execution of an 'agreement for purchase and sale' of the realty ultimately acquired by 10 Centre. In the purchase of the realty, Nash assisted with the preparation, review and execution of several agreements related to the intricate multi-million dollar acquisition and the financing and refinancing of a bridge loan. It is unclear whether he provided individual legal advice to Nugiel regarding this transaction, while also acting as 10 Centre's counsel. Nash also drafted a lease agreement allowing RCP to lease the property acquired by 10 Centre for twenty years at a flat rent. In this regard, Nash insists he took direction from Nugiel and "never gave [] Comando any personal advice or counsel on those issues."

Id. at 380-81 Ialterations in original).

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

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

Id. at 381 (alterations in original) (emphasis added).

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

> This assertion contradicts his claim of serving as counsel for the corporation not its members and also his written representations contained in an opinion letter delivered to TD Bank in respect of the highly complex financing arrangement. In issuing his legal opinion, Nash stated NMM "acted as special counsel to 10 Centre Drive, LLC (the 'Borrower'), RCP Management Company, Inc. (the 'Equity Guarantor') and Mary Faith Radcliffe and Elizabeth Comando (each, an 'Individual Guarantor' and collectively, the 'Individual Guarantors') in connection with the closing . . . of a $1,500,000 mortgage loan from you to Borrower (the 'First Mortgage Loan') and a $350,000 bridge loan from you to Borrower (the 'Bridge Loan, [']) and together with the First Mortgage Loan, the 'Loan Facilities')."

Id. at 381 (emphases added).

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

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

Id. at 379-80 (emphases added).

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

Even more recently, a California court carefully analyzed the status of a lawyer's attorney-client relationship with a closely-held corporation -- ultimately concluding that the law firm's current representation of the corporation prevented the firm from representing one of its owners against the corporation itself.

- M'Guinness v. Johnson, 196 Cal. Rptr. 3d 662, 673, 673-74, 674, 677, 678 (Cal. Ct. App. 2015) (holding that a law firm which represented a corporation owned equally by three shareholders could not represent one of the shareholders in counterclaims against the third shareholder and the company; "Johnson's [one-third owner of TLC, represented by the law firm in counterclaiming against another one-third shareholder and the company] position in opposing the motion was that the Firm had 'concluded its representation of TLC in early March 2012,' and it did 'not currently represent TLC in any matter whatsoever.' But this position is belied by (1) the specific terms of the client agreement, (2) the Law Firm's retention of TLC funds in the Firm's trust account, (3) the Law Firm's billing practices with respect to TLC, (4) the Law Firm's actions up through at least April 2013, and (5) the law addressing an attorney's role as counsel for a corporation."; finding that the law firm continued to represent TLC based on the law firm's retainer agreement; "The Law Firm's client agreement provided: 'Nature of Legal Representation: Advice and representation concerning TLC Builders, Inc. and other general legal work directed by you from time to time.' The agreement thus provided that the Firm's engagement was a broad and open-ended one."; also noting that the law firm retained a retainer amount in its trust account from the company, and continued to bill the company; "In the fifth paragraph of the client agreement, the Firm provided: 'You may terminate our relationship at any time. We may withdraw from representation with your consent or for good cause. . . . At the conclusion of our engagement, at your request and at your cost for any file review, copy and delivery charges, we will review and deliver your files to you, along with any of your funds or property in our possession, charged at our hourly rate.'"; "The terms of the agreement thus evidenced the parties' intent to establish an ongoing attorney-client relationship of an open-ended nature, terminable only by specific methods described in the agreement and under conditions that included the Firm's return of all property and funds to the client. . . . [T]here is no evidence TLC terminated its relationship with the Law Firm at any time. Nothing in the record indicates the Law Firm withdrew from the engagement (either with or without the client's consent)."; concluding that the law firm continued to represent TLC; "The Law Firm's actions controlling and limiting access by two of TLC's shareholders, officers, and directors to the aforementioned records suggest the Firm continued to act as TLC's corporate counsel as late as April 2013."; pointing to the law firm's retention of TLC's (the corporation) funds in its escrow account; after concluding that the law firm continued to represent TLC, disqualifying the law firm from suing a company that it was then currently representing; "Here, the record shows the Law Firm's representation of TLC had not terminated; therefore, the Firm's concurrent representation of TLC and Johnson as opposing parties in the litigation could not continue.

  Both M'Guinness and Stuart -- like the minority shareholder in Gong [Gong v. RFG Oil, Inc., 82 Cal. Rptr. 3d 416 (Cal. Ct. App. 2008)] -- alleged claims of breach of fiduciary duty against Johnson that involved alleged self-dealing, diversion of corporate opportunities, and wasting of corporate assets that harmed TLC. Under these circumstances, the Law Firm could not defend Johnson against these claims because Johnson's interests conflicted with the interests of the corporation.

  Additionally, the Law Firm could not act as Johnson's counsel in pursuing his amended cross-complaint that included claims for money against TLC."; "During oral argument, Johnson's counsel asserted that TLC did not have an active role in

this case. Instead, he asserted, TLC was merely a stakeholder in a dispute between its three shareholders. But M'Guinness and Stuart alleged that Johnson committed acts that harmed TLC, and Johnson alleged tort claims against M'Guiness and Stuart that included allegations of self-dealing that harmed TLC. Johnson also alleged claims against TLC for money owed, belying the assertion that TLC did not have an active role in the litigation."; "[A]s a matter of corporate law, the Firm's ongoing duty to TLC precluded its representation of Johnson in a lawsuit involving allegations in which the interests of the corporation diverged from those of shareholder litigants. . . . The undisputed facts therefore showed the Law Firm had a concurrent representation conflict of interest that required its disqualification as Johnson's counsel in this case.").

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

Of course, such explicit representations may require consents from the corporate entity or its majority or minority shareholders.

• Vermont LEO 2014-2 (2014) ("[A] lawyer, who has represented a corporation and its sole shareholder, may subsequently represent the purchaser of the corporate shares and the corporation where the interests are materially adverse, provided that both the former shareholder and the new shareholder give informed consent to such representation, confirmed in writing. In addition, a lawyer may serve as an escrow agent of the pledged stock held as security in the sale, provided that both parties give informed consent.").

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

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

It is worth mentioning one more implication of lawyers' explicit representation of a corporation. As explained above, such an attorney-client relationship prevents the lawyer from adversity to the corporation -- absent its consent. This conflict of interest principle sometimes prevents lawyers from litigating against the corporation in intra-corporate control fights.

Closely-Held Corporations' Lawyers' Duty to Minority Shareholders

Lawyers have the power to define or disclaim attorney-client relationships. In a closely-held corporate context, it is even more important that in a normal corporate context to explicitly identify the client or clients. Failure to do so can result in disqualification, malpractice actions, or even worse sanctions.

Unfortunately, even lawyers who properly identify their "client" as only the corporate entity and not any of its individual owners face another dilemma that can affect their duties and (especially in the closely-held context) their day-to-day interactions. This is because lawyers representing corporations owe what might be described as a derivative duty to the minority shareholders. Such a duty does not rest on an attorney-client relationship, but instead on the corporate client's duty not to oppress such minority shareholders. Thus, a lawyer representing a corporation may not advise the corporation to, or assist it in, oppressing minority shareholders.

The Restatement acknowledges this duty:

> (2) Lawyer represents Client, a closely-held corporation, and not any constituent of Client. Under law applicable to the corporation, a majority shareholder owes a fiduciary duty of fair dealing to a minority shareholder in a transaction caused by action of a board of directors whose members have been designated by the majority stockholder. The law provides that the duty is breached if the action detrimentally and substantially affects the value of the minority shareholder's stock. Majority Shareholder has asked the board of directors of Client, consisting of Majority Shareholder's designees, to adopt a plan for buying back stock of the majority's shareholders in Client. A minority shareholder has protested the plan as unfair to the minority shareholder. Lawyer may advise the board about the position taken by the minority shareholder, but is not obliged to advise against or otherwise seek to prevent action that is consistent with the board's duty to Client.
>
> (3) The same facts as in Illustration 2, except that Lawyer has reason to know that the plan violates applicable corporate law and will likely be successfully challenged by minority shareholders in a suit against Client and that Client will likely incur substantial expense as a result. Lawyer owes a duty to Client to take action to protect Client, such as by advising Client's board about the risks of adopting the plan.

Restatement (Third) of Law Governing Lawyers § 96 cmt. g, illus. 2, 3 (2000).

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

> For purposes of identifying conflicts of interest, a lawyer's client is ordinarily the person or entity that consents to the formation of the client-lawyer relationship . . . . For example, when a lawyer is retained by Corporation A, Corporation A is ordinarily the lawyer's client; neither individual officers of Corporation A nor other corporations in which Corporation A has an ownership interest, that hold an ownership interest in Corporation A, or in which a major shareholder in Corporation A has an ownership interest, are thereby considered to be the lawyer's client. In some situations, however, the financial or personal relationship between the lawyer's client and other persons or entities might be such that the lawyer's obligations to the client will extend to those other persons or entities as well. That will be true, for example, where financial loss or benefit to the nonclient person or entity will have a direct, adverse impact on the client.

Restatement (Third) of Law Governing Lawyers § 121 cmt. d (2000) (emphasis added)).

Although this principle applies in a normal corporate context, with closely-held corporations the risk of the majority shareholders abusing their status seems much more acute -- which places the corporations' lawyers in a difficult position.

Courts dealing with this scenario have had to reconcile two competing principles: (1) lawyers explicitly or implicitly (by operation of law) representing a closely-held corporation owe duties to the entity, not to its constituents; (2) although such lawyers do not have attorney-client relationships with the minority owners, they may owe some derivative duties to them.

Most courts emphasize the former principle when addressing such issues as disqualification, malpractice, file ownership, etc. A minority of courts emphasize the second principle. These competing approaches are discussed below.

Majority Approach: Lawyers Representing Closely-Held Corporations Can Represent the Corporation (and Sometimes the Majority Owners) Against the Minority Owners

As with all corporations, ABA Model Rule 1.13(a)'s "default" position recognizes that a corporation's lawyer represents the entity rather than any of its constituents.

In the closely-held corporate context, this principle focuses on the presence or absence of an attorney-client relationship with the minority owners. Before turning to many courts' adoption of the general "default" position, it is worth noting that corporate

lawyers' arguable "derivative" duty to minority owners can affect those lawyers' ability to represent the corporations even in the absence of an attorney-client relationship with the minority owners. This is discussed below.

In analyzing the existence of an attorney-client relationship and the ability to represent a corporate client against minority shareholders, most courts follow the general "default" rule.

- Coldren v. Hart, King & Coldren, Inc., 190 Cal. Rptr. 3d 655, 646, 653-54 (Cal. Ct. App. 2015) (holding that the same law firm could represent another law firm and its 50 percent shareholder owner in a lawsuit filed by the other owner who had left the law firm; "Plaintiffs Robert S. Coldren (Coldren) and his wife, Brook Coldren, sued defendants Hart, King & Coldren, Inc. (HKC), and William R. Hart asserting several causes of action arising out of Coldren's departure from his law practice at HKC. Defendants appeal from an order disqualifying HKC's counsel, Grant, Genovese & Baratta, LLP (Grant Genovese), who had been representing both Hart and HKC. The court held there was an unwaivable actual conflict between the two. The court concluded a conflict existed because Coldren is a 50 percent shareholder of HKC, and HKC could have duties to Coldren that were in conflict with Hart's interests in defeating the litigation. Accordingly, the court ordered Hart to confer with Coldren on the appointment of 'neutral' counsel for HKC."; "We reverse. Coldren sued both Hart and HKC -- directly, not derivatively -- on essentially the same claims. He is seeking over $8 million in damages against both. Hart's interest is perfectly aligned with HKC's interest in seeing Coldren's claims defeated. Coldren's position seems to be that he can sue his company and then, because he is a 50 percent shareholder, have a say in its defense. That is not the law. Moreover, Grant Genovese's duty of loyalty, as counsel for HKC, runs to HKC, not its shareholders. HKC is free to defend itself and assert relevant counterclaims to the detriment of Coldren. Since there is no conflict, we reverse."; "The question is . . . do Hart and HKC 'have opposing interests in the lawsuit which the attorney would have a duty to advance simultaneously for each.'. . . Coldren has not identified any such opposing interests. He points vaguely to the fact that he is a 50 percent shareholder, but as the foregoing principles make clear, Grant Genovese's duty is to HKC, not its shareholders, and HKC is free to defend Coldren's lawsuit and assert relevant counterclaims.").
- Weingarden v. Milford Anesthesia Assocs., P.C., No. NNHCV116016353S, 2013 Conn. Super. LEXIS 1239, at *20, *20-21, *22-23 (Conn. Sup. Ct. May 30, 2013) ("The other basis for the plaintiff's claim under rule 1.9 is that by representing Milford Associates, Mathieson represented the shareholders and thus the plaintiff as a shareholder is a former client of Mathieson. Such an argument is easily rejected in light of clear authority to the contrary. . . . Rule 1.13 makes clear that a shareholder of an organization is not the client of that organization's lawyer absent some set of facts independently creating an attorney-client relationship." (emphasis added); "This principle is further supported in case law. In the analogous context of partnerships, '[a] partnership usually is a legal entity and is the lawyer's client. Thus a lawyer who represents a partnership does not thereby become counsel or owe a duty to the partners.'" (citation omitted); "The plain language of rule 1.13, the official comment to that rule, appellate case law explaining entity theory and the overwhelming stance taken in other Superior Court decisions makes it abundantly clear that the plaintiff cannot establish an attorney-client relationship with Mathieson simply by relying on his status as a shareholder of an organization that Mathieson represented. The plaintiff would have to demonstrate some other facts creating such a relationship, none of which have been shown here." (emphases added)).
- Nilavar v. Mercy Health Sys., 143 F. Supp. 2d 909, 914, 915, 917 (S.D. Ohio 2001) (holding that the lawyer who represented a closed corporation did not also represent a major shareholder, and therefore could be adverse to the shareholder; "The fact that SRI was a close corporation does not lead to the conclusion that Plaintiff reasonably believed that he personally had an unrestricted attorney-client relationship with Mehnert. Between 1970 and 1983, SRI consisted of six physician-shareholders . . . . When Dr. Bavendam retired in 1983, the corporation was restructured, with the five remaining principals receiving equal shares in the corporation . . . . At the time, accordingly, Plaintiff would have had a twenty percent (20%) interest in the corporation. By 1991, SRI had approximately eleven principals . . . . Thus, assuming that each principal had an equal interest in the corporation, Plaintiff held approximately a nine percent (9%) interest in SRI at that time. As stated by the Correspondent Servs. [Correspondent Servs. Corp. v. J.V.W. Inv. Ltd., No. 99 Civ. 8934 (RWS), 2000 U.S. Dist. LEXIS 11881 (S.D.N.Y. Aug. 16, 2000)] court, even twenty percent is 'a far cry from the 50-50 ownership stake in Rosman [Rosman v. Shapiro, 653 F. Supp 1441 (S.D.N.Y.1987)].' Therefore, the degree to which Plaintiff shared an ownership interest in SRI does not provide a strong basis for the conclusion that Plaintiff believed, at the time that he communicated with SRI's corporate counsel, that he was communicating with Mehnert as his personal attorney." (emphasis added); "Although Plaintiff has stated in his affidavit that he was not informed by Mehnert that Frost &

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

• Correspondent Servs. Corp. v. J.V.W. Inv. Ltd., No. 99 Civ. 8934 (RWS), 2000 U.S. Dist. LEXIS 11881, at *36, *36-37 (S.D.N.Y. Aug. 16, 2000) (refusing to disqualify Shaw Pittman from adversity to an individual who owned an interest in the corporation that Shaw Pittman represented; finding that the attorney-client relationship existed between Shaw Pittman and the corporation rather than the individual; "Here, the words and actions of the parties demonstrate that Shaw Pittman was engaged to act as attorney for JVW [corporation], not Kelleher [individual seeking to disqualify Shaw Pittman] individually. First, Kelleher concedes in an affidavit that he was 'acting on behalf of JVW' when he identified Shaw Pittman as a potential firm to represent JVW in the attempt to recover the missing assets. . . . Although Kelleher also asserts in the affidavit that Shaw Pittman was retained 'to act as the attorneys for JVW, Waggoner, and myself,' . . . this statement is not supported by any of the documents submitted in connection with these motions." (emphasis added); "Caruso wrote to Kelleher after the conference call with Kelleher and Duperier. The letter is addressed to Kelleher as Director of JVW and Trustee, stated that 'As the Director and Trustee, you no doubt possess E-mail, documents, etc. in your computer, in originals, or in first-stage fax copies,' and requested that copies of those be sent to Shaw Pittman to provide a background to the case. According to Caruso's (Shaw Pittman attorney) uncontradicted affidavit, Kelleher then faxed Caruso a quantity of materials consisting largely of JVW corporate documents and correspondence between Kelleher and others on JVW corporate letterhead. In addition, Shaw Pittman's retainer was paid by JVW, not Kelleher, and Shaw Pittman's engagement letter stated that Shaw Pittman was 'pleased to have been engaged to represent J.V.W. Investments, Ltd.' for the purpose, inter alia, of recovering 'amounts due and owing to J.V.W. Investments, Ltd.' Shaw Pittman sent a bill on November 17, 1998 to 'J.V.W. Investments Ltd.' At Kelleher's address. Other documents support the conclusion that Kelleher, likewise, considered Shaw Pittman to be JVW's attorneys."

• Jesse v. Danforth, 485 N.W.2d 63, 66, 67, 68, 68-69, 69 (Wis. 1992) (holding that a law firm's pre-incorporation representation of individuals did not prevent the law firm from adversity to two of the individuals on unrelated matters; "We conclude that the entity rule does extend to Drs. Danforth and Ullrich such that DeWitt's [Law firm] pre-incorporation involvement with Drs. Danforth and Ullrich is properly characterized as representation of MRIGM [a corporation created by the law firm at the direction of 23 doctors, including the two individual doctors now seeking to disqualify the law firm from adversity in an unrelated matter], not Drs. Danforth or Ullrich, i.e., DeWitt's client was and is MRIGM, not Drs. Danforth or Ullrich."; "If a person who retains a lawyer for the purpose of organizing an entity is considered the client, however, then any subsequent representation of the corporate entity by the very lawyer who incorporated the entity would automatically result in dual representation. This automatic dual representation, however, is the very situation the entity rule was designated to protect corporate lawyers against."; We thus provide the following guideline: where (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre - incorporation involvement with the person is deemed to be representation of the entity, not

the person." (emphasis added); "In essence, the retroactive application of the entity rule simply gives the person who retained the lawyer the status of being a corporate constituent during the period before actual incorporation, as long as actual incorporation eventually occurred."; "This evidence overwhelmingly supports the proposition that the purpose of Flygt's pre-incorporation involvement was to provide advice with respect to organizing an entity and that Flygt's involvement was directly related to the incorporation. Moreover, that MRIGM was eventually incorporated is undisputed."; also finding that the individual doctors could not disqualify the law firm based on confidential information they gave the lawyer [who handled the incorporation]; "Drs. Danforth and Ullrich also contend that they provided certain confidential information to attorney Flygt that should disqualify DeWitt under SCR 20:1.6, the confidential information rule. Defendants point to questionnaires Flygt provided to the physicians involved in the MRI project which inquire, in part, as to the physicians' personal finances and their involvement in pending litigation."; "Because MRIGM, not the physician shareholders, was and is the client of DeWitt, and because the communications between Drs. Danforth and Ullrich were directly related to the purpose of organizing MRIGM, we conclude that Drs. Danforth or Ullrich cannot claim the privilege of confidentiality."; finding that the law firm's current representation of a malpractice plaintiff suing the two doctors was not "directly adverse" to the corporation, even though the malpractice case could result in the doctors losing their licenses and therefore depriving the corporation of two shareholders and its president).

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

• Records v. Geils Unlimited Research, LLC, Civ. A. No. 12-11419-FDS, 2013 U.S. Dist. LEXIS 106375, at *8-9, *11-12, *12, *16, *16 n.5, *21 (D. Mass. July 30, 2013) (holding that even in the context of a close corporation, a lawyer can represent the corporation and some shareholders in litigation with other shareholders; "The First Circuit has held that '[a]bsent some evidence of true necessity, [the court] will not permit a meritorious disqualification motion to be denied in the interest of expediency unless it can be shown that the movant strategically sought disqualification in an effort to advance some improper purpose.' Fiandaca, 827 F.2d at 830-831 [Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987)]. Furthermore, the great majority of cases where motions to disqualify as untimely involved motions filed on the eve of trial. . . . Here, the litigation is still in its relative infancy. Accordingly, the Court will not deny the motion to disqualify attorney Butters and his firm is untimely."; "Plaintiffs seem to suggest that an attorney can never represent a corporation in a claim brought by a shareholder of that corporation. But it is well-settled that '[a] lawyer retained by a corporation represents the corporate entity, not its shareholders, employees, or directors.'. . . Indeed, if plaintiffs' theory were correct -- and counsel for a corporation necessarily must represent the interests of all the shareholders -- it would lead to an absurd result: no corporation could ever retain counsel in a suit brought by a shareholder. That, obviously, cannot be the rule." (emphases added); "There may be circumstances, particularly involving close corporations, where an attorney for a corporation might in fact be precluded from representing that corporation in a claim brought by a minority shareholder. T&A may be such a close corporation, and individual defendants Justman, Klein, Salwitz, and Blankfield together appear to represent a majority of shareholder interests."; "[P]laintiffs have cited to no authority holding that counsel here owes a fiduciary duty to the minority shareholders, or that such a duty would survive the filing of a claim against the corporation by a minority shareholder. If there are facts in this case that might bear on the creation of such a duty, they have not been made part of the record. Under the circumstances, it does not appear that Butters owes a fiduciary duty to Geils, and, even if such a duty once existed, it may have terminated when his interests become [sic] adverse to the corporation. Accordingly, the Court will not disqualify attorney Butters on that basis." (footnote omitted) (emphasis added); "In Bovee v. Gravel, 174 Vt. 486, 811 A.2d 137 (2002), the Vermont Supreme Court addressed the issue of whether an attorney for a close corporation owes a separate duty of care to individual shareholders.

The court surveyed opinions from a number of jurisdictions across the country and concluded as follows: 'Although a few courts have evinced a willingness to recognize an attorney's duty to care to the shareholders of a closely-held corporation, these decisions are generally based on circumstances demonstrating a relationship between the attorney and a small number of shareholders approaching that of privity. See, e.g., United States v. Edwards, 39 F. Supp. 2d 716, 731-32 (M.D. La. 1999) ("The issue of attorney-client relationship becomes more complicated in the case of a small closely-held corporation with only a few shareholders or directors. In such cases, the line between individual and corporate representation can

become blurred.”); Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (counsel for closely-held corporation consisting of two fifty-percent shareholders represented both corporate entity and individual shareholders).”’; “‘Many courts, however, have refused to recognize a duty to nonclient shareholders even in such closely-held corporations. See Skarbrevik v. Cohen, England & Whitfield, 231 Cal. App. 3d 692, 282 Cal. Rptr. 627, 634-36 (Ct. App. 1991) (counsel for close corporation owed no duty to nonclient shareholder); Brennan and Ruffner, 640 So. 2d 143, 145-46 (Fla. Dist. Ct. App. 1994) (‘where an attorney represents a closely-held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder’); Felty v. Hartweg, 169 Ill. App. 3d 406, 523 N.E.2d 555, 557, 119 Ill. Dec. 799 (Ill. App. Ct. 1988) (declining to recognize corporate attorney's duty to shareholders, court observed that ‘even in closely-held corporations, minority shareholders often have conflicting interests with the corporation’).” (citation omitted)); “Rule 3.7 provides that a lawyer who is a necessary witness ‘shall not act as an advocate at trial.’ (emphasis added). Therefore, it is not necessary to disqualify attorney Butters at this juncture. Indeed, plaintiffs . . . have yet to explain the testimony they intend to elicit from Butters. If plaintiffs in the future can meet their burden of showing that necessary testimony could not be acquired from another witness, it might then be appropriate to disqualify attorney Butters from serving as trial counsel. However, ‘that future possibility provides no basis for disqualifying [Butters] from continuing to represent [defendants] in pre-trial activities.”’ (citation omitted)).

• Stanley v. Bobeck, 2009-Ohio-5696, ¶ 16 (Ohio Ct. App. 2009) (reversing a lower court's order disqualifying a lawyer who had represented a limited liability company from representing the company in an action brought by a member of the limited liability company; “The trial court made an exception to this rule by concluding a closely-held corporation is different from a large corporation because it is more like a partnership. No exception, however, was made regarding close corporations in the Rules of Professional Conduct. There is also no case law indicating that a different standard applies when the corporation is a closely-held corporation. Moreover, there is no evidence that Stanley [member of the limited liability company] believed that MRFL [law firm] was acting as his personal attorneys when representing Sunshine I as Stanley never conferred with MRFL on legal matters. Therefore, because there was no prior attorney-client relationship between Stanley and MRFL, the first prong of the Dana [Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882 (6th Cir. 1990)] test was not met.” (emphases added)).

• Classic Coffee Concepts, Inc. v. Anderson, 2006 NCBC 21, ¶¶ 34, 35, 36, 37, 38, 39, 40, 47, 48, 49, 63, 76 (N.C. Super. Ct. Dec. 1, 2006) (declining to disqualify the law firm of Mayer Brown from representing the closely-held plaintiff company in a lawsuit against its former CFO and shareholder for refusing to sell his stock back to the plaintiff company pursuant to the terms of an agreement; noting that a Mayer Brown lawyer had represented the CFO/shareholder in connection with his guaranty of the company's loan to a lender; holding that the guaranty was not substantially related to the current dispute; explaining that Rules 1.7 and 1.13 applied to the closely-held corporation in the same way as to other corporations; explaining Mayer Brown's role as defendant's counsel in the limited guaranty matter; “During negotiation of the Stockholders Agreement and Anderson's [Defendant] Employment Agreement, Barrett [Mayer Brown lawyer] advised Anderson, Bailey, and Brinson that they were free to seek outside counsel to advise them in their individual capacity.”; “When Anderson and Brinson sought Barrett's advice on the effect of designating Bailey as Chairman of Classic Coffee's Board, Barrett's response was directed to both Anderson and Brinson.”; “MBR&M acted as special counsel to Anderson, Bailey, and Brinson in their capacities as guarantors under the Guaranty Agreement. There is no evidence that Barrett or MBR&M actually represented Anderson in any matters other than the Guaranty Agreement.”; “The only information that MBR&M received from Anderson during its representation of him was a certification that he was not aware of any violations of existing laws and regulations that could ‘materially adversely affect [Classic Coffee] or his ability to fill [sic] his obligations under the [Guaranty Agreement],’ and a certification that Anderson was not involved in any pending or threatened lawsuits, investigations, or proceedings.” (internal citation omitted); “During his employment, Anderson never entered into a written engagement for legal representation with Barrett or MBR&M. . . . He never received an invoice from or made any payment to Barrett or MBR&M . . . and MBR&M's services were billed to and paid for by Classic Coffee exclusively.”; “Whenever Barrett discussed Anderson's Employment Agreement with him, Barrett informed Anderson that he represented Classic Coffee exclusively. . . . Barrett never advised Anderson that he was acting on his behalf or that he did not need to seek separate counsel.”; “Anderson never informed Barrett that he considered him to be his personal

attorney . . . and Anderson never stated to any third party that he considered Barrett to be his personal attorney."; "[T]his representation is not substantially related to the claims before the Court because: (a) the Guaranty Agreement is separate from the transactions that give rise to the claims in this case; and (b) MBR&M did not obtain information during its representation that would materially advance Classic Coffee's position here.";

"The Guaranty Agreement is separate from the transactions that give rise to the claims in this case for two reasons: (a) neither Anderson nor Classic Coffee have alleged any cause of action arising out of the Guaranty Agreement; and (b) the Guaranty Agreement, the Stockholders Agreement, and Anderson's Employment Agreement are separate and distinct transactions between different parties and concerning different subject matters."; "Classic Coffee's claim for breach of contract arises exclusively out of the Stockholders Agreement . . . and none of Anderson's four counterclaims arise out of the Guaranty Agreement . . . . Anderson's reference, in paragraphs 60 and 61 of his Answer and Counterclaims, to the Guaranty Agreement as a source of irritation does not state a claim is an insufficient basis for disqualifying MBR&M."; "In First Republic Bank [First Republic Bank v. Brand, 51 Pa. D. & C. 4th 167, 184-85 (C.P. Phila. 2001)], the court outlined several factors for determining whether a corporation's attorney had entered into an attorney-client relationship with the corporation's stockholder. . . . These factors include: '(1) whether the stocholder was separately represented by other counsel when the corporation was created or in connection with its affairs; (2) whether the stockholder sought advice on and whether the attorney represented the stockholder in particularized or individual matters, including matters arising prior to the attorney's representation of the corporation; (3) whether the attorney had access to the stockholder's confidential or secret information that was unavailable to other parties; (4) whether the attorney's services were billed to and paid by the corporation or the stockholder; (5) whether the corporation is closely-held; (6) whether the stockholder could reasonably have believed that the attorney was acting as his individual attorney rather than as the corporation's attorney; (7) whether the attorney affirmatively assumed a duty of representation to the stockholder by either express agreement or implication; (8) whether the matters on which the attorney gave advice are within his or her professional competence; (9) whether the attorney entered into a fee arrangement; and (10) whether there was evidence of reliance by the stockholder on the attorney as his or her separate counsel or of the shareholder's expectation of personal representation.'" (internal citation omitted)); "These rules [1.7 and 1.13], in combination, clearly contemplate representation of a corporation by corporate counsel in situations where the corporation's interests are adverse to one of its constituents. Furthermore, they make no exception for closely-held corporations like Classic Coffee. Since the North Carolina Revised Rules of Professional Conduct do not establish a per se rule against corporate counsel representing a closely-held corporation against one of its stockholders or directors, the Court declines to create such a rule here.").'

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

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

This type of representation represents a reliance on the principle that a corporation's lawyer does not represent minority owners. By definition, representing the corporation itself and some owners against other owners involves a dispute related to corporate control. This is quite different from the corporation's lawyer taking matters adverse to minority shareholders on issues unrelated to the corporation.

But some courts allow lawyers to represent both the corporation and one of its owners against its other owners. Of course, the lawyer will be in a position to do so only if the owner/client controls the corporation, and can consent it to jointly retaining that lawyer.

- Coldren v. Hart, King & Coldren, Inc., 190 Cal. Rptr. 3d 655, 646, 653-54 (Cal. Ct. App. 2015) (holding that the same law firm could represent another law firm and its 50 percent shareholder owner in a lawsuit filed by the other owner who had left the law firm; "Plaintiffs Robert S. Coldren (Coldren) and his wife, Brook Coldren, sued defendants Hart, King & Coldren, Inc. (HKC), and William R. Hart asserting several causes of action arising out of Coldren's departure from his law practice at HKC. Defendants appeal from an order disqualifying HKC's counsel, Grant, Genovese & Baratta, LLP (Grant Genovese), who had been representing both Hart and HKC. The court held there was an unwaivable actual conflict between the two. The court concluded a conflict existed because Coldren is a 50 percent shareholder of HKC, and HKC could have duties to Coldren that were in conflict with Hart's interests in defeating the litigation. Accordingly, the court ordered Hart to confer with Coldren on the appointment of 'neutral' counsel for HKC."; "We reverse. Coldren sued both Hart and HKC -- directly, not derivatively -- on essentially the same claims. He is seeking over $8 million in damages against both. Hart's interest is perfectly aligned with HKC's interest in seeing Coldren's claims defeated. Coldren's position seems to be that he can sue his company and then, because he is a 50 percent shareholder, have a say in its defense. That is not the law. Moreover, Grant Genovese's duty of loyalty, as counsel for HKC, runs to HKC, not its shareholders. HKC is free to defend itself and assert relevant counterclaims to the detriment of Coldren. Since there is no conflict, we reverse."; "The question is . . . do Hart and HKC 'have opposing interests in the lawsuit which the attorney would have a duty to advance simultaneously for each.'. . . Coldren has not identified any such opposing interests. He points vaguely to the fact that he is a 50 percent shareholder, but as the foregoing principles make clear, Grant Genovese's duty is to HKC, not its shareholders, and HKC is free to defend Coldren's lawsuit and assert relevant counterclaims.").

- Havasu Lakeshore Invs., LLC v. Fleming, 158 Cal. Rptr. 3d 311, 314, 319, 321 (Cal. Ct. App. 2013) (holding that a lawyer could represent a limited liability company and its managing members in a litigation against two members, each of whom owned approximately ten percent of the LLC interest; "The trial court disqualified a law firm from simultaneously representing a limited liability company, its managing member (a partnership), and the person who managed that partnership (who was not himself a member of the company) in a lawsuit against two of the company's minority members. The court found that the interests of the company and the nonmember individual potentially conflicted, and concluded the law firm could not jointly represent the company and the nonmember individual against the company's minority members. The court based its ruling on rule 3-310(C) of the State Bar Rules of Professional Conduct and Gong v. RFG Oil, Inc. (2008) 166 Cal.App.4th 209, 214-216 [82 Cal. Rptr. 3d 416] (Gong), both of which concern an attorney's duty of loyalty to simultaneously represented clients. Because no actual conflict of interest existed between the company and the individual who managed the company's managing member, and there was no reasonable likelihood such a conflict would arise, we reverse the court's ruling." (footnote omitted); "With respect to the cross-complaint, there is no conflict; the LLC's interests and Peloquin's are clearly allied. The LLC and the other cross-complainants seek to recover the LLC's property and to restore value to the LLC. Fleming Jr., in his respondent's brief, agrees these are the LLC's litigation goals. These goals are beneficial to every member of the LLC, including the Flemings in their status as members of the LLC, and to Peloquin, in his status as a partner and principal in the LLC's other members."; "Fleming Jr. cites no authority for the proposition that an attorney may never jointly represent an entity and its management against a non-managing minority member.").

It is worth noting that representing both a closely-held corporation and some of its owners in matters adverse to its other owners involves some risk. As explained more fully below, if the corporation changes hands because of a court order (based on a finding that the minority owners should control the corporation) or even a settlement, the corporation will undoubtedly fire the lawyer who had previously represented the lawyer's adversary (who now control the corporation). But the corporation is now the lawyer's former client. Among other things, that usually allows the corporation to access the lawyer's files. This is

discussed fully below in connection with the minority view preventing lawyers from representing a closely-held corporation against its minority owners -- or at least warning them of such representations' danger.

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

- Simms v. Rayes, 316 P.3d 1235, 1238, 1238-39, 1239, 1240 (Ariz. 2014) (declining to disqualify Greenberg Traurig from simultaneously representing a minority owner of a limited partnership in a derivative case against other partners, while defending the minority owner in a lawsuit brought by the limited partnership; "As TP Racing [limited partnership] concedes, no attorney-client relationship exists between GT [Greenberg Traurig] and TP Racing. An attorney-client relationship exists when a person has manifested to a lawyer his intent that the lawyer provide him with legal services and the lawyer has manifested consent to do so. . . . Nothing in the record shows that TP Racing manifested to GT its intent that GT provide legal services to it or that GT manifested any consent to do so. GT's only attorney-client relationship is with Ron [minority partner of TP Racing]."; "The fact that GT's client Ron -- in his capacity as a minority partner of TP Racing -- has filed derivative claims on behalf of TP Racing changes nothing. Although no Arizona appellate court has considered the issue, courts that have considered the issue have held that lawyers are not disqualified from representing clients who are simultaneously pursuing direct claims against a corporation and derivative claims on behalf of that corporation." (emphasis added); "Derivative actions allow a minority shareholder to pursue a claim on behalf of a corporation when the management of the corporation has refused to pursue the claim itself. . . . The corporation is merely a nominal party in a dispute between a minority shareholder and the management that controls the corporation. . . . The corporation thus is not a 'client' of the lawyer for the minority shareholder and the lawyer has no attorney-client relationship with it."; "Because the lawyer in a derivative action has an attorney-client relationship only with the minority shareholder, nothing prevents the lawyer from also representing the minority shareholder on any direct claims against the corporation or its management that arise from the same set of facts. The shareholder may sue directly for harms the mismanagement of the corporation has caused him personally, and derivatively for harms the mismanagement has caused the corporation." (emphasis added); "TP Racing nevertheless argues that even though no attorney-client relationship exists between GT and TP Racing, GT still has a conflict of interest under ER 1.7(a) because the derivative claims impose a fiduciary duty on GT to TP Racing that conflicts with GT's duty to Ron. Although a fiduciary duty does exist in a derivative action, it exists between the corporation or partnership and the minority shareholder or partner asserting the derivative claim. . . . Thus, Ron, as the minority limited partner asserting the derivative claim, has a fiduciary duty to act in TP Racing's interest. GT is counsel for the person having the fiduciary duty to TP Racing; the firm itself has no separate fiduciary duty to TP Racing.").
- Shen v. Miller, 150 Cal. Rptr. 3d 783 (Cal. Ct. App. 2012) (holding that a lawyer can represent the fifty-percent owner of a company in a derivative action and represent the same individual in an action against the other fifty-percent owner; noting that the lawyer also represented the fifty-percent owner in a wind-up lawsuit adverse to the company; rejecting the defendant half-owner's argument that the plaintiff's lawyer conflict because he was simultaneously representing the company in the derivative case while being adverse to it in the wind-up case; holding that the plaintiff's lawyer filed a derivative action "on behalf of" the company but did not represent the company; explaining that a lawyer representing a plaintiff in a derivative case is actually adverse to the company, although the company benefits if the plaintiff wins).

The general principle that a closely-held corporation's lawyer does not represent its shareholders implicates other issues -- such as standing to file malpractice actions against the lawyer, and ownership of the lawyer's files.

Thus, courts applying the general "default" rule usually conclude that a closely-held corporation's owner cannot file a malpractice action against the corporation's lawyer.

- Kelly Knaub, McNees Wallace Freed From Malpractice Suit Over Stock Sale, Law360, Mar. 11, 2014 ("The Pennsylvania Superior Court upheld a trial court decision letting law firm McNees Wallace & Nurick LLC off the hook in a case accusing the firm of committing legal malpractice in connection with All-Staffing Inc. (ASI) co-owner Alfonso Sebia's sale of stock during an acquisition of the company."; "In an opinion penned by Superior Court Judge Patricia H. Jenkins, the three-judge panel agreed with the Court of Common Pleas' determination that McNees Wallace did not have an attorney-client relationship with Sebia and his wife Pamela, also a plaintiff, saying the firm had only represented ASI. Alfonso Sebia owned 50 percent of the company's stock, while his partner, Stan Costello, owned the other half." (emphasis added); "'Viewed in the light most favorable to the Sebias, the evidence fails to establish that it was reasonable for them

to believe McNees was representing them,' the opinion says."; "ASI, which Sebia and Costello formed in 1992, was a privately held professional employment organization that provided payroll, human resources and workers' compensation insurance services to its clients. Things went awry in 2007 after California-based Dalrada Corporation purchased ASI and its assets, including ASI stock, which were foreclosed on later that year by one of Dalrada's lenders. The Sebias -- who had carved out employment agreements during the acquisition -- were also fired."; "The Sebias sued McNees Wallace for legal malpractice, but the appeals court affirmed the trial court's decision, saying the firm had only represented ASI and not the Sebias."; "The appeals court said that ASI -- not the Sebias -- signed an engagement letter with McNees Wallace, which explicitly identified the firm's client as the corporation, not an individual shareholder. According to the court, the firm had included the following line in the letter: 'We always recommend that individual owners consider obtaining separate legal counsel. We do so here as well.'" (emphasis added); "Judge Jenkins wrote in the opinion that the Sebias never had face-to-face meetings with the firm, never received bills from it, never paid the firm's bills or complained about its services. The Sebias did not ask the firm to perform due diligence during the Dalrada transaction, invite the firm to meetings with ASI's accountants or ask the firm for its opinion about the original or revised stock purchase agreements with Dalrada, according to the appeals court." (emphasis added)).

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

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

• Brennan v. Ruffner, 640 So. 2d 143, 145-46, 146 (Fla. Dist. Ct. App. 1994) (holding that a shareholder controlling one-third of a company's stock cannot directly sue the company's lawyer; "Dr. Brennan argues that a separate duty to him as a shareholder arose by virtue of the lawyer's representation of the closely-held corporation. Although never squarely decided in this state, we hold that where an attorney represents a closely-held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually. While there is no specific ethical prohibition in Florida against dual representation of the corporation and the shareholder if the attorney is convinced that a conflict does not exist,

an attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders. The duty of an attorney for the corporation is first and foremost to the corporation, even though legal advice rendered to the corporation may affect the shareholders. Cases in other jurisdictions have similarly held." (footnote omitted) (emphasis added); "[T]here are no facts to support Dr. Brennan's assertion that the primary intent of the corporation in hiring the attorney to draft the shareholder's agreement was to directly benefit Dr. Brennan individually. Dr. Brennan admits that there was an inherent conflict of interest between the rights of the individual shareholder and the corporation. This alone expressly undercuts a third party beneficiary claim. . . . A third party beneficiary theory of recovery has been rejected in other jurisdictions in similar circumstances on the basis that the individual shareholder cannot be an intended third party beneficiary of a shareholder's agreement because the interests of the corporation and the minority shareholder are potentially in opposition.").

• Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 634-35, 636, 637 (Cal. Ct. App. 1991) (holding that plaintiff officer, director, and 25 percent shareholder cannot directly sue the company's lawyer; "An attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders; as attorney for the corporation, counsel's first duty is to the corporation. . . . Corporate counsel should, of course, refrain from taking part in any controversies or factional differences among shareholders as to control of the corporation, so that he or she can advise the corporation without bias or prejudice. . . . Even where counsel for a closely-held corporation treats the interests of the majority shareholders and the corporation interchangeably, it is the attorney-client relationship with the corporation that is paramount for purposes of upholding the attorney-client privilege against a minority shareholder's challenge. . . . These cases make clear that corporate counsel's direct duty is to the client corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders." (emphases added); "Plaintiff in this case did not have close interaction, or any interaction at all, with defendant attorneys during the time period in which the legal services sued upon were rendered. The evidence at trial was that after the July 13, 1983, meeting, plaintiff was told by the other shareholders that defendant Comis would prepare the documents to effect the buy out of his shares, and that in August 1983, when plaintiff asked Erlich [one of the other three 25% shareholders] if the papers were ready, Erlich told plaintiff that because of their attorney's advice, he and the two other shareholders had decided not to pay him for his shares, and that no contract would be forthcoming."; "There was no contact between plaintiff and defendant Comis regarding the proposed buy out; the initial instructions regarding the drafting of buy out documents were given to Comis by Erlich. Nor was there any basis for plaintiff to place faith, confidence or trust in Comis to protect his interests in regard to this rift among the shareholders, particularly after he was told that it was on the basis of their attorney's advice that the other three shareholders had decided not to pay him for his shares. All the wrongful acts complained of were subsequent to the date he received that information, and he was completely unaware of any of those acts until after he brought this action."; "Applying these principles to the case before us, we conclude that plaintiff had no attorney-client relationship with defendant attorneys, he was not an intended beneficiary of the attorney-client relationship, and certainly had no reason to believe he was intended to be benefited by that relationship, particularly after he was told by Erlich that based on 'their attorney's counsel,' the majority shareholders would not pay him for his shares. The evidence at trial demonstrates that plaintiff was at that time a potential adverse party whose interests could not be, and were not, represented by his adversaries' chosen counsel, whose duty of loyalty was to his own clients. . . . The fact that defendant Comis could have foreseen the adverse consequences of his advice and its impact on plaintiff is not sufficient justification for fixing liability on him to a nonclient shareholder under these circumstances." (emphasis added); "Defendants owed no professional duty of care to plaintiff, and in the absence of duty, could not be held liable for professional negligence.").

Lawyers' file ownership usually follows from attorney-client relationships. A 2009 Western District of New York case applied the general "default" rule in denying a closely-held company's owners access to the company lawyer's files.

• MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D. 241, 246, 248, 249, 250, 251, 252, 252-53, 253. 254, 255 (W.D.N.Y. 2009) (addressing privilege issues in a trademark case; explaining that a lawyer had represented a closely-held business, which had eventually declared bankruptcy, with the assets sold to a number of successors; analyzing the ability of the former sole owners of the company to obtain privileged documents from the lawyer -- thus raising the issue of whether the lawyer had represented them individually or their closely-held company; explaining the co-owners' position that the lawyer represented them; "Victoria and Richard argue that Salai [lawyer] 'act[ed] as their personal attorney and not as

attorney for their wholly owned company.'. . . Because they were fifty percent shareholders of a closely-held corporation, they continue, they had 'every right' to assume that Salai was acting as their personal attorney when he provided trademark and copyright advice. . . . In support of their position, they also offer copies of nearly thirty supplementary copyright registrations that Salai submitted on January 16, 1997, correcting earlier registrations for works previously identified as works for hire. . . . Salai signed each of the filings and certified that he was the 'duly authorized agent of Victoria and Richard [co-owners] MacKenzie-Childs.'" (internal citation omitted); explaining the basic rule involving an asset sale; "Where one corporation merely sells its assets to another, however, the privilege does not pass to the acquiring corporation unless (1) the asset transfer was also accompanied by a transfer of control of the business and (2) management of the acquiring corporation continues the business of the selling of the corporation."; also explaining how the joint representation and common interest doctrine apply in a corporate setting; "The concept of joint representation and the related common interest doctrine are particularly complex in the corporate setting. . . . Under this rule, courts presume that the corporation owns the privilege -- rather than the individual corporate representatives, or the individuals and the corporation jointly -- and the individuals bear the burden of rebutting the presumption."; "Despite this 'default' rule, courts have been willing to recognize that an individual corporate representative may assert an individual attorney-client privilege in communications with corporate counsel provided that certain requirements are met. . . .

Some courts, such as the First, Third and Tenth Circuits, apply the following five-part test enunciated in Bevill to determine whether an individual has demonstrated a personal privilege in communications with corporate counsel."; "Thus, although this authority permits an individual to assert a personal privilege in certain communications with corporate counsel, it does not stand for the proposition that an individual and a corporation may enjoy a joint privilege in the same, non-segregable communication with counsel by a corporate representative in both his representative and individual capacity."; "Although the Second Circuit has acknowledged the Bevill test, it has not clearly adopted it. . . . It has made it clear, however, that whether Bevill is or is not applied, a prerequisite to assertion of a personal privilege by a corporate representative is proof that the employee 'ma[de] it clear to corporate counsel that he [sought] legal advice on personal matters.'" (citation omitted); noting the lawyer's testimony; "He testified that he always believed that he was acting as counsel to the corporation, and not as counsel to Richard and Victoria, individually. . . . He further testified that he never spoke to either of them about any matters, but instead communicated with other corporate employees, some of whom he identified in his testimony. . . . Invoices for his services were paid by the corporation, and not by Victoria and Richard personally. . . . On this record, defendants' contention that Salai never provided legal advice or services to the corporation strains credulity and cannot be accepted."; holding that the privilege passed with the assets sole to various successors; "I find that MacKenzie-Childs II purchased substantially all of the assets then-owned and the business then-operated by MacKenzie-Childs I and thereafter continued the business in which MacKenzie-Childs I had been engaged. . . . Thus, I conclude that the attorney-client privilege passed from MacKenzie-Childs I to MacKenzie Childs II."; "I likewise conclude that the privilege passed again in 2008, this time from MacKenzie-Childs II to MacKenzie-Childs III. The record demonstrates that MacKenzie-Childs III purchased substantially all of the assets of MacKenzie-Childs II, including its intellectual property, and has continued the business of MacKenzie-Childs II and III. . . .

Considering these facts, plaintiffs have the authority to assert -- as they did in Salai's deposition -- the attorney-client privilege to protect confidential communications made between representatives of MacKenzie-Childs I and Salai, as counsel to the corporation."; rejecting the co-owners' argument that they reasonably believe they were the lawyer's client; "[T]he fact that an attorney represents a corporation does not make that attorney counsel to the corporation's officers, directors, employees or shareholders." (emphasis added); "[W]hether Richard and Victoria believed that Salai was acting as their individual attorney and whether that belief was reasonable are simply irrelevant to the pending privilege doctrine." (emphasis added); "Rather, whether Richard and Victoria may establish a personal privilege in communications with Salai depends on proof that they sought legal advice from Salai about personal matters and that they made it clear to him that they were seeking advice in their individual, not representative, capacities." (emphasis added); "First, it does not allege that Victoria or Richard ever actually communicated directly with Salai, as opposed to communicating through other corporate representatives. Defendants have cited no authority, and the Court is unaware of any, to support the novel proposition that a privileged relationship may be created between an individual and a corporate attorney with whom the individual has never spoken nor directly communicated." (emphasis added); "Moreover, [there is] the dearth of any evidence showing that Victoria or Richard ever personally paid for Salai's legal advice."; "In sum, defendants' reliance

on their 'reasonable belief' that Salai represented them personally because they were the sole shareholders and ultimate decisionmakers of a closely-held corporation is insufficient to establish a personal attorney-client privilege. Because they cannot even establish that they ever communicated directly with Salai, let alone that they made clear to him that they were seeking legal advice in their individual capacities, their contention that they possess a privilege capable of being waived must be rejected."; also finding that the lawyer must honor the current privilege owner's direction about documents; "Consistent with my determination that any attorney-client privilege belongs to the companies, and not to Victoria and Richard personally or jointly with the companies, Salai and HSE [lawyer's present firm] must respect plaintiffs' assertion of privilege concerning the requested documents.").

In some situations, corporations' shareholders can rely on what is called the "fiduciary exception" to access otherwise privileged communications between management and the corporations' lawyer.

Minority Approach: Lawyers Representing Closely-held Corporations Cannot Represent the Corporation Against Minority Owners

Some jurisdictions take a different approach.

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

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

District of Columbia Rule 1.7 cmt. [23].

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

- Ontiveros v. Constable, 199 Cal. Rptr. 3d 837, 844, 845, 846 (Cal. Ct. App. 2016) (holding that the same lawyer could not represent the company and a sixty-percent shareholder of the company in an action brought by the minority shareholder; "Defendants contend the trial court erred by disqualifying Counsel as to Omega [company]. We disagree because Counsel concurrently represented defendants in the same action where an actual conflict existed between them, and Kent alone did not have authority to consent to the conflicting representation on Omega's behalf."; "Omega's and the Constables' [sixty-percent owner] respective interests were clearly adverse to one another. Although Ontiveros's [Minority owner suing the company and the majority shareholder] complaint nominally named Omega a defendant, Omega 'is the real plaintiff' on those claims against the Constables. . . . 'Current case law clearly forbids dual representation of a corporation and directors in a shareholder derivative suit, at least where, as here, the directors are alleged to have committed fraud.'" (citation omitted); "The nature of Ontiveros's derivative claims, which sound in fraud, demonstrates that an actual conflict of interest existed. Omega's interests were adverse to the Constables' with regard to, at a minimum, ownership of the property and Omega's payment of rent to the Constables."; "Defendants contend the trial court erred because rule 3-600 allows an attorney to concurrently represent an organization and its shareholders, provided they all knowingly consent to the joint representation."; "[W]e conclude that because Ontiveros's derivative claims render the Constables' and Omega's interests adverse, Kent's [Constable] attempt to consent to Counsel's concurrent representation of Omega over Ontiveros's objection was ineffective. Therefore, the trial court did not err in disqualifying Counsel as to Omega."; "Nor are persuaded by defendants' argument that 'there exists a split in authorities regarding joint representation in derivative actions.' (Capitalization omitted.) The argument relies entirely on foreign authority. The California authorities we have discussed clearly and uniformly address the issue and support the trial court's ruling as to Omega.").

- Rosman v. ZVI Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (finding that the half-owner of a corporation could reasonably have thought that the same lawyer representing the company also represented him, and therefore disqualifying that lawyer from representing the company and the company's other owner; "Rosman and Shapiro jointly consulted Y&Y [Law firm] for legal advice concerning Filtomat's [defendant] contractual relationship with Filtration [defendant]. Moreover, it is clear that Y&Y now represents Shapiro against Rosman in two actions before the Court and that both actions focus on the identical issues discussed during the prior consultations. Based on these facts, Rosman seeks to disqualify Y&Y pursuant to Canons 4 and 9 of ABA Code of Professional Responsibility."; "It is clear that Rosman reasonably believed that Zisman [Y&Y lawyer] was representing him. Although, in the ordinary corporate situation, corporate counsel does not necessarily become counsel for the corporation's shareholders and directors . . ., where, as here, the corporation is a

close corporation consisting of only two shareholders with equal interests in the corporation, it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney." (emphasis added); "This is especially true in this case because both Rosman's uncontradicted affidavit . . . and the shareholder agreement creating Filtomat . . ., demonstrate that both Rosman and Shapiro treated Filtomat as if it were a partnership rather than a corporation. In short, it would exalt form over substance to conclude that Y&Y only represented Filtomat, solely because Rosman and Shapiro chose to deal with Filtration through a corporate entity.").

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

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

• Ontiveros v. Constable, 199 Cal. Rptr. 3d 837, 844, 845, 846 (Cal. Ct. App. 2016) (holding that the same lawyer could not represent the company and a sixty-percent shareholder of the company in an action brought by the minority shareholder; "Defendants contend the trial court erred by disqualifying Counsel as to Omega [company]. We disagree because Counsel concurrently represented defendants in the same action where an actual conflict existed between them, and Kent alone did not have authority to consent to the conflicting representation on Omega's behalf."; "Omega's and the Constables' [sixty-percent owner] respective interests were clearly adverse to one another. Although Ontiveros's [Minority owner suing the company and the majority shareholder] complaint nominally named Omega a defendant, Omega 'is the real plaintiff' on those claims against the Constables. . . . 'Current case law clearly forbids dual representation of a corporation and directors in a shareholder derivative suit, at least where, as here, the directors are alleged to have committed fraud.'" (citation omitted); "The nature of Ontiveros's derivative claims, which sound in fraud, demonstrates that an actual conflict of interest existed. Omega's interests were adverse to the Constables' with regard to, at a minimum, ownership of the property and Omega's payment of rent to the Constables."; "Defendants contend the trial court erred because rule 3-600 allows an attorney to concurrently represent an organization and its shareholders, provided they all knowingly consent to the joint representation."; "[W]e conclude that because Ontiveros's derivative claims render the Constables' and Omega's interests adverse, Kent's [Constable] attempt to consent to Counsel's concurrent representation of Omega over Ontiveros's objection was ineffective. Therefore, the trial court did not err in disqualifying Counsel as to Omega."; "Nor are persuaded by defendants' argument that 'there exists a split in authorities regarding joint representation in derivative actions.' (Capitalization omitted.) The argument relies entirely on foreign authority. The California authorities we have discussed clearly and uniformly address the issue and support the trial court's ruling as to Omega.").

• Eternal Pres. Assocs., LLC v. Accidental Mummies Touring Co., 759 F. Supp. 2d 887, 888-89, 893-94, 894 (E.D. Mich. 2011) (denying a motion to disqualify Clark Hill from representing both an LLC and an entity that controls the LLC's managing member; explaining that the LLC sued its half-owner, and that Clark Hill represented both the LLC and the other half-owner; "The Court finds that a conflict certainly exists; but the conflict is between Wolf [half owner of the LLC represented by Clark Hill] and DSC [entity controlling the managing member of the LLC] over who should control the litigation against AMTC [LLC represented by Clark Hill, and plaintiff in suing half-owner Wolf]. Disqualifying Clark Hill would do little to resolve that conflict, and the Court finds it unnecessary to do so under the Michigan Rules of Professional

Conduct. Clark Hill's loyalties are not divided, since the firm is doing the bidding of AMTC's managing member. That is not to say, however, that Clark Hill may not have a fiduciary duty to Wolf as an equal member of AMTC. For now, however, the Court concludes that Clark Hill may continue to represent AMTC in this litigation, albeit at its peril. The motion to disqualify, therefore, will be denied."; "[A]s long as DSC controls AMTC, Clark Hill will not face that conflict. Clark Hill must follow the instruction of its client, and it must give advice unfettered by conflicting loyalty to another client. But it is unlikely that AMTC would consider the possibility of a suit against DSC while an entity controlled by DSC determines AMTC's litigation decisions. As long as DSC-controlled interests are in a position to decide what is in AMTC's best interests, Clark Hill's simultaneous representation of both AMTC and DSC will not violate Michigan Rule of Professional Conduct 1.7." (emphasis added); "It is important to note that Wolf's claim of conflict of interest is not based on Clark Hill's possession of confidential information . . . . Instead, it is based on the idea that Clark Hill, taking instruction from the managing member of AMTC, Marcon Eekstein (which is manages [sic] by Eekstein's Workshop, L.L.C., in turn wholly owned by DSC), will not pursue a litigation strategy that Wolf would like and DSC may not. That cannot constitute a violation of Michigan Rule of Professional Conduct 1.7(b); if it did, no lawyer could represent AMTC in the present litigation, regardless of which of the fifty percent members controlled AMTC. Disputes between constituent members over control of an entity should not be resolved under the guise of an attorney conflict of interest." (emphasis added); "That is not to say that Wolf may not have recourse against Clark Hill directly. An attorney who represents a closely-held corporation and a controlling shareholder may also have a fiduciary [duty] to the other shareholder(s)." (emphasis added)).

• Classic Ink, Inc. v. Tampa Bay Rowdies, Civ. A. No. 3:09-CV-784-L, 2010 U.S. Dist. LEXIS 75220, at *6-7, *7-8 (N.D. Tex. July 23, 2010) (disqualifying a lawyer from adversity to an individual, based on the lawyer's previous representation of the entity solely owned by the individual; "Anderson was the sole shareholder, employee, and president of the Entity when it was formed. The Entity never grew significantly in size and eventually came to include a three-person Board of Directors, consisting of Anderson, his wife Carolyn Anderson, and fellow shareholder Mark Scott. At all times, the Entity fit the profile classification of a closely-held corporation, and it [sic] status as a closely-held corporation is undisputed by the parties." (footnote omitted); "The record and hearing testimony make clear that Anderson sought Hemingway [lawyer] because he knew Hemingway, trusted him, and needed legal assistance to help carry on his Internet sales activities. Although Anderson ultimately gave Hemingway approval to incorporate the Entity, it is apparent that incorporating the Entity was Hemingway's legal opinion and advice, which Anderson admittedly accepted and authorized, but not originally Anderson's idea. Hemingway testified that all of the legal work he performed was at the behest of his 'client,' referring to Anderson. That Hemingway, on the one hand, would call Anderson his client and, on the other hand, maintain the position that he never had an attorney-client relationship with Anderson does not square. As it is uncontroverted that the Entity did not exist at the time Anderson first met with and retained Hemingway, the court determines that, at best, Hemingway has demonstrated that he jointly represented Anderson and the Entity. Moreover, given their prior acquaintanceship and the absence of any documentation or contract narrowing Hemingway's representation solely to the Entity, it was reasonable for Anderson -- as well as an objective third-party observer -- to assume that Hemingway represented him and not just the Entity. Accordingly, the court concludes that Anderson has satisfied the first element of the 'substantial relationship' test. An actual attorney-client relationship existed between Anderson and Hemingway." (emphases added)).

Several ethics opinions have warned lawyers who represent closely-held corporations that they must remain neutral in the owners' fight over control of the corporation. That reticence might be expected from bars' legal ethics opinions. Those tend to be very cautious.

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

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

• Vermont LEO 2009-4 (2009) (holding that a law firm could represent a client adverse to the principal of a corporation which the law firm had previously represented, although the law firm could not use information obtained from the principal; explaining the situation: "The requesting attorney's firm represents A and has done so for a number of years. One matter handled by the requesting attorney was A's purchase of a parcel of land that adjoins lands owned by a corporation in which B is a principal. The firm has never represented the landowner corporation but has formed an LLC for B and has performed collection work for a different corporation in which B is also a principal. Both files are now closed. There are no open files in which either B or any of his business entities are represented by the firm."; "Recently, on A's behalf, the firm sent a letter to the landowner corporation disputing the landowner corporation's claimed right of access onto A's adjoining property. In response to that letter, B has claimed a conflict of interest and requested that the firm refrain from representing A in connection with the dispute."; "In B's claim of conflict he asserts that the requesting attorney's firm's representation of A 'creates at least the appearance of conflict'. He also expresses a concern that his interest may have been compromised by dual loyalties. He goes on to claim that the firm is privy to financial and legal concerns that would compromise him in his negotiations with A. The firm has no active case files for B, and no retainer arrangement exists."; noting that the principal was never the law firm's client; "In the matter at hand, the firm has never actually represented the corporation which is the landowner. Rather, it has represented one of the principals of the landowner corporation in the formation of an LLC and it has performed collection work for an entirely different corporation. On these facts, we do not believe that the landowner corporation is even a former client. While this may seem an overly technical conclusion, clients should understand that they have separate legal identities from the entities they create so long as those entities have been properly formed and maintained." (emphasis added); warning the law firm that it could not use information obtained from the principal; "Having reached that conclusion, however[,] does not mean that the firm may use information obtained in the course of its work for B and B's other corporation in a manner which is adverse to B's interests. The firm has a continuing duty under Rule 1.9(c) to maintain the confidentiality of information obtained and not to use any information that it may have against B or B's interests." (emphasis added); "It is noted that Rule 1.9(c) does not preclude representation of A. Rather it prohibits the requesting attorney from using or revealing information relating to the former representation of B against B. Even if we (1) assume that the requesting attorney's firm has confidential or secret information obtained during the prior representations of B or B's other corporation; and (2) infer that the requesting attorney has access to all of the firm's files, Rule 1.9(c) does not preclude the requesting attorney from representing A. Rather it precludes the use of confidential or secret information to B's disadvantage.").

• California LEO 1999-153 (1999) (holding that a lawyer who had not previously represented a corporation or any of its executives may represent the company and one of its owners in an action brought by the other owner, as long as both of the lawyer's clients consent; articulating the issue as follows: "May a lawyer, who is not currently and has not previously

represented a close corporation as to the subject of a dispute, be retained to represent the corporation and Shareholder A, who is authorized to retain and oversee counsel for the corporation, in a lawsuit brought by Shareholder B, the only other shareholder of the corporation, against both the corporation and Shareholder A?"; offering the following as a digest: "Under the particular facts presented, and subject to any limitations created by any fiduciary duties of Shareholder A, a lawyer may ethically represent both the corporation and Shareholder A in the lawsuit. To the extent a potential conflict of interest exists between Shareholder A and the corporation, the lawyer must obtain the informed written consent of both the corporation and Shareholder A before commencing the representation under rule 3-310(C)(1) of the California Rules of Professional Conduct. Under the facts presented, the corporation's consent to the joint representation may be obtained from Shareholder A. Consistent with rule 3-310(C)(1), this joint representation is permissible only for so long as the corporation and A do not have opposing interests in the lawsuit which the attorney would have a duty to advance simultaneously for each. Additionally, the lawyer must fulfill those duties to the corporation described in rule 3-600."; noting that "[a]t the time of the engagement, Attorney is not currently and has not previously represented Corporation as to the subject matter of the dispute. In addition, Attorney has not previously represented Corporation in any matter." (emphasis added); explaining California law on this issue; "California law has long recognized that when a lawyer acts as corporate counsel, the lawyer's first duty is to the corporation. (Meehan v. Hopps, supra, 144 Cal. App. 2d at p. 293.)

As a result, courts have held that corporate counsel should retain from taking part in any controversies or factual differences among shareholders as to control of the corporation so that he or she can advise the corporation without prejudice or bias. (Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp. (1995) 36 Cal. App. 4th 1832, 1842 [43 Cal. Rptr. 2d 327]; Skarbrevik v. Cohen, England & Whitfield, supra, 221 Cal. App. 3d at p. 704; Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 622 [120 Cal. Rptr. 253].) This rule generally applies when a lawyer who has been representing a corporation is asked to represent one shareholder against another shareholder in a dispute over control of the corporation. (Woods v. Superior Court (1983) 149 Cal. App. 3d 931 [197 Cal. Rptr. 185] (lawyer who for years represented corporation owned by husband and wife could not represent one shareholder against the other in a marital dissolution action when the corporation was the primary focus of the dispute); Goldstein v. Lees, supra, 46 Cal. App. 3d 614 [former corporate counsel who had material confidential information could not represent one shareholder in a proxy fight for control of the corporation].)" (emphases added); "On the other hand, a lawyer is not prohibited from taking actions on behalf of the corporation that negatively impact the interests of a shareholder or other constituents. (See Skarbrevik v. Cohen, England & Whitfield, supra, 231 Cal. App. 3d 692 [holding that a lawyer for a corporation may render advice and draft documentation for the corporation that results in a dilution of a minority shareholder's interest in the company]; Meehan v. Hopps, supra, 144 Cal. App. 2d 284 [corporation's lawyer may bring an action on behalf of the corporation's receiver against a majority shareholder who had previously dominated the corporation].)"; noting that the analysis might change if the adverse half-owner gains control of the company or obtains access to confidential communications; "To the extent that B, or another person such as a receiver, obtains the ability to control the affairs of Corporation, an actual conflict of interest could arise. In that situation, Attorney could receive conflicting instructions from Corporation and A.

Attorney could be called on to advance inconsistent positions or to pursue a claim by Corporation against A, or vice versa. Attorney could be required to disclose confidential communications with A in the course of the joint representation which A would not want disclosed. Both clients could make a demand on Attorney for the original file."; "Even if a change of control does not occur, a conflict of interest could arise if B, as a constituent of Corporation, has or obtains a right to learn the substance of confidential communications Attorney has with A in the course of the joint representation, which A does not want disclosed to B. These concerns exist not only during the representation, but after the representation as well. While B or some other person might not have the ability to learn the substance of A's confidential information while the joint representation of A or Corporation is pending, in some cases they may attain a position in the Corporation in the future that would entitle them to obtain such information from Attorney."; explaining that the individual half-owner represented by the lawyer may consent on behalf of the company; "Attorney may obtain Corporation's consent to the joint representation from A under the second of the two approaches set forth in the rule. Under the facts presented, A may consent to the joint representation for the Corporation because (1) A is the only other shareholder, and (2) as president of

Corporation, A is authorized to retain counsel for the Corporation and oversee the representation of the Corporation by that counsel. These two facts taken together allow Attorney to ethically represent Corporation and A jointly with A's consent for both."; noting that "this opinion does not address a situation in which the lawyer seeking to represent Corporation and A has previously represented Corporation and in so doing has obtained confidential information that is material to the current dispute." (emphasis added); also noting that the lawyer may not assist the clients in violations of law that may harm the corporation).

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

Lawyers would be wise to heed such warnings.

As explained above, lawyers representing a closely-held corporation owe what might be called a derivative duty to its minority owners - even in the absence of an attorney-client relationship with them. That might not explicitly prohibit such lawyers from representing the closely-held corporation and its majority owners against its minority owners, but the duty certainly raises the stakes of counterclaims against the corporation (and perhaps even a malpractice claim or ethics charge against the lawyers.

In the classic fight for control of a closely-held corporation, the corporation itself may not need much legal advice or an intensively involved lawyer to represent it. For this reason, it usually seems wise for a lawyer representing a majority owner or owners to select some other lawyer to represent the corporate entity. Even though the majority controls the entity and therefore may direct the entity's lawyer in such a dispute, the majority owner's lawyer is not burdened by any arguable duty to the minority shareholders who are now litigation adversaries.

Such an approach carries another benefit. If a court ultimately finds that the minority shareholders do, or should in the future, control the corporation, the lawyers who have represented the corporation normally must turn over their files to the corporation -- now in the hands of the former adversary. And majority shareholders who have not been warned by their lawyers could even settle a dispute with the minority owners by turning over control of the corporation to them - perhaps in return for some benefit in a related or even unrelated dispute.

The majority owners may not recognize the significance of such a settlement. But just as when a court grants a closely-held corporation's control to an adversary, such a settlement hands over control of the lawyers' corporate client to a former adversary -- who may now access the lawyers' files. This could be an enormous problem for the lawyers, because they presumably had jointly represented the corporation and the owner or owners who at that time controlled the corporation. Because joint clients normally have joint ownership of the lawyers files generated during the joint representation, the former joint client corporation -- now in the hands of former adversaries -- probably can access the lawyer's entire file from the joint representation. This file includes communications and documents relating to the lawyer's representation of the corporation. But more importantly, it includes all of the communications between the lawyer and the owner or owners who formerly controlled the corporation.

Derivative Cases

As in so many other areas, derivative cases present different and usually more complicated issues.

An ABA Model Rules Comment explains that

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.

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.

ABA Model Rule 1.13 cmt. [13] and [14].

Lawyers who represent derivative case corporate defendants and other defendants sometimes regret such a joint representation -- if the corporation declares bankruptcy or otherwise becomes an adversary.

• In re Equaphor Inc., Ch. 7 Case No. 10 20490 BFK, 2012 Bankr. LEXIS 2129, at *9-10 (Bankr. E.D. Va. May 11, 2012) (analyzing the ramifications of a law firm jointly representing a company and two of its executives in a derivative case; noting that the company later declared bankruptcy, and that the bankruptcy trustee moved to compel the turnover of documents the law firm created during the joint representation; inexplicably confusing the joint defense/common interest doctrine and the joint representation situation; ordering the law firm to produce the documents; "WTP and the Individual Defendants place great reliance on the fact that the corporation is named as a 'nominal defendant' in the shareholders' Complaint. In doing so, WTP and the Individual Defendants imply that the interests of the Individual Defendants are entitled to greater weight than those of the Debtor (and now, its creditors). However, while the Debtor may have been named as a nominal defendant, there is no such thing as a nominal client of a law firm. Further, there is no support in the case law for a 'nominal defendant exception' to the principle that all clients are entitled to an attorney's files. The corporation's status as a nominal defendant is of no consequence in considering the common interest privilege of the parties."; "But this is not a discovery dispute in the ordinary sense of the term. It is a motion to compel the turnover of the law firm's files under 11 U.S.C. § 542(e) to the party who now stands in the shoes of the former client, the Debtor. Under these circumstances, the courts have been uniform in holding that the work product doctrine does not prevent the turnover of the files." (emphasis added)).

In 2015, the Southern District of New York addressed a complicated issue involving in lawyers representing corporations and others in a derivative setting.

• Obeid v. La Mack, No. 14 cv 6498 (LTS) (MHD), 2015 U.S. Dist. LEXIS 154546, at *2-3, *3, *4 n.3, *4, *6, *7-8, *8 n.6, *8, *11, *12-13, *15-16, *16-17 (S.D.N.Y. Nov. 9, 2015) (denying a motion to disqualify the law firm McGuireWoods from representing a corporation and two of its owners in a derivative action filed by the third owner; noting that the firm had withdrawn from representing the corporation, and had not represented the third owner in matters substantially related to the current dispute among the owners; finding unpersuasive an affidavit filed by Plaintiff's expert professor Bruce Green; noting New York law's reluctance to disqualify law firms; "We start by emphasizing the cautions that the Second Circuit has advised district courts to observe when addressing disqualification motions. Such motions 'are generally viewed with disfavor' . . . since (1) they interfere with a party's ability to select its own counsel, (2) are often invoked for tactical reasons, and (3) almost invariably cause delays. . . . Thus, a party moving for disqualification must bear 'a heavy burden' . . . even though 'in the disqualification situation any doubt is to be resolved in favor of disqualification.'" . . . (citation omitted); "'The Second Circuit has directed that courts faced with disqualification motions take a "restrained approach that focuses primarily on preserving the integrity of the trial process."'" . . . (citations omitted); "Thus, '[d]isqualification is only warranted in the rare circumstance where an attorney's conduct "poses a significant risk of trial taint."'" (citation omitted); "In addressing disqualification motions, courts look to the American Bar Association Model Rules of Professional Conduct and to state rules governing attorney conduct, but these sources serve only as guides, since the court is exercising its inherent supervisory authority."; "There is some case law suggesting that the mere assertion of derivative claims -- at least theoretically on behalf of the company and against some of its officers or directors -- should preclude joint representation of the defendant officers or directors and of the company, which has the status of a nominal defendant in such a case. . . . Such routine disqualification appears to be inconsistent with the cautions emphasized by the Second Circuit when addressing motions to disqualify the opposing attorney.

The better reasoned decisions in such cases have declined to apply such a rubber stamp and have indeed delayed acting on such a basis absent clear evidence of a colorable or stronger basis to infer potential merit to a purported derivative claim."; "Moreover, the New York courts have observed that representation of a company sued derivatively as a nominal

defendant does not ordinarily trigger a need for separate representation."; "Apart from these general concerns, when the company in question is closely-held, as in this case, additional practical considerations suggest caution in approaching a disqualification motion."; "This case presents the paradigm for these practical concerns. Gemini is owned and controlled by its three principals -- plaintiff Obeid and defendants La Mack and Massaro -- and each is entitled to one vote, with decisions mandated to be made by majority vote. Unavoidably, then, any replacement attorney would be chosen by Messrs. La Mack and Massaro, and would be subject to their direction. Since a mandated change of counsel would not improve matters, and since there is no demonstrated meaningful threat to the integrity of the trial from the challenged joint representation, we would be strongly inclined to allow McGuire Woods to continue as counsel to Gemini as well as to La Mack and Massaro, were such a decision necessary. In any event, however, during the pendency of this motion, new counsel has been substituted to represent the nominal defendants, and that step leaves no basis to disqualify McGuire Woods from representing the other, active defendants on a conflict-of-interest theory"; "These concerns were highlighted at oral argument when the court inquired of plaintiff's counsel how a substitute attorney for Gemini would make any practical difference and specifically how that lawyer would be selected other than by La Mack and Massaro. Counsel responded with the obviously illusory assumption that plaintiff would join in making the selection, which would have to be unanimous, a scenario that collides with the rules of governance for Gemini, which impose majority rule, with the result that La Mack and Massaro would make the decision. . . . Counsel's only other suggestion was that in the case of a deadlock, the court should somehow solve the conundrum."; "Plaintiff's alternative ground for disqualification, based on the assertion that McGuire Woods previously represented plaintiff, fares no better.

The motion plainly fails to satisfy the requirements for triggering disqualification on this basis"; "In substance, Obeid argues that in the past McGuire Woods represented him as a client as well as representing Gemini. He further seems to suggest, albeit in general terms, that the services provided by the law firm involved matters substantially related to the issues in this case. He fails, however, to make a persuasive showing on the essentials of this rule"; "In view of the stated concerns of the Second Circuit as to the disruptive effect of motions to disqualify, the potential for their use as tactical devices, and the desirability of honoring a litigant's choice of attorney, the requirement that there be 'a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit' is strictly enforced. Thus the Circuit has observed that disqualification will be granted -- assuming the other Evans [Evans v. Artek Sys. Corp., 715 F.2d 788 (2d Cir. 1983)] criteria are met -- 'only when the issues [in the two matters are] "identical" or "essentially the same,"' and only if the moving party makes that substantial relationship "patently clear.' . . . Moreover, the congruence must involve an identity of factual issues and not merely an overlap of areas of law."; "There is no obvious linkage -- much less identity -- between legal work that the firm did in altering the Gemini operating agreement to allow Jariwala's [former minority member of Gemini] participation as a minority member of Gemini and the issues in this lawsuit. Although Jariwala may at some point have been a member of Gemini, he had left by the time of the events that gave rise to this lawsuit, and in any event the drafting of documents and the rendition of any advice to Gemini members about their rights vis-a-vis each other and their responsibilities to each other at that earlier time do not mirror the claims or defenses, or any identified legal or factual issues, currently in the case."; "Similarly, the law firm's work on various investment transactions, and some potential transactions, in locations other than New York does not involve factual issues substantially related to the current litigation. Equally irrelevant is any advice that the firm may have given to Obeid (or indeed to the other members of Gemini) about their potential exposure on guarantees that they executed when purchasing or refinancing some properties (none apparently at issue here). Finally, neither the apparent effort by Mr. Harmon [McGuireWoods lawyer] in 2013 and 2014 to drum up some business from Gemini (for which the law firm had last worked in 2009) nor Obeid's asserted disclosure to Harmon of his 'vision' for the company amounts to performance by the firm on matters substantially related to the lawsuit before us." (emphasis added)).

Conclusion

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

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

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

Lawyers must also remember that a corporate client must avoid oppressing any minority owners. The corporation's lawyers may not assist a corporate client in such wrongful action. This duty to minority owners does not rest on the corporate lawyers' attorney-client relationship with them. The corporation is still the only client. But that client has duties to its minority owners that the corporation's lawyer may not assist the corporation in skirting or violating.

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

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

Best Answer

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

B 8/16

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

Hypothetical 11

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

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

MAYBE

Analysis

When representing a corporation, the entity is the client. [FN38] However, it is unclear whether all members of the corporate "family" are also clients for conflicts purposes. [FN39]

ABA Model Rules

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

> A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the

> circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

ABA Model Rule 1.7 cmt. [34] (emphasis added).

The ABA has also issued a legal ethics opinion discussing this issue. [FN40] In ABA LEO 390 (1/25/95) the ABA rejected a per se determination that representation of one corporate affiliate and adversity to another automatically creates a conflict. The ABA indicated that the existence of a conflict depends on: the lawyer's and client's understanding of which corporate entities are clients; the client's expectations about an attorney-client relationship with the affiliated corporation; the facts of the representation (such as whether the lawyer actually performs work for a corporate affiliate, reports to the general counsel of a parent when working for a subsidiary, etc.); the nature of the corporate affiliation (such as any alter ego relationships among corporate affiliates); and whether the lawyer has acquired any confidential information from the corporate affiliate. The ABA indicated that adversity to a corporation generally amounts only to "indirect" adversity to an affiliated corporation, because the adversity only derivatively affects the affiliate.

Finally, the ABA explained that even in the absence of a conflict lawyers might be prohibited from taking positions adverse to a corporate client's affiliate if their diligence or judgment on behalf of the corporate client might be adversely affected (if, for instance, the corporate client would "resent" the lawyer undertaking the representation).

As might be expected, the ABA advised lawyers to resolve any doubts in favor of withdrawal, and suggested that a lawyer should discuss matters with the existing client even if consent is not required.

Restatement

The Restatement takes the same basic approach.

> For purposes of identifying conflicts of interest, a lawyer's client is ordinarily the person or entity that consents to the formation of the client-lawyer relationship, see § 14. For example, when a lawyer is retained by Corporation A, Corporation A is ordinarily the lawyer's client; neither individual officers of Corporation A nor other corporations in which Corporation A has an ownership interest, that hold an ownership interest in Corporation A, or in which a major shareholder in Corporation A has an ownership interest, are thereby considered to be the lawyer's client.

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

The Restatement includes two illustrations (Illustrations 6 and 7) which distinguish between: (1) a lawyer taking a litigation matter against a client's wholly owned subsidiary, when the lawsuit might materially affect the client's value; [FN41] and (2) a lawyer taking a litigation matter against a company that is 60% owned by the client's parent, in a matter that will not materially affect either the defendant's or the parent's financial position [FN42] -- the former is unacceptable, while the latter is acceptable.

State Ethics Rules

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

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

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

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

> As is provided in Rule 1.13, the lawyer who represents a corporation, partnership, trade association or other organization-type client is deemed to represent that specific entity, and not its shareholders, owners, partners, members or "other constituents." Thus, for purposes of interpreting this rule, the specific entity represented by the lawyer is the "client." Ordinarily that client's affiliates (parents and subsidiaries), other stockholders and owners, partners, members, etc., are not considered to be clients of the lawyer. Generally, the lawyer for a corporation is not prohibited by legal ethics principles from representing the corporation in a matter in which the corporation's stockholders or other constituents are adverse to the

> corporation. See D.C. Bar Legal Ethics Committee Opinion No. 216. A fortiori, and consistent with the principle reflected in Rule 1.13, the lawyer for an organization normally should not be precluded from representing an unrelated client whose interests are adverse to the interests of an affiliate (e.g., parent or subsidiary), stockholders and owners, partners, members, etc., of that organization in a matter that is separate from and not substantially related to the matter on which the lawyer represents the organization.

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

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

> However, there may be cases in which a lawyer is deemed to represent a constituent of an organization client. Such de facto representation has been found where a lawyer has received confidences from a constituent during the course of representing an organization client in circumstances in which the constituent reasonably believed that the lawyer was acting as the constituent's lawyer as well as the lawyer for the organization client." See generally ABA Formal Opinion 92-365. In general, representation may be implied where on the facts there is a reasonable belief by the constituent that there is individual as well as collective representation. Id. The propriety of representation adverse to an affiliate or constituent of the organization client, therefore, must first be tested by determining whether a constituent is in fact a client of the lawyer. If it is, representation adverse to the constituent requires compliance with Rule 1.7. See ABA Opinion 92-365. The propriety of representation must also be tested by reference to the lawyer's obligation under Rule 1.6 to preserve confidences and secrets and to the obligations imposed by paragraphs (b)(2) through (d)(4) of this rule. Thus, absent informed consent under Rule 1.7(c), such adverse representation ordinarily would be improper if:
>
> (a) the adverse matter is the same as, or substantially related to, the matter on which the lawyer represents the organization client,
>
> (b) during the course of representation of the organization client the lawyer has in fact acquired confidences or secrets (as defined in Rule 1.6(b)) of the organization client or an affiliate or constituent that could be used to the disadvantage of any of the organization client or its affiliate or constituents, or
>
> (c) such representation seeks a result that is likely to have a material adverse effect on the financial condition of the organization client.

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

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

> In addition, the propriety of representation adverse to an affiliate or constituent of the organization client must be tested by attempting to determine whether the adverse party is in substance the "alter ego" of the organization client. The alter ego case is one in which there is likely to be a reasonable expectation by the constituents or affiliates of an organization that each has an individual as well as a collective client - lawyer relationship with the lawyer, a likelihood that a result adverse to the constituent would also be adverse to the existing organization client, and a risk that both the new and the old representation would be so adversely affected that the conflict would not be "consentable." Although the alter ego criterion necessarily involves some imprecision, it may be usefully applied in a parent-subsidiary context, for example, by analyzing the following relevant factors: whether (i) the parent directly or indirectly owns all or substantially all of the voting stock of the subsidiary, (ii) the two companies have common directors, officers, office premises, or business activities, or (iii) a single legal department retains, supervises and pays outside lawyers for both the parent and the subsidiary. If all or most of those factors are present, for conflict of interest purposes those two entities normally would be considered alter egos of one another and the lawyer for one of them should refrain from engaging in representation adverse to the other, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [22] are not applicable. Similarly, if the organization client is a corporation that is wholly owned by a single individual, in most cases for purposes of applying this rule, that client should be deemed to be the alter ego of its sole stockholder. Therefore, the corporation's lawyer should refrain from engaging in representation adverse to the sole stockholder, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [22] are not applicable.

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

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

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

Florida Rule 4-1.13 cmt. (emphasis added). Thus, Florida also recognizes exceptions to the general rule if (1) the lawyer has learned confidences from the corporate client that could be used against the affiliates, and (2) the two corporate family members are considered "alter egos" of each other.

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

Not surprisingly, New York's ethics rules effective April 1, 2009 deal with this issue. One of the comments to New York Rule 1.7 essentially follows the ABA approach -- without coming to a definitive conclusion.

> A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

New York Rule 1.7 cmt. [34]. The New York Bar adopted two other comments not found in the ABA Model Rules. The first provides helpful guidance to lawyers attempting to analyze the conflict of interest situation (although without providing absolute certainty), and the second reminds lawyers of the economic impact of their analysis.

> Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

New York Rule 1.7 cmt. [34A].

> Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer's ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer's corporate client.

New York Rule 1.7 cmt. [34B].

State Bar Opinions

State bars also take differing approaches.

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

• New York City LEO 2005-05 (6/2005) (addressing what are called "thrust upon" conflicts; among other factors, analyzing the ethics rules governing a lawyer's adversity to a corporate client; "Previous opinions have articulated the circumstances under which an apparent conflict involving a member of a current client's corporate family will be considered an actual conflict of interest requiring consent to continue representing both parties. This determination is based on several factors, including the relationship between the two corporate entities, and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client's corporate family member. See Eastman Kodak Co. v. Sony Corp., 2004 WL 2984297 at *3 (W.D.N.Y. Dec. 27, 2004) ('[t]he relevant inquiry centers on whether the corporate relationship between the two corporate family members is 'so close as to deem them a single entity for conflict of interest purposes'"); Discotrade Ltd v. Wyeth-Ayerst Int'l, Inc., 200 F.Supp.2d 355, 358-59 (S.D.N.Y. 2002) (concluding that a corporate affiliate was also a client for conflict purposes because, among other things, the affiliate was an operating unit or division of an entity that shared the same board of directors and several senior officers and used the same computer network, e-mail system, travel department and health benefit plan as the client); J.P. Morgan Chase Bank v. Liberty Mutual Insurance Co., 189 F.Supp.2d 20, 21 (S.D.N.Y. 2002) (concluding that a subsidiary of a corporate client is also a client for conflicts purposes because 'the relationship [between the two] is extremely close and interdependent, both financial and in terms of direction'; among other things they operated from the same headquarters, shared the same board of directors, and the general counsel (and senior vice president) of the parent was also the general counsel (and senior vice president) of the subsidiary). See also N.Y. City Eth. Op. 2003-03 (whether a corporate affiliate is a client for conflicts purposes 'will depend on many factors, including the relationship between the two corporations and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client's corporate family member'); [s]ee also ABA Formal Op. No. 95-390 (1995) (factors as to whether a corporate affiliate of a client is also considered a client include whether the subject matter of the representation involves the affiliate; whether affiliate reasonably believes that it is a client of the lawyer; whether the affiliate imparted confidential information to the lawyer in expectation of representation; and whether the lawyer may be required to regard the affiliate as a client due to the relationship between the client and affiliate); N.Y. County Eth. Op 684 (1991) (factors as to whether representation of parent company extends to subsidiary include whether either the parent or subsidiary reasonably believes that an attorney-client relationship exists; whether counsel to the parent is privy to confidential information about subsidiary that could be detrimental to the subsidiary's interests; and whether the parent's interests would be materially adversely affected by an action against its subsidiary).").

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

• Illinois LEO 95-15 (5/1996) (addressing the ability of a lawyer representing a corporation to take matters adverse to one of the client's wholly owned subsidiaries; "The Committee therefore concludes that a corporate affiliation, including a majority or even sole ownership of a subsidiary, without more, does not make a client corporation's affiliate an additional client of the lawyer. Because a corporate client's affiliate is not deemed to be a client of the corporation's lawyer merely because of the affiliation, then a representation adverse to the affiliate will not be directly adverse to 'another client' within the meaning of Rule 1.7(a)."; "The Committee notes, as do the ABA and the California Bar, that there may well be particular circumstances that would require the lawyer to consider a subsidiary or other constituent of a corporate client to be a client of the lawyer as well. Such instances could include, for example, situations where the lawyer's work for a corporate parent involves direct contact with its subsidiaries and the receipt of information concerning the subsidiaries protected by Rule 1.6 or situations where the client corporation and the subsidiary in question have the same management group. Another situation that would require the lawyer to treat a corporate affiliate as a client is where one entity could be considered the alter ego of the other. In these kinds of circumstances, the lawyer would be required to seek the corporate client's consent, with appropriate disclosure, before accepting a representation adverse to the affiliate."; "In conclusion, the Committee believes that the Rules of Professional Conduct generally permit a lawyer to accept a proposed representation adverse to a subsidiary or other affiliate of an existing corporate client entity. As also noted above, however, this general proposition may be altered by the specific facts and circumstances of any particular situation. As noted above, the better solution to the issue addressed in this opinion is the agreement of lawyers and corporate clients, in defining the scope of an engagement, as to those affiliates that will be included in the corporate client group.").

In California LEO 1989-113, the California Bar concluded that

> [a] parent corporation, even one which owns 100 percent of the stock of a subsidiary, is still, for purposes of rule 3-600, a shareholder and constituent of the corporation. Rule 3-600 makes clear that in the representation of corporations, it is the corporate entity actually represented, rather than any affiliated corporation, which is the client.

California LEO 1989-113 (1989). Furthermore, "[t]he fact of total ownership does not change the parent corporation's status as a constituent of the subsidiary." The parent corporation argued that a successful action against its subsidiary would adversely affect its finances. The Bar rejected this argument:

> [H]ere, the parent is not a party to the suit against the subsidiary, and there is no prospect that it will be made a party. The representation against the subsidiary can therefore have no direct consequences on the parent; the only adversity can be that indirect adversity which might result from the diminution in the value of the parent's stock in the subsidiary if the attorney's suit against the subsidiary is ultimately successful. This possible indirect impact is insufficient to give rise to a breach of the duty of loyalty owed to the parent.

Id. The California Bar recognized only one exception to this rule -- if corporate form is disregarded and a parent is considered its subsidiary's "alter ego."

Case Law

Courts also take differing positions. Some courts hold that the representation of one member of the corporate family makes other members "clients" for conflicts purposes. [FN43]

Other courts flatly state that the representation of one member of a corporate family does not have that effect. [FN44]

In 2012, the Northern District of Ohio flatly held that a law firm representing a parent corporation did not automatically represent its subsidiary.

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

The case law generally looks at the same factors as the legal ethics opinions.

In 2010, the Second Circuit adopted what it called the "operationally integrated" standard.

- GSI Commerce Solutions, Inc. v. Babycenter, L.L.C., 618 F.3d 204, 211, 213, 210, 210-11, 211, 211-12, 212 n.3 (2nd Cir. 2010) (disqualifying the law firm of Blank Rome from handling a matter adverse to BabyCenter, a wholly owned subsidiary of Blank Rome's client Johnson & Johnson; ultimately adopting a "operationally integrated" standard for determining what a law firm's corporate client's affiliate should be regarded as a law firm "client" for conflict purposes; noting that the Blank Rome retainer letter contained the following provision: "'Unless otherwise agreed to in writing or we specifically undertake such additional representation at your request, we represent only the client named in the engagement letter and not its affiliates, subsidiaries, partners, joint venturers, employees, directors, officers, shareholders, members, owners, agencies, departments or divisions."'; noting that Johnson & Johnson complained about Blank Rome's role only after the mediation failed; "Although the American Bar Association ('ABA') and state disciplinary codes provide valuable guidance, a violation of those rules may not warrant disqualification. . . . Instead, disqualification is warranted only if 'an attorney's conduct tends to taint the underlying trial.'" (citation omitted); "The factors relevant to whether a corporate affiliate conflict exists are of a general nature. Courts have generally focused on: (i) the degree of operational commonality between affiliated entities, and (ii) the extent to which one depends financially on the other. As to operational commonality, courts have considered the extent to which entities rely on a common infrastructure. . . .

Courts have also focused on the extent to which the affiliated entities rely on or otherwise share common personnel such as managers, officers, and directors."; "This focus on shared or dependent control over legal and management issues reflects the view that neither management nor in-house legal counsel should, without their consent, have to place their trust in outside counsel in one matter while opposing the same counsel in another."; "[W]e agree with the ABA that affiliates should not be considered a single entity for conflicts purposes based solely on the fact that one entity is a wholly - owned subsidiary of the other, at least when the subsidiary is not otherwise operationally integrated with the parent company." (emphasis added); "First, Babycenter substantially relies on J&J for accounting, audit, cash management, employee benefits, finance, human resources, information technology, insurance, payroll, and travel services and systems. Second, both entities rely on the same in-house legal department to handle their legal affairs. The member of J&J's in-house legal department who serves as 'board lawyer' for BabyCenter helped to negotiate the E-Commerce Agreement between BabyCenter and GSI that is the subject of the present dispute. Moreover, J&J's legal department has been involved in the dispute between GSI and BabyCenter since it first arose, participating in mediation efforts and securing outside counsel for BabyCenter. Finally, BabyCenter is a wholly-owned subsidiary of J&J, and there is at least some overlap in management control."; "GSI argues that BabyCenter and J&J have forfeited any right to contest Blank Rome's representation. It focuses on the fact that J&J and BabyCenter waited several months before objecting to Blank Rome as counsel. We reject GSI's argument because a party's delay in raising a conflict-of-interest objection does not prohibit a court from deciding whether a conflict of interest exists."; ultimately holding that Blank & Rome's retainer letter was insufficient to allow the law firm to represent a party adverse to the Johnson & Johnson affiliate; noting among other things that the retainer letter purported to allow Blank Rome to sue even departments and divisions of Johnson & Johnson, which would clearly be unethical. (emphasis added)).

Courts applying this approach have sometimes disqualified law firms.

• Atl. Specialty Ins. Co. v. Premera Blue Cross, No. 2:15-cv-01927-TSZ, 2016 U.S. Dist. LEXIS 54333, at *34-35, *35, *38-39 (disqualifying a law firm from representing defendant, because the law firm's earlier representation of the plaintiff's affiliate created a conflict; "[T]he question is whether ASIC [plaintiff] and Homeland's [insurance company] common management, reinsurance agreement, and shared Legal Claims Unit require them to be treated as a single entity for conflicts purposes. As noted above, Lane Powell contends that these entities are 'distinct corporations,' with each maintaining its own financial reporting, and the firm represented Homeland (and not OneBeacon) in the AAM matter and has always been adverse to ASIC."; "The most helpful cases on point, although they are largely from other districts, have considered the question of when a corporate parent and its wholly-owned subsidiary should be considered the same entity for conflicts purposes. Although this matter, of course, involves the slightly different question of whether two corporate affiliates should be considered the same entity for conflicts purpose, the analysis is, for all intents and purposes, the same."; "Based upon this precedent, the Court concludes that ASIC and Homeland must be considered a single entity for purposes of the conflicts analysis. ASIC has provided substantial evidence showing that ASIC and Homeland's operations are sufficiently intertwined to reflect a unity of interest. As wholly-owned subsidiaries of OneBeacon, ASIC and Homeland conduct unified operations. . . . All OneBeacon member companies share the same mailing address and principal place of business. . . . Perhaps most significantly, however, these entities' operations are structured so that all claims-handling services for all OneBeacon companies are handled by the same internal Claims Unit personnel, who are employees of ASIC, with the claim leadership located in Plymouth, Minnesota. . . . The same Claims Legal Unit handles all insurance coverage litigation commenced by or against the OneBeacon companies, including ASIC and Homeland. . . . This is further exemplified by the fact that Homeland, Lane Powell's client in the AAM coverage dispute, has no employees, and the same claims attorney, Ms. Lindley, was involved in both the AAM and Premera matters. . . . In hiring Lane Powell and obtaining legal advice in the AAM matter, Ms. Lindley was an ASIC employee fulfilling ASIC's contractual obligations to its affiliate, Homeland.").

• Honeywell Int'l, Inc. v. Philips Lumileds Lighting Co., Case No. 2:07-CV-463-CE, 2009 U.S. Dist. LEXIS 12496, at *4, *4-5, *6, *7-8, *8 (E.D. Tex. Jan. 6, 2013) (disqualifying Paul Hastings under the simultaneous concurrent representation standard; "Philips Lumileds claims that much of the work conducted by PHJW [Paul Hastings] on behalf of Philips is funneled through a wholly-owned Philips Division, Philips IP&S. Philips IP&S directs intellectual property legal strategy in the United States and abroad for Philips divisions and subsidiaries, including Philips Consumer Electronics, Philips Healthcare, and Philips Lumileds. Similar to other Philips subsidiaries, Philips Lumileds, the defendant in this case, receives legal direction from Philips IP&S. Neither Philips, nor any of its subsidiaries has consented to PHJW's handling this infringement case against Philips Lumileds."; "Honeywell, to the contrary, contends that Philips Lumileds is not a client of

PHJW. Honeywell concedes that PHJW represents PENCA [sic] in a number of governmental matters. Honeywell, however, asserts that Philips Lumileds and PENAC [Philips Elecs., N. Am. Corp] do not share a parent-subsidiary relationship, but are attenuated affiliates of one another. Honeywell also denies the fact that PHJW has represented any of the above asserted Philips entities, including Philips IP&S."; "The first issue is whether Philips Lumileds is a current client of PHJW. Here, the issue centers on whether a corporate affiliation creates a concurrent client-lawyer relationship. The issue of whether a corporate affiliation 'ipso facto creates a client-lawyer relationship with every member of a corporate family when one of its members is formally represented by the lawyer' is not addressed in the ABA Model Rules themselves."; "Here, it is undisputed that (1) Philips Lumileds and the other Philips affiliates share a common legal department, Philips IP&S; (2) Philips and Philips Lumileds share common management, computer networks, and marketing designs; and (3) PHJW currently represents PENAC. As indicated above, Philips IP&S directs intellectual property litigation and licensing strategy for Philips subsidiaries worldwide, including Philips Lumileds. Additionally, while it is generally disputed, PHJW has had broad access to confidential information of various Philips entities, based on its representation of various Philips entities. In fact, Lawrence R. Sidman, a partner at PHJW, stated in his declaration that he had received confidential information concerning PENAC, Philips Consumer Electronics, Philips Healthcare, and Philips IP&S. . . . Although it is not clear whether PHJW's representation of PENAC will directly benefit Philips Lumileds, this fact is not dispositive."; "In addition, some courts have pointed to manifestations to the public as a factor relevant to disqualification."; "Here, both the Philips Lumileds' website and marketing materials feature the Philips logo. The PENAC website also features the Philips logo. Considering all the facts, the Court is persuaded that Philips Lumileds should be considered a current client of PHJW." (emphases added)).

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

• Bd. of Managers v. Wabash Loftominium, L.L.C., 876 N.E.2d 65, 74 (Ill. App. Ct. 2007) (assessing the conflict of interests involved in litigation brought by a lawyer who moved from the Chicago law firm of Michael Best & Friedrich to the firm of Arnstein & Lehr, which was then representing related corporations; describing the connection between the defendants and the law firm's clients, most of which involved indirect ownership through LLCs; upholding the trial court's reliance on Illinois LEO 95-15, which points to related corporations' "same management group" as a factor demonstrating that the related companies should be considered as the same client for conflicts purposes; "The particular circumstances of this case indicate Arnstein [law firm] was engaged by and reports to a management group that runs parent, subsidiary, and affiliated corporations that own, manage, and develop residential condominium properties in Chicago. The particular circumstances of this case would lead the management group and the Ambelos corporations [the holding company which developed residential condominium projects in Chicago] to reasonably believe they were Arnstein's existing clients."; noting that the law firm had represented "this management group" on sixty different matters between 1999 and 2005; explaining that any the doubt about

the existence of a lawyer-client relationship be clarified by the lawyer; "Significantly, there is no indication that Arnstein took any affirmative action to inform the Ambelos management group that it was ending their long-term attorney-client relationship regarding the ownership, management, and development of residential condominium properties in Chicago."; also rejecting the law firm's effort to avoid disqualification by imposing an internal screen; disagreeing with the law firm that the clients had waived their right to complain about the conflict by not raising it for six or seven months after learning that the lawyer had moved to the new law firm).

More infrequently, courts decline to disqualify law firms under this fact-intensive standard.

- Skanska USA Bldg. Inc. v. Atl. Yards B2 Owner, LLC, 40 N.Y.S.3d 46, 54, 55 (N.Y. App. Div. 2016) (declining to disqualify Troutman Sanders from presenting a defendant despite the firm's representation of plaintiff's corporate affiliates in unrelated matters; "Skanska USA Civil Inc. (Skanska Civil) is a wholly owned subsidiary of Skanska USA Inc. Plaintiff is likewise a wholly owned subsidiary of Skanska USA. Skanska Civil holds entities which work in various regions of the United States, including Skanska USA Southeast Inc. (Skanska Southeast). Neither Skanska Southeast's Virginia litigation nor its Florida and Maryland transactional matters have any relationship to, or involve any of the same adverse parties as, the instant action. Nor does plaintiff allege that any of Troutman's Forest City litigation team members possesses any of plaintiff's confidential information, or that the ethical screen that Troutman has set up between its Forest City and Skanska attorneys is in any other way inadequate."; "The motion court therefore providently exercised its discretion in denying plaintiff's motion to disqualify the law firm. Plaintiff has not shown that, standing alone, Troutman's representation of corporate affiliates of plaintiff and adversity to one of the directors of one of plaintiff's affiliates creates a conflict of interest (see Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.7[a], 1.13[a]).").

Ability to Define the "Client" in Retainer Agreements

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

- Avocent Redmond Corp. v. Rose Elecs., 491 F. Supp. 2d 1000, 1004, 1004 n.2, 1007-08, 1010, 1011 (W.D. Wash. 2007) (disqualifying Heller Ehrman from adversity to a corporate affiliate of a corporate client; noting that the retainer letter with its client specifically indicates that the law firm will represent its corporate client "and its affiliates"; "Had Heller Ehrman wanted to limit the scope of its representation, it could have done so by expressly limiting the OSA affiliates that it was agreeing to represent rather than broadly agreeing to represent all of them. As one scholar cited by defendant's expert states, 'The lack of a per se disqualification rule does not mean that the corporate family would be unable to impose such a rule. The law firm and client, in the initial engagement letter, could always agree to treat some or all members of the corporate family as a single entity, or as separate entities'). Ronald D. Rotunda, Conflicts Problems When Representing Members of Corporate Families, 72 Notre Dame L. Rev. 655, 687-88 (1997); see Dkt. # 68 at P8. Furthermore, the conflict at issue here could have been discovered earlier if Heller Ehrman had listed 'OSA . . . and its affiliates' as the client in its electronically-maintained conflicts database." (emphasis added); also noting that during the scope if its representation of the corporate client Heller Ehrman would have dealt with licenses in the same "patent family" as the patents at issue in the current adversity -- meaning that the law firm's previous representation of the corporate client was "substantially related" to the current adversity; also noting that Heller Ehrman retained its former client's files -- meaning that Heller Ehrman's current adversary would have to ask the law firm for its files; "This puts Heller Ehrman in the troublesome position of having to review and produce documents from its own files relating to the representation of a former client because a current litigation client has requested the documents in discovery."; "Should any issue regarding attorney-client privilege or work product doctrine arise, Heller Ehrman lawyers would be both asserting privilege or work-product on behalf of Redmond as an OSA affiliate, and representing defendants in contesting any claim of privilege.").

In some cases, law firms have been able to avoid disqualification by relying on a retainer agreement that explicitly limited the firm's representation to one corporate entity -- thus implicitly allowing the law firm to represent other clients adverse to its corporate affiliates.

- e2Interactive, Inc. v. Blackhawk Network, Inc., No. 09-cv-629-slc, 2010 U.S. Dist. LEXIS 48333, at *4-5, *6, *12, *13-14, *14-15, *15, *16-17, *17, *17-18 (W.D. Wis. May 17, 2010) (refusing to disqualify Alston & Bird from handling a matter adverse to a Safeway subsidiary while simultaneously representing Safeway itself in another matter; also finding that Alston's past representation of a trade association that included Safeway's subsidiary did not warrant disqualification because the representation was not related to the matter Alston was handling adverse to the subsidiary; explaining that

Safeway's in-house lawyer refused to sign Alston's retainer letter that limited the firm's representation to Safeway and excluded affiliates, but then signed a letter with the same provision on a later occasion two years later; "In September 2007, Safeway retained William Baker of Alston & Bird to represent Safeway in the Ware litigation. Ann Erickson, senior corporate counsel for Safeway, refused to sign Alston's initial proposed retainer agreement and specifically objected to an advance waiver of conflicts provision and a 'one client' provision limiting Alston's representation to the Safeway parent entity and not its subsidiaries. The first provision, entitled 'Waiver of Future Conflicts,' stated that Safeway waived any future conflicts so long as the subject matter was not substantially related to Alston's work for Safeway. The second provision, entitled 'Limitation of Client Relationship to One Entity, Not Affiliates,' provided that Alston's 'representation of Safeway, Inc., does not give rise to an attorney - client relationship between the Firm and . . . any . . . subsidiary or affiliated entity . . . .'"; "In summer 2009, Baker sent Erickson a new retainer letter to change the hourly fee arrangement for the Ware litigation, to a fixed monthly fee arrangement. The 2009 retainer letter contained the provisions titled 'Waiver of Future Conflicts' and 'Limitation of Client Relationship to One Entity, Not Affiliates,' that were identical to the provisions Erickson had struck in the October 2007 retainer letter.

Erickson struck the 'Waiver of Future Conflicts' provision in the new retainer letter and Alston inserted a notice provision instead; however, she signed the revised retainer letter on or about September 1, 2009 without striking the 'Limitation of Client Relationship' provision." (emphases added); holding that "[t]he attorney-client relationship may be informal and implied from the words and actions of the parties Whether and when an attorney client relationship exists depends on the contractual intent and conduct of the parties."; finding that there was no "Conflict by Agreement"; "Safeway struck these provisions, stating its position that by representing Safeway, Alston was representing Safeway's subsidiaries and that Safeway would not argue to allow Alston to sue its subsidiaries. However, Safeway never put these statements into the amended retainer, so it is not clear whether Alston actually agreed with Safeway's position or simply agreed to delete the contrary language from the retainer agreement."; "That retainer was replaced with a 2009 retainer in which defendant agreed that Alston's representation of Safeway did not give rise to an attorney-client relationship between Alston and defendant's subsidiaries. In other words, any 'understanding' was erased on September 1, 2009 by agreement. Because there is no evidence that Alston had started representing plaintiffs by that date, the 2007 agreement created no conflict."; "Not so fast, argues defendant: Safeway should not be held to the terms of the 2009 agreement because it was not expecting the conflict terms to change from the previous agreement. This is not going to g et defendant very far: a person signing a document has a duty to read it and know the contents of the writing." (emphasis added); "Defendant tries to shift the onus to Alston, by contending that the law firm was its 'fiduciary' who therefore was required to alert Safeway to every change made to the agreement rather than expect Safeway to read it. . . . If Alston sneaked in a change (or just forgot to include Safeway's redactions in the new version of the agreement), that's either a sharp practice or sloppy work, but neither is enough to conclude that a large corporation with sophisticated in - house lawyers should not be held to the terms of an agreement it signed." (emphasis added); also finding that there was no "conflict by creation of [an] attorney-client relationship," because even if the subsidiary was to be treated as a client for conflicts purposes pursuant to the 2007 letter, it did not create a full attorney-client relationship; "An agreement to treat a subsidiary as a client in this setting 'does not in itself establish a full fledged client-lawyer relationship with the affiliates,' ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995), so no current or former client status arises out of such an agreement.")).

Although one might expect courts to honor such explicit arrangements (especially with sophisticated corporate clients), not all of them do.

In 2014, the Southern District of New York acknowledged that Gibson Dunn had disclaimed any representation of a corporate parent's subsidiaries, but nevertheless found that the subsidiaries were Gibson Dunn's clients for conflicts purposes (presumably by operation of law, applying the fact-specific standard discussed above). Fortunately for Gibson Dunn, the court nevertheless declined to disqualify the law firm.

• HLP Props., LLC v. Consol. Edison Co. of N.Y., No. 14 Civ. 01383 (LGS), 2014 U.S. Dist. LEXIS 147416, at *9-10, *10-11, *12, *13-14, *14, *16 (S.D.N.Y. Oct. 16, 2014) (refusing to disqualify the law firm of Gibson Dunn from adversity to the subsidiary of a parent that the firm represents in unrelated matters; noting that Gibson Dunn's retainer letter with the parent excluded its subsidiaries from any attorney-client relationship, although the parent and the subsidiary shared law the same law department; also noting that Gibson Dunn asked the parent for consent to be adverse to the subsidiary after the parent complained, and was turned down; "CECONY [subsidiary] argues two theories upon which Gibson Dunn should be

disqualified, both premised on Gibson Dunn's alleged concurrent representation of adverse clients. First, CECONY asserts that Gibson Dunn has served both CECONY and CEI [parent] directly as clients. Because the evidence in the record does not establish that Gibson Dunn provided any legal services directly to CECONY, this argument is rejected. Second, CECONY asserts that, even if Gibson Dunn provided services only to CEI, CECONY and CEI must be considered the same client for purposes of disqualification. This contention is correct, and accordingly the burden is on Gibson Dunn to demonstrate that 'there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation.' . . . Because Gibson Dunn has met its burden, and because other factors counsel against disqualification, the motion is denied." (citation omitted); "CECONY's argument that it was a client of Gibson Dunn is not supported by the evidence. First, the engagement letter in the CEI matter explicitly states that Gibson Dunn is not undertaking the representation of any of CEI's subsidiaries absent express agreement. The parties agree that there was no such agreement. Second, Olson denies having performed work in any capacity for CECONY. Third, the two instances in which Gibson Dunn allegedly rendered services to CECONY -- Gibson Dunn's review of CEI's proxy statements and Gibson Dunn's advice to CEI in respect to a third party audit relating to issues at both CEI and CECONY -- were not rendered to CECONY or with the express purpose of assisting CECONY, although they may have indirectly benefitted CECONY. On this record, no attorney-client relationship existed between Gibson Dunn and CECONY.

See generally Merck Eprova AG v. ProThera, Inc., 670 F. Supp. 2d 201, 210 (S.D.N.Y. 2009) (citing six-factor test for determining existence of attorney-client relationship)."; "The same operational commonalities exist here [as in GSI Commerce Solutions, Inc. v. Babycenter LLC, 618 F.3d 204, 209 (2d Cir. 2010)] -- namely, CEI and CECONY share corporate headquartesr, a computer system, a payroll system, a human resources department, benefits plans and their law department. Further, the two companies share management -- all of the CEI's six officers are also officers of CECONY. Finally, there is substantial financial dependence between the two companies -- CECONY is CEI's principal subsidiary and represents 85% of its operating revenues, 96% of its net income and 89% of its assets. Accordingly, CEI and CECONY are the same corporate entity for conflicts purposes."; "While Gibson Dunn engaged in troubling conduct in failing to obtain a waiver from CEI and Plaintiffs when it undertook to represent CEI, that conduct does not warrant disqualification. First, the record provides no indication of an actual or apparent conflict in loyalties or diminished vigor in Gibson Dunn's representation. Plaintiffs have attested to their confidence in Gibson Dunn's continuing as their litigation counsel and Gibson Dunn has already represented Plaintiffs for fifteen years without complaint from either Plaintiffs or CEI."; "Second, the record contains no evidence that there is any risk of trial taint, and Defendant does not suggest otherwise. Gibson Dunn's dual representations involve unrelated subjects, different attorneys, different Gibson Dunn departments (transactional versus litigation), different offices, and different legal entities -- a parent and a subsidiary."; "The final consideration is whether Plaintiffs will suffer significant prejudice if Gibson Dunn is disqualified. Were it not for this consideration, the outcome of this motion might well have been different, but the issue of prejudice given the duration of the parties' dispute -- 15 years -- is critical and weighs heavily against disqualification. Gibson Dunn has represented Plaintiffs in connection with the Site since 1999. The case involves complex environmental and regulatory matters. It is doubtful, to say the least, that new counsel could acquire the knowledge accumulated over the years by Gibson Dunn in the time it will take for this case to run its course." (emphases added)).

On the other hand, courts have disqualified law firms based on engagement letters (or, more frequently, outside counsel guidelines) defining the law firms' "clients" as all corporations affiliated with the corporation to whom the law firm will provide legal advice.

- Dr. Falk Pharma GmbH v. Generico, LLC, 916 F.3d 975, 982, 982-83, 983, 984, 984-85, 985, 986 (Fed. Cir. 2019) (disqualifying law firm of Katten Muchin from representing its client Mylan in trademark litigation against Bausch & Lomb, relying on the engagement letter Katten had earlier signed with Bausch & Lomb's parent Valeant, which recognized all Valeant affiliates as Katten Muchin clients; explaining that two Alston & Bird lawyers moved to Katten and brought Mylan as a client with them, which was then a defendant in a case brought by Valeant; "Circumstances in which an affiliate is considered a client of a lawyer can arise by express agreement or when affiliates are so interrelated that representation of one constitutes representation of all."; "Katten's representation of Mylan adverse to Valeant-CA and Salix in Valeant II and its ongoing representation of Bausch & Lomb, an affiliate of movants, presents a concurrent conflict of interest in violation of Rule 1.7. This is true even though movants are affiliates of Bausch & Lomb because the terms of the engagement letter

and movants' demonstration of interrelatedness between the various Valeant affiliates presents circumstances such that movants should also be considered a client of Katten."; "Because the engagement letter creates an ongoing attorney-client relationship between the law firm, Katten, and its organizational clients, Valeant-CA and Salix, Katten's representation of Mylan adverse to movants in Valeant II gives rise to a concurrent conflict of interest under Rule 1.7. The express terms of the engagement letter and accompanying OC Guidelines indicate that Katten formed such a relationship with the movants when it signed the engagement letter for the Bausch & Lomb trademark litigation. Specifically, the engagement letter states that it 'represents the general terms of engagement governing the overall relationship between [Katten] and Valeant Pharmaceuticals International, Inc.' . . . This sentence, on its face, demonstrates that Katten's relationship extends beyond just Bausch & Lomb to at least Valeant-CA." (first alteration in original); "The OC Guidelines, which are expressly incorporated into the engagement letter, further extend the relationship to include any Valeant entity."; also relying on case law to come to the same conclusion; "Even if there were any plausible ambiguity in the engagement letter, Mylan's arguments would still fail because Valeant-CA, Salix, and Bausch & Lomb have demonstrated that the three entities are sufficiently interrelated to give rise to a corporate affiliate conflict. The relevant regional circuits have not previously set out factors governing corporate interrelatedness in this context."; pointing to the frequently cited "operational commonality" standard articulated in GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C., 618 F.3d 204, 210-11 (2d Cir. 2010); "In the absence of evidence to the contrary, we conclude that the relevant regional circuits would likely find the Second Circuit's reasoning persuasive and would therefore adopt its factors here.

In particular, we find that they would agree that shared or dependent control over operational and legal matters between the affiliates is significant to the inquiry. Accordingly, we apply the Second Circuit's interrelatedness test to the facts in this case, and find that Valeant-CA, Salix, and Bausch & Lomb all share a high degree of operational commonality and are financially interdependent. Gorman Suppl. Decl. at ¶¶ 5, 6, 7, 10, 11, 12."; "The two also 'share the same in-house Valeant legal department."' (internal citation omitted); recognizing that some courts adopt a per se disqualification standard for ethics violations, while others look at total circumstances, but that Katten would be disqualified under either standard; "Mylan contends that, even if Katten has violated Rule 1.7, disqualification is not warranted under the circumstances. Some district courts have held that disqualification is mandatory for violation of Rule 1.7. See, e.g., Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188, 195 (D.N.J. 1989) (finding that disqualification should be mandatory for violation of Rule 1.7). But other district courts have considered whether the totality of the circumstances--including the impact, nature, and degree of a conflict, the prejudice or hardship to either party, and which party was responsible for creating the conflict--warrants disqualification. Wyeth v. Abbott Labs., 692 F. Supp. 2d 453, 457-59 (D.N.J. 2010) (citing Boston Sci. Corp. v. Johnson & Johnson, Inc., 647 F. Supp. 2d 369, 374 (D. Del. 2009); Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc., 142 F. Supp. 2d 579, 583-84 (D. Del. 2001) (balancing factors to find disqualification unwarranted). We have previously disqualified counsel without consideration of any factor, other than the fact of the ethical violation, but did so in a nonprecedential decision. Freedom Wireless, 2006 U.S. App. LEXIS 32797, 2006 WL 8071423, at *3 ('Having concluded that a conflict of interest exists, we further conclude that disqualification . . . is warranted.'). Here, we need not decide which approach is preferable because we find that, even if additional considerations were necessary, they all weigh in favor of disqualification." (alteration in original); "Finally, we conclude that Katten's erection of an ethical wall is insufficient to resolve its violation of Rule 1.7. Katten claims that this wall cordons off Mukerjee and Soderstrom from Katten attorneys who have worked on matters for Bausch & Lomb, Valeant-CA, or affiliates in the 18 months preceding May 7, 2018. But this wall does nothing to address the concerns stemming from Katten's violation because it was created after Mukerjee and Soderstrom joined Katten, it applies only partially to work conducted within 18 months before May 7, 2018, and Katten never previously informed movants of any potential conflict." (emphases added)).

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

Conclusion

There is no clear answer to this hypothetical. Under some courts' and bars' approaches, you might be barred from representing one subsidiary and being adverse to another. On the other hand, the sister-subsidiary relationship is even more attenuated than

the parent-subsidiary connection, and the ABA Model Rules emphasize that the lawyer's client is the entity and not any of its constituents.

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

Best Answer

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

B 8/16

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

Hypothetical 12

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

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

MAYBE

Analysis

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

The ABA Model Rules explain that

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

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

In the disqualification context, the stakes of improperly identifying the client (or in recognizing the attorney-client relationship) can involve very high stakes.

The ABA Model Rules include law departments within their definition of law firms.

> "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization."

ABA Model Rule 1.0(c). (emphasis added).

This seemingly innocuous definition imputes to an entire law department an individual in-house lawyer's disqualification under ABA Model Rule 1.10 (absent some other ABA Model Rules provision). Thus, each in-house lawyer must guard against his or her own individual disqualification -- to avoid an imputed disqualification. The risk of each lawyer's disqualification in turn depends on the identity of that lawyer's current and former clients.

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

> Whether a lawyer represents affiliated organizations as clients is a question of fact . . . . When a lawyer represents two or more organizations with some common ownership or membership, whether a conflict exists is determined primarily on the basis of formal organizational distinctions. If a single business corporation has established two divisions within a corporate structure, for example, conflicting interests or objectives of those divisions do not create a conflict of interest for a lawyer representing the corporation. Differences within the organization are to be resolved through the organization's decisionmaking procedure.

> If an enterprise consists of two or more organizations and ownership of the organizations is identical, the lawyer's obligation is ordinarily to respond according to the decisionmaking procedures of the enterprise, subject to any special limitations that might be validly imposed by regulatory regimes such as those governing financial institutions and insurance companies.
>
> On the other hand, when ownership or membership of two or more organizations is not identical, the lawyer must respect the organizational boundaries of each and analyze possible conflicts of interest on the basis that the organizations are separate entities. That is true even when a single individual or organization has sufficient ownership or influence to exercise working control of the organizations.

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

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

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

As in the ABA Model Rules, the Restatement generally imputes an individual in-house lawyer's disqualification to the entire law department.

> Questions concerning the proper scope of imputation can also arise because of inter-organizational relationships. For example, if one corporation owns all of the stock of another, it is ordinarily appropriate to consider lawyers employed by each corporation as part of a single legal office for purposes of imputed prohibition. Likewise, if one corporation exercises substantial control over the actions of another corporation or if such control is exercised by a group of shareholders of two or more corporations, principles of imputed prohibition similarly should be applied to corporate counsel. However, imputation between the legal offices might be inappropriate where, despite common management in other respects, the legal offices of the affiliated organizations are separately operated.").

Restatement (Third) of Law Governing Lawyers § 123 cmt. d(i) (2000).

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

> • New York City LEO 2008-02 (2/1 /08) ("In analyzing the conflicts facing inside counsel who represent corporate affiliates, this Opinion describes two distinct scenarios. The first is when inside counsel represent a parent corporation and one or more of the parent's wholly owned affiliates. This Opinion assumes that inside counsel for the parent provide legal services to the entire corporate 'family.' But the analysis in this Opinion holds equally true when affiliates within the corporate family have their own legal departments that in turn report to a single lawyer, typically the general counsel of the parent. Under this circumstance, the conflicts of the parent's legal department become those of each affiliate's legal department, and vice versa. See, e.g., ABCNY Formal Op. 2007-2; N.Y. State 793 (2006). The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent."; "In the first scenario, inside counsel's representation is not of entities whose interests may differ, as a matter of corporate law. In the second scenario, inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests. In the second scenario, when inside counsel determine that a conflict may exist between corporate affiliates that they jointly represent, or intend to jointly represent, inside counsel should consider whether joint representation comports with the requirements of DR 5-105(C), or whether independent counsel should be engaged to represent at least some of the clients. If inside counsel conclude that joint representation may pass muster, they may also conclude in some circumstances that they should engage independent counsel to help satisfy the 'disinterested lawyer' and 'informed consent' tests required by DR 5-105(C). In all events, a robust consent process should be employed, emphasizing a full explanation of the advantages and disadvantages of joint representation. The propriety of joint representation should be revisited as circumstances change."; "Two potentially useful mechanisms that can help inside counsel navigate conflicts are an advance conflict waiver and limiting their representation to avoid conflicts."; "Sensitivity to conflicts between represented affiliates will help forestall judicial criticism and avoid unnecessary curtailment of inside counsel's continued functioning in their expected capacity."; "It is inevitable that on occasion parents and subsidiaries will see their interests diverge, particularly in spin-off, sale,

and insolvency situations. When this happens, it is wise for the parent to secure for the subsidiary outside representation. Maintaining a joint representation for the spin-off transaction too long risks the outcome of Polycast [Tech. Corp. v. Uniroyal, Inc.], 125 F.R.D. [47, 49 (S.D.N.Y. 1989)], and Medcom /Holding Co. v. Baxter Travenol Lab.], 689 F. Supp. [842, 844 (N.D. Ill. 1988)] -- both cases in which parent companies were forced to turn over documents to their former subsidiaries in adverse litigation -- not to mention the attorneys' potential for running afoul of conflict rules."; "In analyzing the conflicts facing inside counsel that represent corporate affiliates, it is important to divide the discussion into two distinct scenarios.

The first is when inside counsel represent a parent corporation and one or more of the parent's wholly owned affiliates. The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent."; "In the first scenario, inside counsel's representation is not of entities whose interests may differ because the parent's interests completely preempt those of its wholly owned affiliates. As a matter of corporate law, 'in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.' Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988)."; "The analysis changes in the second scenario. In that scenario, inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests. Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1983) (when the parent does not wholly own the affiliate, the joint directors of both parent and affiliate, 'owe the same duty of good management to both' companies, and 'this duty is to be exercised in light of what is best for both companies.') This is so even when the parent 'has sufficient ownership or influence to exercise working control of the [affiliate]' Restatement (Third) of the Law Governing Lawyers. §131, cmt. d. (2000)."; "Inside counsel should consider carefully these conflict-of-interest rules. Sometimes, a potential conflict will be apparent from the outset of the representation. At other times, the conflict may not become apparent until after the joint representation has begun. To pick just one example, at the outset of a litigation in which a parent and a majority-owned affiliate have been sued, their positions may appear identical and they may choose to be jointly represented by inside counsel. Then discovery may unexpectedly reveal that there is a basis for the parent to offload responsibility onto the affiliate."; "Once it has been determined that a conflict of interest exists between represented corporate clients, inside counsel must withdraw from the representation, unless the Code otherwise permits. If the Code does not, the entire corporate legal department is barred from the representation because DR 5-105(D) provides that conflicts are imputed in a law firm."; "Two useful mechanisms that a corporate legal department may employ in navigating conflicts between represented affiliates are an advance conflict waiver and limiting the joint representation to avoid conflicts."; "Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises."; "Alternatively, inside counsel can limit the representation of one or more affiliates to avoid conflicts."; "Limiting the representation of an affiliate is at times accompanied by retaining other counsel -- for example, outside counsel -- to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients.").

In 2017, the Illinois Bar issued a legal ethics opinion suggesting that in-house lawyers always treat their employer's affiliates as if they were separate clients - for both loyalty and confidentiality purposes.

• Illinois LEO 17-05 (5/2017) (analyzing the loyalty (conflicts) and confidentiality implications of parent company's in-house lawyer's dealings with corporate subsidiaries of the lawyer's client/employer; recommending: (1) that lawyer treat subsidiaries as separate clients for loyalty/conflicts purposes, including even obtaining consents or prospective consents in the event of any "competing interests"; and (2) also treat subsidiaries as separate clients for confidentiality purposes, including even analyzing how confidential information will be shared among the corporate affiliates; "For the in-house lawyer, there is no one size fits all test for identifying the client. It may change depending on the circumstances of the representation. Is it the single corporate parent (whose interests may be considered to preempt the interests of any subsidiary, or in any case, be able to provide informed consent to any conflict waiver or disclosure of confidential information)? Or is it the legally distinct individual subsidiaries? Recognizing subsidiaries as separate clients seems to be acknowledged in the IRPC noted above, particularly IRPC 1.13. For practical purposes, treating subsidiaries as distinct clients would seem the better practice if for no other purpose than to focus the in-house lawyer's attention on identifying and addressing

problematic legal and ethical issues."; "With respect to conflicts of interests, when an in-house lawyers is called upon to provide legal services to a related corporate entity that is not the lawyer's direct employer, the lawyer must be careful to recognize the potential for competing interests. . . . As with any representation, the in-house lawyer must consider and, if applicable, apply IRPC 1.7. Although impacted by client identification, the interests of intra-family corporate entities may or may not be considered aligned. If the interests are determined to conflict, an in-house lawyer can consider a number of actions to address and resolve the conflict. First and foremost is to obtain, if possible, the subsidiary's and parent's consent to the representation as permitted by IRPC 1.7(b). Counsel may also consider obtaining advance conflict waivers, limiting the scope of the representation to eliminate the potential conflict, or retaining outside counsel."; "Perhaps even thornier issues than conflicts arise with respect to confidentiality under IRPC Rule 1.6. Virginia State Bar Opinion 1838 provides that an in-house lawyer must maintain a subsidiary's confidences unless the subsidiary consents to disclosure. In most corporate contexts, maintaining this confidentiality from the corporate parent, and perhaps other subsidiaries, is likely unworkable and doesn't reflect the work of an in-house legal department. . . . Attempting to maintain confidentiality between related corporate entities, but particularly between a subsidiary and a parent, tends to disregard corporate ownership and hierarchy. . . . In these situations, as with conflicts of interest, a prudent course for the in-house lawyer may be to memorialize in writing how confidential information will be treated, obtain advance consent for disclosure, or retain outside counsel.") (emphases added).

It seems seems unlikely that many in -house lawyers would take these steps, but Illinois LEO 17-05 (5/2017) certainly serves to "focus the in-house lawyer's attention on identifying and addressing problematic legal and ethical issues."

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

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

- SCR-Tech LLC v. Evonik Energy Servs. LLC, 2013 NCBC 42, at ¶ 18, ¶¶ 15, 26 (N.C. Super. Ct. Aug. 13, 2013) (reviewing the very sparse case law on privilege protection for communications with partially owned subsidiaries; dealing with communications to and from plaintiff SCR-Tech (1) when the company was partially owned by Ebinger; (2) when the company was then sold to, and wholly owned by, Catalytica, and (3) when the company later entered into a "common interest agreement" with Ebinger, because both faced similar litigation; applying a sort of sliding scale, considering both the percentage of ownership and any "shared legal interest."; concluding that the privilege protected communications during all three situations, because (1) SCR-Tech's shared legal interest with Ebinger meant that the court did not have to determine whether Ebinger's 37.5% ownership (which gave it control) was "too limited" to assure privilege protection by itself; (2) Catalytica's 100% ownership of, and shared legal interest with, SCR-Tech assured privilege protection; (3) the "common interest" doctrine could protect communications between SCR-Tech and its former controlling shareholder Ebinger even in the absence of any corporate affiliation at that time.).

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

Some courts insist that corporate affiliates demonstrate a common legal interest before protecting their communications as privileged.

• Au New Haven, LLC v. YKK Corp., No. 15-CV-03411 (GHW)(SN), 2016 U.S. Dist. LEXIS 160602, at *10, *20 (S.D.N.Y. Nov. 18, 2016) (rejecting defendants' argument that "entities under common ownership sharing privileged information are always considered to be a single entity for the purpose of attorney-client privilege" protection; instead holding that "[entities that are under common ownership must still demonstrate that [the common interest doctrine] applies, such as by making a showing that a common attorney was representing both corporate entities or that they otherwise shared a common legal interest"; ultimately finding the privilege applicable).

The required commonality is axiomatic in the case of wholly owned subsidiaries. And presumably the type of communications that would otherwise deserve privilege protection would normally be based on a common legal interest even if there was no totally identical ownership.

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

Best Answer

The best answer to this hypothetical is **MAYBE**.
B 8/16

Ownership of the Attorney-Client Relationship after Corporate Transactions

Hypothetical 13

As the most experienced transactional lawyer in your law department, you generally take responsibility for large corporate transactions. Your client has been trying to dramatically downsize as it struggles to avoid bankruptcy, and you have several questions about the effect of transactions on the attorney-client relationship (including the privilege).

(a) The current crisis began when one of your clients wholly - owned subsidiaries declared bankruptcy after a disastrous transaction. Who now owns the attorney-client relationship and privilege for that subsidiary ?

(A) Your client?

(B) The bankruptcy trustee?

(B) THE BANKRUPTCY TRUSTEE

(b) If your client sells the stock of a subsidiary to another company, who will own the attorney-client relationship and privilege?

(A) Your client?

(B) The former subsidiary?

(B) THE FORMER SUBSIDIARY

(c) If your client sells substantially all the assets of a subsidiary to another corporation, who will own the relationship and privilege?

(A) Your client?

(B) The former subsidiary?

(B) YOUR CLIENT (PROBABLY)

(d) Can you affect the relationship's and the privilege's ownership in the transactional documents?

(A) YES (PROBABLY)

Analysis

Although starting with the common-sense notion that in-house and outside lawyers represent the institutional client and not any constituent of the institutional client, any analysis involving corporate stock and asset transactions can create remarkably complicated and even frightening implications.

(a) As a corporate asset, the attorney-client relationship and privilege normally passes to corporate successors (who can assert or waive the privilege) -- including bankruptcy trustees. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 (1985); United States v. Campbell, 73 F.3d 44, 47 (5th Cir. 1996).

In contrast to this universally-accepted result in the context of a corporate bankruptcy, the issue is more complicated when an individual declares bankruptcy.

Lawyers representing corporations which are teetering on the edge of bankruptcy should keep this rule in mind. Bankruptcy trustees might ultimately control the privilege that would otherwise protect from public view desperate pre-bankruptcy communications between management and the lawyer.

This universally-accepted principle can lead to some counter-intuitive results.

For instance, in 2015 the SEC asked a corporation to waive its privilege and produce documents during its investigation. SEC v. Present, Civ. No. 14-14692-LTS, 2015 U.S. Dist. LEXIS 170245 (D. Mass. Dec. 21, 2015). The company refused to do so. When the company went bankrupt, the SEC started to focus on its former CEO. The CEO sought documents from the now-bankrupt company he once led -- claiming that he needed them to support his advice of counsel defense. The bankruptcy trustee now running the company refused to waive the privilege, -- and the court upheld that refusal.

- SEC v. Present, Civ. No. 14-14692-LTS, 2015 U.S. Dist. LEXIS 170245, at *2-3, *3, *9-10 (D. Mass. Dec. 21, 2015) (concluding that a former CEO could not obtain documents from a bankrupt company he founded and ran in order to use the documents to defend himself from an SEC action by asserting advice of counsel; "In 2013, the Securities and Exchange Commission ('SEC') commenced an investigation into both F-Squared and Present. . . . In August 2014, during the course of this investigation, F-Squared, with Present as CEO, refused the SEC's request to waive its attorneyclient [sic] privilege . . . . In November 2014, Present left F-Squared . . . and thereafter F-Squared admitted liability for making materially false statements . . . and paid a $35 million fine. . . . F-Squared has now filed for bankruptcy protection, where it faces a variety of creditor claims, including a potential class action lawsuit."; "On the day the SEC settled with F-Squared, the SEC sued Present for various violations of the Advisers Act . . . and associated SEC regulations."; "Among other affirmative defenses, Present asserted in his Answer that he 'reasonably relied upon the work, advice, professional judgment, and opinion of others, including but not limited to legal and compliance professionals."; "Both as the CEO and a sophisticated businessman, he necessarily understood that F-Squared, rather than he, personally held the keys to attorney-client privilege. At that time, as the CEO of F-Squared, Present was in the position either to waive the privilege or to obtain in his personal capacity the right to be able to waive the privilege in the future. He chose not to do so. These circumstances mitigate the fairness considerations advanced by Present. Finally, ordering disclosure, even under a protective order, necessarily divests F-Squared from control over its privileged information and exposes it to the SEC and, ultimately, at trial to a variety of others contrary to the fundamental purposes of the privilege.").

Even more interesting issues can arise when a company buys assets out of bankruptcy, and therefore essentially stands in the shoes of the bankrupt entity (as explained below, this bankruptcy setting was the birthplace of the "practical consequences" standard).

In 2018, a New York court dealt with a fascinating situation - the winner in a litigated case that drove the loser in bankruptcy purchased the loser's assets out of bankruptcy, and then sued the loser's law firm for malpractice in the case the winner had just won.

- Utilisave, LLC v. Fox Horan & Camerini, LLP, No. 652318/2014, 2018 NY Slip Op 33320(U), at *2, *3,*11, *8-9, *10-11, *15 (N.Y. Sup. Ct. Dec. 17, 2018) (addressing a situation in which one of Utilisave's two managing members (MHS, which was owned by Michael Steifman) had earlier successfully "pursued both direct and derivative claims against Utilisave and its then-CEO"; noting that after Utilisave declared bankruptcy, MHS and Steifman: (1) purchased Utilisave's assets from a liquidation trustee, (2) caused Utilisave to file a malpractice case against Utilisave's law firm that had lost the earlier action, and (3) sought access to communications between that law firm and Utilisave's then-CEO; explaining that the law firm argued that "Utilisave is not entitled to any privileged communications because the company was purchased by Steifman, who was adverse to Utilisave in the Prior Action"; acknowledging that "had Steifman or MHS sought privileged communications during the pendency of that [earlier] action, defendants' documents would have been prohibited from

disclosure"; concluding that now that MHS and Steifman owned Utilisave, they could rely on what is called the "practical consequences" standard to assert ownership of Utilisave's attorney-client privilege and its former law firm's files; ordering Utilisave's former law firm to describe the files in its possession so some could be produced; inexplicably holding in contrast "that [Utilisave] has not advanced any argument that it is entitled to [its former law firm's] work product").

More recently, a court was less generous to a plaintiff who purchased a now-bankrupt defendant's assets out of bankruptcy. The court held that some of the bankrupt defendant's executives' personal emails were not owned by the defendant (despite being housed on its server). This meant that the bankruptcy trustee did not acquire them, so it could not convey them to the plaintiff who purchased the defendant's assets out of bankruptcy.

- In re Ahlan Industries, Inc., Ch. 7 Case No. BG 18-04650, 2020 Bankr. LEXIS 1746, at *27-28, *46-47 (Bankr. W.D. Mich. July 2, 2020) (addressing a situation in which GRE sued several corporate defendants, individual owners and managers; noting that when one defendant corporation declared bankruptcy, GRE purchased from a Chapter 7 trustee all of the corporation's assets, and that GRE claimed that it now owned 60,000 emails on the corporation's servers; further noting that the individual defendants argued that 424 of the emails were their communications with their personal lawyers, which the trustee did not own and therefore could not sell to GRE; agreeing with the individual defendants; applying the generally accepted standard for ownership of such personal emails on company servers (In re Asia Global Crossing, Ltd., 322 B.R. 247 (Bankr. S.D.N.Y. 2005)); pointing to the company's "lack of policies concerning email usage or monitoring, the password protection of the accounts, and the fact that the company had never taken any steps to invade the confidentiality of the accounts"; holding that even if the company (now under the trustee's control) could waive its privilege, the individuals could veto that waiver as the privilege's co-owners).

(b) Outside the bankruptcy setting, the purchaser of a corporation's stock generally steps into the shoes of the previous owner, and may assert or waive the privilege.

This approach is consistent with corporate law, and common sense -- when applied to the privileged communications created during and related to the corporation's day-to-day operations. After all, the corporation remains exactly the same incorporeal entity -- but a different set of directors has become the decision-makers.

Not surprisingly, numerous courts have applied this almost-axiomatic principle.

- Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 50-51 (S.D.N.Y. 1989) ("Polycast acquired this authority to waive the joint privilege when it purchased the stock of Plastics. The power to waive the corporation's attorney-client privilege rests with corporate management, who must exercise this power consistent with their fiduciary duty to act in the best interest of the corporation. Just as Plastics' new management has an obligation to waive or preserve the corporation's privileges in a manner consistent with their fiduciary duty to protect corporate interests, Polycast, as parent and sole shareholder, has the power to determine those interests. Because there are ample grounds for a finding that the privilege is held jointly by Polycast and Uniroyal, and because Polycast acquired control over Plastics' privilege rights when it purchased the company, Polycast and Plastics' new management may now waive the privilege at their discretion." (citations omitted); finding that the purchaser of a subsidiary of Uniroyal was entitled to obtain copies of notes of the subsidiary's vice president that he prepared before the transaction).

- McCaugherty v. Siffermann, 132 F.R.D. 234, 245 (N.D. Cal. 1990) ("the purchaser of a corporate entity buys not only its material assets but also its privileges. . . . Since the attorney-client privilege over a corporation belongs to the inanimate entity and not to individual directors or officers, control over privilege should pass with control of the corporation, regardless of whether or not the new corporate officials were privy to the communications in issue.").

- In re Grand Jury Subpoenas 89 - 3 & 89-4, John Doe 89-129, 902 F.2d 244, 248 (4th Cir. 1990) (finding that the new management of a subsidiary created by divestiture could waive the privilege).

- Rayman v. Am. Charter Fed. Sav. & Loan Ass'n, 148 F.R.D. 647, 652 (D. Neb. 1993) ("a surviving corporation following a merger possesses all of the privileges of the pre-merger companies").

- Chase Manhattan Mortg. Corp. v. Advanta Corp., Civ. A. No. 01-507 (KAJ), 2004 U.S. Dist. LEXIS 7378, at *6-7 (D. Del. Apr. 23, 2004).

- M-I LLC v. Stelly, Civ. A. No. 4:09-cv-1552, 2010 U.S. Dist. LEXIS 52736, at *11 (S.D. Tex. May 26, 2010) (holding that the company acquiring another company in a merger became the owner of the acquired company's privilege; explaining

that the new owner's "management stood in the shoes of prior management and controlled GCS's attorney client privilege as it related to the company's operations.").

• Girl Scouts - Western Okla., Inc. v. Barringer - Thomson, 252 P.3d 844, 847, 849 (Okla. 2011) (holding that a successor after a merger owned the entities' attorney-client privilege; "Western [plaintiff] alleged ownership of all of Sooner's documents and materials based on the merger. In support of its counter-motion for summary judgment, Western attached the merger agreement, annual meeting minutes of Sooner and Red Lands adopting the merger agreement, the Certificate of Merger submitted to the Secretary of State and the Certificate of Merger issued by the Secretary of State. The merger agreement provides that all of the assets, properties, rights, privileges, immunities, powers and franchises of Sooner shall vest in the surviving entity. Likewise, under the merger agreement, all debts, liabilities and duties of Sooner shall become the debts, liabilities and duties of the surviving entity. Thus, under the merger agreement, what belonged to Sooner now belongs to Western. Western recognizes that matters that were confidential in the hands of Sooner must remain confidential in the hands of Western."; explaining that "[i]f the client is a corporation, the privilege may be claimed by the successor, trustee, or similar representative."; implying that the companies could have altered this general rule in the agreement; "Sooner did not exempt or exclude confidential or any other materials from the merger agreement; it adopted a merger agreement that transferred all assets, properties and privileges to the surviving corporation. Ownership of Sooner's assets, as well as its attorney-client privilege, has now transferred to Western by operation of law as a result of the merger. To allow Attorney to assert Sooner's attorney-client post-merger would be in derogation of the merger agreement transferring ownership to Western.").

Not surprisingly, when a company sells or spins off a subsidiary, it must immediately treat the now - independent former subsidiary as a separate company. As awkward as it might be to take this approach when dealing with those who were colleagues the day before, failure to do so can causes damaging consequences - as Boeing discovered.

In 2010, the District of Kansas dealt with a transaction in which a portion of Boeing became a separate corporation named Spirit. [FN45] In that case, several labor unions sued Boeing in connection with its sale of a Wichita, Kansas, facility to buyer Spirit. Boeing and Spirit sought the return of protected emails that they claimed to have inadvertently produced to the unions.

The court refused to order the documents' return, finding that they did not deserve any protection, because Boeing had waived any attorney-client privilege protection during the sale to Spirit. As the court explained it, to "facilitate a smooth transition" after the sale of the Wichita facility, Boeing allowed 8,000 former Boeing employees (now working for Spirit) to continue using the Boeing email system. [FN46] Boeing argued that this disclosure of pre-transaction privileged documents in its email system to another company's employees did not waive the privilege, because there were "unique circumstances" resulting from "the need for Spirit employees to have access to the Boeing e-mail messages in order to continue their work at the Wichita facility." [FN47] The court rejected Boeing's argument, concluding that Boeing had made "an educated business decision" to allow employees who no longer worked for Boeing to have access to Boeing electronic records. [FN48] Although the court acknowledged that the 8,000 Spirit employees with access to the Boeing records had themselves been Boeing employees, it nevertheless found a waiver.

> Unquestionably, Boeing was presented with a dilemma in how to handle e-mail files when negotiating with Spirit. Boeing made an educated business decision that it would not pre-screen the electronic files in order to preserve the confidentiality of attorney-client communications. However, Boeing presents no persuasive authority to support its contention that 'unique circumstances' excuse the intentional disclosure of attorney-client privileged communications to a third party. At best, Boeing proposes a 'business decision' exception to the general rule that disclosure of privileged materials to a third party waives the privilege. In the absence of persuasive authority, the court is unwilling to recognize a 'business decision' exception to the general rule. Accordingly, Boeing and Spirit's motion for a protective order and return or destruction of the e-mail messages shall be denied.

Soc'y of Prof'l Eng'g Emps. in Aerospace v. Boeing Co., Case Nos. 05-1251- & 07-1043-MLB, 2010 U.S. Dist. LEXIS 27093, at *21-22 (D. Kan. Mar. 22, 2010) (footnotes omitted)).

This result is somewhat surprising. Disclosing pre-existing privileged communications to a former employee would not automatically waive the corporation's privilege. One would have thought that the court's holding that there had been a waiver would focus on emails created after the transaction rather than before the transaction. Still, the District of Kansas's analysis points out the necessity of remembering that post-transaction corporations must be treated as separate legal entities.

But despite such occasional snafus, it makes sense to include operational - related privileged communications in a stock transaction.

But that general principle's application to a company's day-to -day operations - related privileged communications seems inapt in the context of a tiny but key subset of the company's privileged communications - those relating to the sale transaction itself. If ownership of those communications also passes to the stock purchaser, new management could immediately see what the selling management and their lawyers were saying to each other up until the moment of closing. In other words, the new management could see the selling management's negotiation strategy, bottom line figure, and even what the selling management and their lawyers thought of the purchasing group and its lawyers.

In 1996, New York's highest court distinguished between these communications and the ordinary business - related privileged communications. The court essentially held that by operation of law (rather than through negotiation), the transaction - related privilege documents did not pass to the buyer in a stock transaction.

- Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 668, 669, 670, 670-71, 671, 671-72, 672 (N.Y. 1996) (applying the "practical consequences" test in connection with a corporate acquisition; noting the general rule that "[w]hen ownership of a corporation changes hands, whether the attorney-client relationship transfers as well to the new owners turns on the practical consequences rather than the formalities of the particular transaction."; including the purchasing control of pre-merger privileged communications; "That Acquisition, rather than old Tekni-Plex, was designated the surviving corporation, however, is not dispositive. Acquisition was a mere shell corporation, created solely for the purpose of acquiring old Tekni-Plex. Following the merger, the business of old Tekni-Plex, remained unchanged, with the same products, clients, suppliers and non-managerial personnel. Indeed, under the Merger Agreement, new Tekni-Plex possessed all of the rights, privileges liabilities and obligations of old Tekni-Plex, in addition to its assets. Certainly, new Tekni-Plex is entitled to access to any relevant pre-merger legal advice rendered to old Tekni-Plex that it might need to defend against these liabilities or pursue any of these rights."; addressing the buyer's motion to disqualify the seller's law firm in a dispute between the buyer and the seller; noting that the seller's law firm would be able to represent the seller if the dispute related to the merger "as opposed to corporate operations" of the seller before the merger; explaining that the dispute at issue before the court related to the seller's corporate operations, so that the seller's law firm could not represent the seller in a dispute with the buyer; "The dispute here, however, unlike Flanzer [Int'l Elecs. Corp. v. Flanzer, 527 F2d 1288 (2d Cir. 1975)], goes beyond the merger negotiations. It also involves issues relating to the law firm's longstanding representation of the acquired corporation on matters arising out of the company's business operations -- namely, M&L's [seller's law firm] separate representation of old Tekni-Plex [Seller] prior to the merger on environmental compliance matters. Any environmental violations will negatively affect not only the purchasers but also the business interests of the merged corporation. In this regard, the interests of M&L's current client Tang [seller's sole shareholder at the time of the merger] are adverse to the interests that new Tekni-Plex [Buyer] assumed from old Tekni-Plex."; "M&L's earlier representation of old Tekni-Plex provided the firm with access to confidential information conveyed by old Tekni-Plex concerning the very environmental compliance matters at issue in the arbitration. M&L's duty of confidentiality with respect to these communications passed to new Tekni-Plex; yet its current representation of Tang creates the potential for the law firm to use these confidences against new Tekni-Plex in the arbitration."; "[N]ew Tekni-Plex now has the authority to assert the attorney-client privilege to preclude M&L from disclosing the contents of these confidential communications to Tang.

  Likewise, ownership of the law firm's files regarding its pre-merger representation of old Tekni-Plex on environmental compliance matters passed to the management of new Tekni-Plex."; rejecting the seller's argument that the law firm jointly represented the seller and seller's sole shareholder; "Appellants urge that because Tang and old Tekni-Plex were co-clients of M&L, none of the communications made by corporate actors to the law firm are confidential from Tang. Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients . . . . While M&L jointly represented Tang and old Tekni-Plex during the acquisition, with respect to the environmental compliance matters the record before us establishes only M&L's representation of the corporation."; concluding that the buyer did not acquire ownership of privileged communications between the seller and the seller's lawyer; "To allow new Tekni-Plex access to the confidences conveyed by the seller company to its counsel during the negotiations would, in the circumstances presented, be the

equivalent of turning over to the buyer all of the privileged communications of the seller concerning the very transaction at issue. The parties here, moreover, recognized the community between the selling shareholder and his corporation and expressly provided that it be preserved in any subsequent dispute regarding the acquisition."; "[Corporate actors should not have to worry that their privileged communications with counsel concerning the negotiations might be available to the buyer for use against the sold corporation in any ensuing litigation. Such concern would significantly chill attorney-client communication during the transaction."; "In light of the facts of this particular transaction and the structure of the underlying agreement, new Tekni-Plex is without authority to assert the attorney-client privilege to preclude M&L from revealing to Tang the contents of communications conveyed by old Tekni-Plex concerning the merger transaction. Similarly, new Tekni-Plex does not control M&L's files relating to its prior representation of old Tekni-Plex during the acquisition. Of course, nothing in our decision today prevents new Tekni-Plex from obtaining through the normal course of discovery any non-confidential documents, or confidential documents for which the privilege has been waived, to which it is entitled." (emphases added)).

In 2011, the Eastern District of New York explained the rationale for what became known as the Tekni-Plex approach.

- Safeco Ins. Co. of Am. v. M.E.S., Inc., 289 F.R.D. 41, 53 (E.D.N.Y. 2011) ("[E]ven in those circumstances where the successor company is deemed to have acquired the predecessor's privilege, New York courts have carved out an exception for confidential communications related to the acquisition itself. . . . Otherwise, the successor company would have access to the confidential information of its direct adversary in the recently concluded negotiations. . . . Such a scenario, the courts reason, 'would significantly chill attorney client communication during such transactions.' . . . Moreover, the court is reluctant to imply such a provision into the parties' agreements when the parties could have provided it expressly." (emphases added)).

New York courts continue to follow this approach.

- Askari v. McDermott, Will & Emery, LLP, 114 N.Y.S.3d 412, 415, 415-16, 429, 430, 432, 432-33 (N.Y. App. Div. 2019) (confirming and applying the Tekni-Plek doctrine under which the Seller in a stock sale transaction retains the transaction documents' privilege protection essentially by operation of law; "On this appeal we are asked to address a conflict between New York and Delaware law relating to which law applies, and implicating who or which entity may assert the attorney-client privilege, in the context of the merger and restructuring of businesses, the sale of membership interests, and related transactions which occurred in connection with those events."; "Upon concluding that, under Delaware law, the right of the plaintiffs, Kevin Askari and Sina Drug Corp. (hereinafter Sina), as sellers, to transactional documents contained in the file of the defendant law firm McDermott, Will & Emery, LLP (hereinafter McDermott), relating to the reorganization, merger, and sale of Sina, was transferred to the new entity/buyer, the defendant Oncomed Specialty, LLC (hereinafter Specialty), post-merger/reorganization, the Supreme Court denied the plaintiffs' motion for summary judgment on the complaint and granted the defendants' separate cross motions for summary judgment dismissing the complaint insofar as asserted against each of them. We reverse the order appealed from for the reasons set forth herein."; "Under New York law, the attorney-client privilege regarding pre-merger communications between an attorney and his or her client which are related to a business/corporate merger does not fully pass to the new or surviving company/buyer, but remains with the former shareholders of the prior company/seller (see Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d at 130). In Tekni-Plex, the Court of Appeals determined that the buyer in a corporate acquisition controlled the attorney-client privilege as to some, but not all, of the pre-merger communications (see id. at 127)."; "Thus, the Court of Appeals made a clear distinction between confidential communications regarding a company's ongoing operations and those related to its acquisition (see id. at 136). The Court noted that, during the acquisition negotiation process, the predecessor company and its shareholders were in an adversarial relationship with the successor company (see id. at 138-139).

  Therefore, the original Tekni-Plex continued to control the attorney-client privilege with respect to confidential communications concerning the acquisition, and was entitled to refuse to disclose such communications to the new Tekni-Plex (see id. at 138-139; Fochetta v Schlackman, 257 AD2d 546, 546, 685 N.Y.S.2d 22 ["Given the extent of plaintiff's ownership interest and managerial involvement in defendant corporations prior to the disputed stock surrender, the motion court properly determined that the attorney-client privilege was not properly invoked by defendants to deny

plaintiff access to otherwise privileged pre-surrender materials essential to the proof of his claims"]; see also Orbit One Communications, Inc. v Numerex Corp., 255 FRD 98, 104, 106-107 [SD NY] ["Allowing Numerex to control Old Orbit One's privilege would lead to a fundamentally unfair result. . . . Numerex cannot both pursue the rights of the buyer and simultaneously assume the attorney-client rights of the buyer's adversary, Old Orbit One. Old Orbit One retained ownership of, and continues to control, the attorney-client privilege as to confidential communications with [the law firm which represented it throughout the acquisition negotiations] concerning the acquisition transaction" [citation omitted])." (alterations in original); "In a situation where documents are sought, New York will apply the law of the forum where the evidence will be introduced at trial or the location of the proceeding seeking discovery of those documents (see People v Greenberg, 50 AD3d 195, 198-199, 851 N.Y.S.2d 196). Here, the privileged communications being sought by the plaintiffs in this New York replevin action were made in New York between New York-based attorneys at McDermott and Sina, a New York corporation, involving its then-majority shareholder and president, Askari, a New York resident. The sole nexus that Delaware has to this action is that Specialty is a limited liability company formed under the laws of that state. Consequently, New York law applies in this action sounding in replevin seeking the disclosure of McDermott's files (see id. at 199)."; "It would indeed be incongruous to enforce a law which effectively forecloses New York corporations merging with foreign corporations from having the ability to pursue their claims against their counsel or the newly formed, post-merger entities based on the post-merger entities' control of the documents needed by the former entities to prosecute potential claims. Here, Delaware law gives the new corporation, a putative defendant, sole access to and control of the merger-related documents by the exercise of the attorney-client privilege. This is contrary to New York public policy as enunciated in Tekni-Plex.")

Although this Tekni-Plex approach undoubtedly provided some comfort to selling companies' management and their lawyers, it seems oddly paternalistic for perhaps the world's greatest and most sophisticated commercial center. After all, the management of companies whose stock is being sold presumably could exclude from that sale such privileged transaction-related communications. Sophisticated management and lawyers may not deserve to be protected from failure to do so by some operation-of-law doctrine.

In 2013, a Delaware Chancery Court caused quite a stir by implicitly rejecting the operation-of-law Tekni-Plex approach, and instead treating transaction -- related privileged communications as a negotiable item in a stock transaction.

In Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155 (Del. Ch. 2013), [FN49] Chancellor Strine dealt with this ownership issue in connection with the buyer's allegation that selling shareholders defrauded it.

The court explained the factual context.

> After the Buyer brought this suit in September 2012 -- a full year after the merger -- it notified the Seller that, among the files on the Plimus computer systems that the Buyer acquired in the merger, it had discovered certain communications between the Seller and Plimus's then-legal counsel at Perkins Coie regarding the transaction. During that year, the Seller had done nothing to get these computer records back, and there is no evidence that the Seller took any steps to segregate these communications before the merger or excise them from the Plimus computer systems, the control over which was passing to the Buyer in the merger. It is also undisputed that the merger agreement lacked any provision excluding pre-merger attorney-client communications from the assets of Plimus that were transferred to the Buyer as a matter of law in the merger, and the merger was intended to have the effects set forth in the Delaware General Corporation Law ('DGCL'). Nonetheless, when the Seller was notified that the Buyer had found pre-merger communications on the Plimus computer system, the Seller asserted the attorney-client privilege over those communications on the ground that it, and not the surviving corporation, retained control of the attorney-client privilege that belonged to Plimus for communications regarding the negotiation of the merger agreement. Before the court is a motion by the Buyer seeking to resolve this privilege dispute and determine, among other things, that the surviving corporation owns and controls any pre-merger privilege of Plimus or, alternatively, that the Seller has waived any privilege otherwise attaching to those pre-merger communications.

Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 156 (Del. Ch. 2013) (footnote omitted).

The court pointed to the buyer's merger into the purchased corporation, which by Delaware statute transferred all privileges to the merged entity -- including privileged communications about the purchase transaction. The court emphasized the Delaware statute's clear terms.

> The Buyer contends that under the plain terms of § 259 of the DGCL, the attorney-client privilege -- like all other privileges -- passes to the surviving corporation in the merger as a matter of law. Thus, the Buyer argues, this court must enforce the statute. The court agrees. If the General Assembly had intended to exclude the attorney-client privilege, it could easily have said so. Instead, the statute uses the broadest possible language to set a clear and unambiguous default rule: all privileges of the constituent corporations pass to the surviving corporation in a merger.

Id. at 159 (footnotes omitted).

The court noted that the selling shareholders could have negotiated the post-closing ownership of such privileged communications.

> Of course, parties in commerce can -- and have -- negotiated special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger.

Id. at 160. The court even pointed to language from an earlier Delaware chancery court case (applying New York law) that carved out such privileged communications from that sale.

> 'Section 1.2(h) [of the asset purchase agreement] provides that "'Excluded Assets" from the sale include "all rights of the Sellers under this Agreement and all agreements and other documentation relating to the transactions contemplated hereby."'"

Id. at 161 n.27 (quoting Postorivo v. AG Paintball Holdings, Inc., Consol. Civ. A. Nos. 2991 - & 3111 -VCP, 2008 Del. Ch. LEXIS 17, at *19 n.25 (Del. Ch. Feb. 7, 2008)).

Thus, after articulating a frightening scenario, the court prescribed a fairly simple remedy.

> Thus, the answer to any parties worried about facing this predicament in the future is to use their contractual freedom in the manner shown in prior deals to exclude from the transferred assets the attorney-client communications they wish to retain as their own.

Id. at 161.

Other courts have reached the same conclusion.

- Newspring Mezzanine Capital II, L.P. v. Hayes, Civ. A. No. 14-1706, 2014 U.S. Dist. LEXIS 169900, at *6-7, *8, *10-11, *11 (E.D. Pa. Dec. 9, 2014) (holding that a company sold the privilege when it sold the stock of a company, because the law firm assisting the company did not represent the individual selling shareholders as personal clients; "The Baxter Parties insist that they retain the right to assert attorney-client privilege over communications with Wishart Norris pre-merger because they were the sellers of a controlling interest in Old Utilipath. In support of this position, they analogize the current situation to Tekni-Plex v. Meyner and Landis, 89 N.Y.2d 123, 674 N.E.2d 663, 651 N.Y.S.2d 954 (Ct. Ap. N.Y. 1996)."; "The most useful point of departure is the contract of representation whereby Wishart Norris was retained. The retention letter stated that it related to 'this Firm's representation of Utilipath, LLC ('the Company').' The letter also cautioned, 'The advice and communications which we render on the Company's behalf are not intended to be disseminated to or relied upon by any other parties without our written consent' (emphasis added). The signature line identified Utilipath LLC and identified Jarrod Hayes as a 'manager.' Jarrod Hayes did not separately sign as an individual, and neither did his father, Baxter Hayes, Jr., or brother, Baxter Hayes, III."; "I also find nothing in Wishart Norris' actions that indicate it was representing any of the Baxter Parties as individuals in addition to representing the corporations. Further supporting my conclusion is the fact that Baxter, Jarrod, and Lindon Hayes had retained their own personal counsel."; "In contrast, in the situation before me, Wishart Norris was explicitly retained by Old Utilipath to carry out the Utilipath transaction, and other lawyers were retained to personally represent the parties in the transaction. Under Bevill [In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986)], the individuals asserting the privilege have a specific burden, which they have failed to meet."; "Because Wishart Norris represented the corporation, the corporation's post-merger owners took control of the corporation's attorney-client privilege.").

The Great Hill approach (and even the Tekni-Plex approach) work in the abstract, but do not address a practical issue. It is one thing to exclude (either by operation of law or by negotiation) privileged negotiation - related documents from a stock sale. It is quite another thing to remove them from the servers that physically pass to the purchaser. It presumably is impossible to

delete those documents from every nook and cranny in which they exist. Under Tekni-Plex, perhaps the seller could rely on the new management's reluctance to search for documents that by operation of law they do not own. Under Great Hill, presumably the best that selling management could do is to negotiate it an agreement barring new management from searching for or using those transaction - related privileged communications.

In 2019, the Delaware Chancery Court resolved this dilemma under its Great Hill approach - barring new management from "using or relying on" such communications left on the server (or in some other spot).

- Shareholder Representative Services LLC v. RSI Holdco, LLC, C.A. No. 2018-0517-KSJM, 2019 Del. Ch. LEXIS 196, at *3, *4-5, *10,*11-12 (Del. Ch. May 29, 2019) (addressing a situation in which the sellers negotiated a merger agreement provision: (1) recognizing continued privilege protection after the closing for their privileged transactional communications with their law firm Seyfarth Shaw; and (2) prohibiting the buyer from "us[ing] or rely[ing] on any of the Privileged Communications in any action or claim against or involving any of the parties hereto after the Closing"; noting that the buyer nevertheless sought to use them in a post-closing dispute -- arguing that "[b]ecause the sellers did not excise or segregate the privileged communications from the computers and email servers transferred to the surviving company," sellers waived their privilege and "the buyer may thus use the communications in this litigation"; rejecting buyer's argument, finding that it would "undermine the guidance of Great Hill [Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155 (Del. Ch. 2013)] -- which cautioned parties to negotiate for contractual protections"; holding that the sellers could "assert that privilege in this litigation," and that buyer was "barred from using or relying on the Emails in this litigation").

This approach makes great sense, given the impracticability or even impossibility of assuring deletion of all such transaction -related privileged documents.

(c) Asset sale transactions in the corporate context are inherently different from stock sale transactions. With the latter, the incorporeal entity continues just as it was - but now takes direction from a different set of elected directors. With the former, a different incorporeal entity begins to use the assets. The old entity might still exist, but is now shorn of all or some of its assets.

Before turning to some of the key issues, it is first worth noting the application of the normal privilege "waiver" doctrine in an asset sale context.

The attorney-client privilege protection is so fragile that owners have waived that protection even by disclosing privileged communications to their own family members (as Martha Stewart did by sharing a privileged email with her own daughter). The work product doctrine is much more robust - Martha Stewart did not wave that separate protection that also covered the email she shared with her daughter.

And under standard waiver doctrine, disclosing a privileged communication to an outsider waives the privilege protection as to everyone else and for all time -- entitling anyone to access the same formerly privileged communication.

With a stock transaction, there is no waiver - because there is no disclosure to an outsider. The privileged communications stay where there are - in the possession of the same entity, albeit now under the control of different directors. But if the stock transaction is preceded by disclosure during due diligence, etc., there might well (and probably will) be a waiver. The good news in that context that is the communications disclosed during the due diligence or negotiation process most frequently focus on litigation or anticipated litigation -- meaning that the disclosed communications presumably also deserve the more robust work product protection that survives such a disclosure.

In negotiations over an asset transaction, such due diligence has the same waiver implications as in a stock transaction (and the same presumably predominant sharing of work product - protected communications).

To be sure, in an asset transaction closing, privileged communications may be among the assets that convey from the current owner to the new owner. At first blush, that might seem to involve a waiver. But properly considered, it does not. At closing, the privileged communications pass to someone who has also purchased the protection. If that caused a waiver, a client would waive her privilege by replacing her lawyer with another lawyer, a lawyer would waive his clients' protection by permissibly selling his law practice to another lawyer, etc.

So the cases that label such sale or asset transaction conveyances as a "waiver" presumably do not really mean what they say.

- Solis v. Bruister, Civ. A. No. 4:10-cv-77-DPT-FEB, 2013 U.S. Dist. LEXIS 29108, at *4-5, *8-9 (S.D. Miss. Jan. 22, 2013) (concluding that transfer of privileged communications as part of a stock sale of a company waived the seller's attorney-client privilege; analyzing the following situation: "Plaintiff's Motion to Compel seeks an order compelling the production of documents subpoenaed by Plaintiff from DirecTV [nonparty], the purchaser of Southeastern Ventures, Inc. f/

k/a Bruister & Associates, Inc. These documents were stored on Defendant Amy Smith's Bruister & Associates computer, which DirecTV acquired in the purchase. . . . The instant motion seeks production of the DirecTV documents withheld by Defendants. DirecTV asserts no objection to the production of the documents at issue in Plaintiff's Motion."; "Plaintiff has argued that because all the documents at issue were provided to a third party, DirecTV, the privilege, if any ever existed, was waived on that basis. See Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993) ('Patently, a voluntary disclosure of information which is inconsistent with the confidential nature of the attorney-client relationship waives the privilege.'). Along those lines, other federal district courts have held that a sale and transfer of assets, including allegedly privileged information, waives the attorney-client and work product privileges. See Robbins & Myers, Inc. v. J.M. Huber Corp., 2003 U.S. Dist. LEXIS 10001, 2003 WL 21384304, *3 (W.D.N.Y. May 9, 2003); and In re In-Store Adver. Secs. Litig., 163 F.R.D. 452, 458 (S.D.N.Y 1995). Defendants have not convinced the Court that any privileges were not waived when Amy Smith's computer was turned over to DirecTV."; inexplicably failing to address DirecTV's ownership of the documents contained on the computer it purchased, and DirecTV's acquiescence to their production; not addressing the other possible impact of a "waiver" -- such as the availability of other third parties to assess the documents; also finding a waiver based on defendant's inadequate log and on the fiduciary exception. (emphasis added)).

• Robbins & Myers, Inc. v. J.M. Huber Corp., No. 01 -CV-0201 E(F), 2003 U.S. Dist. LEXIS 10001, at *3-4, *16 (W.D.N.Y May 9, 2003) (analyzing the waiver impact of the sale of a subsidiary's stock to a buyer, in connection with the buyer's later lawsuit against the selling parent for fraud; finding a waiver; describing the factual setting as follows: "Robbins & Myers, Inc. ('R&M') bought the stock of Flow Control Equipment, Inc. ('FCE') from J.M. Huber Corporation ('Huber') pursuant to a stock purchase agreement ('the Agreement') dated November 20, 1997. . . . Subsequently, R&M brought this suit for various claims of fraud based on its contention that Huber had induced R&M to buy FCE by misrepresenting the scope of the off-specification closure liability. R&M contends that Huber had represented that the liability was limited to 194 units whereas the liability now appears to be for several thousand units."; among other things, finding a waiver; "[D]efendants have waived any attorney-client privilege or work-product protection that otherwise might have attached to any documents that were left in the possession of FCE after November 20, 1997. See In re Grand Jury Subpoenas, 734 F. Supp. 1207, 1213 (E.D. Va. [1990]) (holding that parent waived attorney-client privilege with respect to documents left in subsidiary's possession after sale of the subsidiary), rev'd on other grounds, 902 F.2d 244 (4th Cir. 1990). Accordingly, defendants may not claim the attorney-client privilege or work product protection with respect to any documents that were left in FCE's possession after it had been purchased by R&M." (footnote omitted); inexplicably failing to address the buyer's possible ownership of the privileged documents belonging to the subsidiary that it had purchased it from the defendant parent corporation; similarly not addressing the possible implications of the waiver analysis, such as third parties' possible right to access the same documents if there had been a waiver. (emphases added)).

In 2015, the Northern District of California dealt with this privilege ownership issue after an asset sale.

In HunterHeart Inc. v. Bio-Reference Laboratories, Inc., the founder of Hunter Laboratories and his wife sold Hunter's "clinical testing laboratory and the bulk of its assets" -- excluding from the sale various tests and protocols that the founder continued to operate under the name HunterHeart. Case No. 5:14-cv-04078-LHK, 2015 U.S. Dist. LEXIS 123921, at *2 (N.D. Cal. Sept. 16, 2015). [FN50]

The court quoted portions of the Asset Purchase Agreement ("APA") which specifically identified some of the assets that Hunter sold to the buyer BRLI.

> [A]ll of "Hunter's computer equipment"; "all electronic files, codes, and software stored on said computer equipment"; Hunter's "e-mail addresses" and "other records, data and communications . . . in the cloud." The APA enumerated the email addresses that BRLI had purchased, one of which was Chris Riedel's [HunterHeart CEO] Hunter email address, "criedel@hunterlabs.com." The agreement permitted Riedel "to have access" to this email address for one year after the closing date.

Id. (footnotes omitted).

The court noted that the founder used his Hunter email address "to communicate with counsel before the sale" and even after the sale. Id. at *3.

About one year after the sale, HunterHeart sued BRLI. In preparing to respond to HunterHeart's discovery, defendant BRLI discovered on its email system pre-closing and post-closing communications between Hunter's founder and the company's lawyers. BRLI notified HunterHeart, which claimed privilege protection for those communications.

The court rejected HunterHeart's privilege claim. In addressing the pre-closing communications, the court found that Hunter waived any privilege by explicitly transferring the privileged communications to BRLI.

> Hunter waived that privilege, however, when it agreed to hand over all of its servers, files and communications. HunterHeart argues that California law, which applies in this diversity case, defines waiver as an "intentional relinquishment of a known right." But that is exactly what Hunter did when it executed the APA -- it intentionally relinquished its ownership right over all of its communications, and it received consideration in exchange. It is immaterial whether Riedel subjectively anticipated the disclosure of privileged emails. He and Hunter were sophisticated entities who negotiated the APA over the course of several months, and they came to an express agreement to hand over all the communications relevant here. And not until two years after the sale did HunterHeart or Riedel try to remove or retrieve these purportedly privileged communications.

Id. at *5 (footnotes omitted).

As explained above, this analysis seems incorrect -- although it resulted in probably the right outcome. If Hunter waived its privilege protection in the sale, under general waiver principles that would have made the privileged communications available to other third parties.

Instead, the proper analysis should focus on ownership of the communications -- which the HunterHeart decision articulated as an alternative.

> Even if Hunter had not waived its privilege in the APA by express transfer of the disputed communications, it passed from Hunter to BRLI by virtue of the APA's transfer of the other company assets. BRLI cites the instructive case City of Rialto v. U.S. Dep't of Def. [492 F. Supp. 2d (C.D. Cal. 2007)], where the court held that a purchaser acquiring "substantially all" of a company's assets also acquired the company's attorney-client privilege. Unlike the purchaser in City of Rialto, BRLI did not purchase literally all of Hunter's assets -- HunterHeart reserved a portion of the business in the form of the HunterHeart program. But the burden of preserving the privilege lies with HunterHeart, and HunterHeart offers insufficient evidence that its sale of all of its tangible assets and nearly all of its intangible ones constituted less than a sale of substantially all of them.

Id. at *6 (footnote omitted).

This seems to be the correct analysis. It gave BRLI ownership of the privileged communications, but without forfeiting BRLI's right to assert protection if some third party sought access to those communications. Thus, this approach makes more sense than the waiver analysis.

In addressing the post-closing communications, the court held that Hunter's founder could not have expected those to remain confidential once the email system belonged to the buyer BRLI.

> HunterHeart has failed to show that the attorney-client privilege protects Riedel's communications with counsel after the APA was executed. The privilege never applied in the first instance because Riedel [Hunter's founder] could not have expected these emails to remain confidential. The APA expressly had transferred ownership of Riedel's email account [sic] and the server where its contents were stored, and he could continue to use the account only because the APA permitted it. Riedel was aware that BRLI controlled his email acco[un]t, as evidenced by the fact that he contacted BRLI to restore his access. Also, as above, HunterHeart waived any privilege that may have applied when it agreed to the APA. Like the pre-APA emails, these communications were stored on BRLI servers, and neither Riedel nor HunterHeart ever showed any intention of moving them from that non-confidential location until now.

Id. at *6-7.

The court's analysis highlights the continuing trend toward court's use of what is called the "practical consequences" test when determining privilege ownership in an asset sale. The court's task was presumably made easier by the explicit transfer of electronic communications.

Although the HunterHeart court ultimately did not rely on a waiver concept (instead finding that the asset transaction conveyed the privileged communications), even the court's consideration of that theory is troubling.

Turning now to the relationship and privilege ownership implications of an asset transaction, traditionally the purchasers of a corporation's assets did not acquire the corporation'a attorney client-privileged communications or rights.

• In re In-Store Adver. Sec. Litig., 163 F.R.D. 452, 455, 455-56, 458 (S.D.N.Y. 1995) (addressing the waiver implications of a company's purchase of another corporation's assets; addressing the following factual context; "[P]laintiffs request the production of documents held by Peat Marwick as stakeholder for Emarc, Inc. . . ., the successor to In-Store. . . . Peat Marwick is holding documents produced to it by Emarc because Kirkland & Ellis, attorneys for the Director Defendants, and Baer Marks & Upham . . ., former counsel for In-Store, have asserted that the documents are attorney-client privileged, or are protected from discovery by the work product doctrine."; "At issue are roughly 250 documents (the 'Emarc Documents') in the possession of Peat Marwick which were produced to it, pursuant to a subpoena relating to this litigation. The Emarc Documents were produced by Valassis Communications, Inc. ('Valassis'), which received them as part of a transfer of assets from Emarc, the successor to In-Store."; finding a waiver; "[A] change in management or a change in control of the corporation does not effect a d isclosure such that the privileged is waived. . . . However, '[a] transfer of assets, without more, is not sufficient to effect a transfer of the privileges; control of the entity possessing the privileges must also pass for the privileges to pass.' In re Grand Jury Subpoenas 89-3 and 89-4, 734 F. Supp. [1207,] 1211 n.3 [(E.D. Va. 1990)]. Therefore, where confidential attorney-client communications are transferred from a corporation selling assets to the corporation buying the assets, the privilege is waived as to those communications."; "Baer Marks represented In-Store in this action until 1993 when O'Sullivan was substituted as counsel for In-Store. . . . In-Store was reorganized in bankruptcy proceedings and was succeeded by Emarc. The attorney-client privilege was controlled at this point by Emarc . . ., and Emarc therefore had the power to assert or waive the privilege . . . . When those communications were transferred to Valassis in connection with a sale of the assets by Emarc to Valassis, Emarc thereby waived any privilege still in effect as to those communications. See In re Grand Jury Subpoenas 89-3 and 89-4, 734 F. Supp. at 1211 n. 3. The former attorney of In-Store, Baer Marks, cannot claim the privilege that has been waived by the successor to its former client."; not finding a subject matter waiver). However, starting several years ago, some courts began to look at the "practical consequences" of a corporate transaction rather than recognizing a strict dichotomy between stock and asset purchases.

• Bass Pub. Ltd. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474, at *6-7 (S.D.N.Y. Apr. 25, 1994) ("Had Promus [parent] wished, it could have sold only Holiday Inn's [subsidiary's] physical assets, which would have avoided the consequences [of allowing new management of the subsidiary to waive the privilege].").

Most courts formerly followed what is called a "bright-line" test -- holding that the privileged commnications never accompanied assets sold to a third party.

• In re In-Store Adver. Sec. Litig., 163 F.R.D. 452, 455, 455-56, 458 (S.D.N.Y. 1995) (addressing the waiver implications of a company's purchase of another corporation's assets; addressing the following factual context; "[P]laintiffs request the production of documents held by Peat Marwick as stakeholder for Emarc, Inc. . . ., the successor to In-Store. . . . Peat Marwick is holding documents produced to it by Emarc because Kirkland & Ellis, attorneys for the Director Defendants, and Baer Marks & Upham . . ., former counsel for In-Store, have asserted that the documents are attorney-client privileged, or are protected from discovery by the work product doctrine."; "At issue are roughly 250 documents (the 'Emarc Documents') in the possession of Peat Marwick which were produced to it, pursuant to a subpoena relating to this litigation. The Emarc Documents were produced by Valassis Communications, Inc. ('Valassis'), which received them as part of a transfer of assets from Emarc, the successor to In-Store."; finding a waiver; "[A] change in management or a change in control of the corporation does not effect a d isclosure such that the privileged is waived. . . . However, '[a] transfer of assets, without more, is not sufficient to effect a transfer of the privileges; control of the entity possessing the privileges must also pass for the privileges to pass.' In re Grand Jury Subpoenas 89-3 and 89-4, 734 F. Supp. [1207,] 1211 n.3 [(E.D. Va. 1990)]. Therefore, where confidential attorney-client communications are transferred from a corporation selling assets to the corporation buying the assets, the privilege is waived as to those communications."; "Baer Marks represented In-Store in this action until 1993 when O'Sullivan was substituted as counsel for In-Store. . . . In-Store was reorganized in bankruptcy proceedings and was succeeded by Emarc. The attorney-client privilege was controlled at this point by Emarc . . ., and Emarc therefore had the power to assert or waive the privilege . . . . When those communications were transferred to Valassis in connection with a sale of the assets by Emarc to Valassis, Emarc thereby waived any privilege still in effect as to those communications. See In re Grand Jury Subpoenas 89-3 and 89-4, 734 F. Supp. at 1211 n. 3. The former attorney of In-Store, Baer Marks, cannot claim the privilege that has been waived by the successor to its former client."; not finding a

subject matter waiver). However, starting several years ago, some courts began to look at the "practical consequences" of a corporate transaction rather than recognizing a strict dichotomy between stock and asset purchases.

However, starting several years ago, some courts began to look at the "practical consequences" of a corporate transaction rather than recognizing a strict dichotomy between stock and asset purchases.

This "practical-consequences" test picked up steam when bankrupt corporations sold essentially all of their assets to another company, who then continued the bankrupt company's operations.

- Coffin v. Bowater, Inc., No. 03-277-P-C, 2005 U.S. Dist. LEXIS 9395, at *9 (D. Me. May 13, 2005) (rejecting a bankruptcy trustee's attempt to waive a bankrupt company's privilege; rejecting a "bright-line rule" that only a stock sale conveyed the privilege; finding that privilege now belonged to the purchaser of the company's assets (including all the company's "tangible and intangible rights"); explaining that because the "practical consequences" of the asset purchase "was to transfer virtually all control and continuation of the [company's] business to [the new owner]," the new owner -- not the company's bankruptcy trustee - had the right to waive or assert the privilege.).

A 2010 decision articulated how the "practical consequences" test applies in a bankruptcy setting.

- Schleicher v. Wendt, No. 1:02-cv-1332-WTL-TAB, 2010 U.S. Dist. LEXIS 48084, at *3-7 (S.D. Ind. May 14, 2010) ("[t]he parties agree on the applicable legal standard: the power to assert or waive a corporation's attorney client privilege is an incident of control of the corporation. . . . Whether control of a corporation transfers from 'old' to 'new' depends on the practical consequences of the transaction at issue. . . . The Defendants and Conseco assert that 'New Conseco is essentially the same business enterprise' as Old Conseco because of all the assets, sources of revenue and expense, and management of New Conseco are the same as that of Old Conseco just prior to the bankruptcy confirmation. . . . Because New Conseco acquired substantially all of Old Conseco's business operations, it also acquired Old Conseco's right to assert the attorney client privilege.

Courts eventually began to reject the traditional "bright-line" test, and instead use the "practical consequences" test outside the bankruptcy setting." One court declined to follow the "bright-line test" when determining whether the privilege passed with assets rather than stock, and ultimately concluded that the transfer of assets also transferred the privilege. [FN51] Another court held in the context of a disqualification motion that the "practical consequences" standard applied in determining ownership of the attorney-client privilege after a corporate transaction (ultimately holding that the attorney-client privilege passed with a father's transfer of stock to his sons). [FN52]

In 2012, the Northern District of Texas dealt with a disqualification motion which focused on whether an asset sale conveyed the elements of an attorney-client relationship. [FN53] The court asked for more evidence, but noted that applying the "practical consequences" test involves

> such factors as the extent of the assets acquired, including whether stock was sold, and whether the purchasing entity continues to sell the same product or service, whether the old customers and employees are retained, and whether the same patents and trademarks are used.

John Crane Prod. Solutions, Inc. v. R2R & D, LLC, Civ. A. No. 3:11-CV-3237-D, 2012 U.S. Dist. LEXIS 67457, at *5 (N.D. Tex. May 15, 2012).

Just as the "practical consequences" test moved from the bankruptcy setting to other contexts, it has also been moving from settings where a company buys substantially all the assets of another company to settings where only a portion of a company's assets pass to the new owner. Thus, several courts have essentially divided up the privilege's ownership after a partial asset sale.

In 2008, a Delaware state court held that the purchaser of a company's assets acquired the privileged communications relating to the company's operations, but not relating to the acquisition that was the subject of later litigation. [FN54] Another Delaware court engaged in an even more subtle analysis. The court addressed a transaction in which a company sold some assets to a buyer, but retained other assets. The court ultimately held that (1) the purchaser owned the privilege covering the seller's "ordinary course of business" communications occurring before the transaction; (2) the seller owned the privilege covering communications relating to the transaction; and (3) the seller owned the privilege relating to the assets it retained. [FN55]

All of this matters because disputes frequently arise between the seller of a subsidiary's stock or assets and the buyer of that stock or those assets. Thus, a number of cases have dealt with adversity between a parent and a former subsidiary (or its new owner), with differing results.

Two 2018 decisions typify the common sense application of the "practical consequences" test.

• Utilisave, LLC v. Fox Horan & Camerini, LLP, No. 652318/2014, 2018 NY Slip Op 33320(U), at *2, *3,*11, *8-9, *10-11, *15 (N.Y. Sup. Ct. Dec. 17, 2018) (addressing a situation in which one of Utilisave's two managing members (MHS, which was owned by Michael Steifman) had earlier successfully "pursued both direct and derivative claims against Utilisave and its then-CEO"; noting that after Utilisave declared bankruptcy, MHS and Steifman: (1) purchased Utilisave's assets from a liquidation trustee, (2) caused Utilisave to file a malpractice case against Utilisave's law firm that had lost the earlier action, and (3) sought access to communications between that law firm and Utilisave's then-CEO; explaining that the law firm argued that "Utilisave is not entitled to any privileged communications because the company was purchased by Steifman, who was adverse to Utilisave in the Prior Action"; acknowledging that "had Steifman or MHS sought privileged communications during the pendency of that [earlier] action, defendants' documents would have been prohibited from disclosure"; concluding that now that MHS and Steifman owned Utilisave, they could rely on what is called the "practical consequences" standard to assert ownership of Utilisave's attorney-client privilege and its former law firm's files; ordering Utilisave's former law firm to describe the files in its possession so some could be produced; inexplicably holding in contrast "that [Utilisave] has not advanced any argument that it is entitled to [its former law firm's] work product").

• United States v. Adams, Case No. 0:17-CR-00064-DWF-KMM, 2018 U.S. Dist. LEXIS 41165, at *3, *5, *8-9, *10, *11, *14 (D. Minn. Mar. 12, 2018) (assessing a situation in which the government seized emails between defendant (also a lawyer) Adams and his former clients ("Apollo"); noting that many of the emails deserved privilege protection, but the government argued that the privilege belonged to Scio, a company which earlier had purchased (in the words of the asset purchase agreement) "certain of [Apollo's] property, assets, rights and privileges."; explaining that the government noted that Scio was willing to waive its privilege; further explaining that Adams argued that although defunct, Apollo "retained the authority to waive," and could therefore assert, the privilege; court applying the "practical consequence[s]" test, and thus focusing on the "practical realities of the Apollo-Scio transactions"; emphasizing that: (1) Apollo had sold Scio "all of its intellectual property"; (2) the transactional parties' contemporaneous communications "support the conclusion that [the transactions] effectively constituted the sale of a business that transferred control of the privilege as well"; and (3) there was no evidence that after the transactions "Apollo continued operating in any meaningful way"*;* concluding that Scio owned and could therefore waive the privilege - even though Apollo continued to exist as a corporate entity).

In 2020, a Delaware Chancery Court decision articulated the diametrically different privilege ownership implications of a stock and an asset sale: (1) in a stock transaction, under Great Hill the negotiation - related privileged communications go to the stock purchaser - unless there is some agreement to the contrary; (2) in an asset transaction, the negotiation - related privileged communications stay with the seller - unless there is some agreement to the contrary.

• DLO Enterprises, Inc. v. Innovative Chemical Products Group, LLC, C.A. No. 2019-0276-MTZ, 2020 Del. Ch. LEXIS 202, at *9, *10, *11 (Del. Ch. June 1, 2020) (not released for publication) (pointing to earlier Delaware case law indicating that by statute the purchaser of a corporation's stock acquires the corporation's privileged transactional documents -- unless the seller explicitly excludes them; explaining that the situation before the court instead involved an asset sale; explaining that "we must look to the Purchase Agreement, not a statute, to determine if Buyers purchased certain assets and privileges"; further explaining that because the Agreement listed "this litigation [as] an Excluded Liability," "the privilege for this litigation remains with [the assets'] Sellers"; noting that asset sales involve a "baseline rule governing pre-closing privilege" that differs from a stock sale context, meaning that "the seller will retain pre-closing privilege regarding the agreement and negotiations unless the buyer clearly bargains for waiver"; emphasizing that "[h]ere, Buyers failed to explicitly secure pre-closing privilege waiver rights relating to the negotiation of the Purchase Agreement").

Not surprisingly, just as the parties in a stock transaction must immediately protect the fragile privilege in light of the transaction, the parties to an asset transaction must similarly follow through on the asset agreement's provision - and safeguard the privilege protection of any privileged communications they retain.

As explained above, Boeing paid the price for not doing so after a stock transaction. More recently, Textron lost its privilege protection because of unfortunate steps after an asset transaction.

• Cooper v. Meritor, Inc., Civ. A. Nos. 4:16-cv-052 to -056-DMB-JMV, 2017 U.S. Dist. LEXIS 4727, at *43, *44, *45-46, *46, *47, *47-48 (N.D. Miss. Jan. 12, 2017) (analyzing the waiver impact of fifteen documents Textron created when it owned a Mississippi facility from 1989 to 1996; explaining that Textron sold assets of the company in 1999; disagreeing with Textron's assertion that the asset purchase agreement excluded the privileged environmental documents; noting that Textron left the documents at the facility without any restrictions on access, and did not object when the asset purchaser

went bankrupt in 2004 and all of its assets were sold to another company out of bankruptcy; finding that Textron waived privilege protection for the fifteen documents, even though Textron claims to have forgotten that the documents were left at the facility; "In the instant case, Textron asserts a privilege over fifteen (15) documents created from 1989 to 1996 during a period of time it owned and operated a wheel cover manufacturing facility in Grenada, Mississippi. In 1999, Textron entered and subsequently consummated an asset sale agreement with Grenada Manufacturing, LLC (hereinafter sometimes 'the APA'). According to Textron, it did not transfer ownership of documents related to environmental matters, including the subject 15 documents, to Grenada Manufacturing, LLC as part of that sale. It is Textron's positon that it retains ownership of all such documents and any affiliated privilege with respect thereto."; "According to an affidavit supplied by Textron, boxes of these environmental documents, together with other business records of Textron's operations prior to the 1999 sale, were left by Textron at the Grenada facility after the sale. Indeed, Textron contracted for a right to access the documents for a period of time following the sale.

APA 14.1. In the court's view, Textron's claim of retained ownership of the d ocuments, even if it were convincing, does not satisfactorily answer whether its treatment of those assets waived any privilege that might be claimed with regard to any of them."; "Textron is faced with the fact that it intentionally left documents that it must acknowledge (because it is material to its claim of retained ownership of the documents in the first instance) it knew concerned environmental matters related to releases from the business prior to 1999. These documents were intentionally left unattended and unrestricted in the hands of yet another party -- this time, Ice Industries, Inc. Though Textron was given notice of the asset transfer to Ice Industries, Inc., it made no effort to retrieve the environmental documents or to even review them for privilege."; "In other words, Textron plainly waived any privilege that would have otherwise been retained if the documents had, in fact, been excluded from the purchase and asset sale."; "Textron argues that unless it realized that the documents concerning environmental matters that it freely gave possession of to others for decades did in fact contain privileged documents, that disclosure could not waive any privilege attendant to the document(s)."; "The court is unpersuaded."; "[T]here is nothing about the 'practical consequences doctrine' that dictates a different outcome. The practical outcome of leaving -- for decades -- documents a company contends it owns in possession of another, with no provision for protection of any privileged communications therein, not to mention permitting the subsequent transfer of possession to others on additional occasions, all without any effort to retrieve them prior to the instant litigation, or to otherwise review them to remove privileged materials has the obvious practical and legal consequence of waiver of any associated privileges.") (emphases added).

(d) Lawyers involved in corporate transactions might consider steps that could shape the privilege's later ownership, but a trend has deprived any certainty about another traditional step.

First, lawyers can avoid a joint representation of multiple clients involved in the transaction. This prevents one of the clients (now independent, or controlled by an entity or person who might become adverse to the remaining client) from claiming joint ownership of the privilege, or seeking discovery from the remaining client if adversity develops.

This step generally would prevent one of the other participants in the transaction from claiming some ownership of the privilege, but might make many possibly sensitive communications vulnerable to a third party's discovery. For example, a lawyer representing a corporate parent in the sale of a subsidiary could assure privilege protection for communications with the parent during the transaction by arranging for another lawyer to represent the subsidiary. However, explicitly disclaiming an attorney-client relationship with a subsidiary means that the lawyer normally could not claim privilege protection for any communications with the subsidiary's employees related to the transaction. [FN56] Third parties attacking the transaction would thus have a much easier time gaining access to those communications. [FN57]

Second, and somewhat ironically, lawyers might explicitly arrange for a joint representation in an effort to shape the privilege's ownership. One court even permitted the same lawyer to represent the buyer and the seller in a corporate transaction who were attempting to resolve one's claim against the other. The joint representation allowed them to protect communications relating to the claim's resolution from a third party's effort to discover those communications.

Thus, unlike the first technique discussed above, this approach protects the communications from third parties. However, it normally would not protect communications from one of the jointly represented clients should adversity develop between them. This approach would also essentially doom any chance that the lawyer jointly representing the clients in the transaction could represent either one if such adversity developed.

Traditionally, clients and their lawyers might have been able to affect the privilege's ownership by choosing an asset rather than a stock sale. However, it is no longer safe to assume that corporations could retain control of their privilege by selling

assets rather than stock (although one court suggested that such a step might work). [FN58] This is because the "practical consequences" standard does not itself provide any certainty about whether the sale of assets will or will not transfer control of the privilege.

Several courts have explained (or at least hinted) that participants in corporate transactions might have some power to affect the privilege's ownership.

In 1988, the Northern District of Illinois bluntly stated that corporate clients and their lawyers can shape the privilege's control in corporate transactions.

> It is reasonable then to treat the parties to a subsidiary divestiture by sale of stock as having contracted on the assumption that after the sale management of the divested corporation will control its attorney-client privilege. The parties are free to vary this rule by agreement. For example, if the selling parent will have a continuing interest after the sale in contracts, assets or liabilities of the subsidiary the parent can negotiate for special access or control to protect that interest. Similarly, if the attorneys who represent a corporate parent also represent its subsidiary in the sale of the subsidiary's stock they run the resulting risk that after the acquisition subsidiary management will waive the privilege with respect to its communications with those attorneys. A seller who wishes to avoid that result can do so by agreement with the purchaser or by employing separate counsel for the subsidiary and limiting to the parent's own attorneys those communications which the parent wishes to protect.

Medcom Holding Co. v. Baxter Travenol Labs., Inc., 120 F.R.D. 66, 70 (N.D. Ill. 1988). The court ultimately concluded that the new owners of a corporate subsidiary could waive the attorney-client privilege relating to pre-transaction communications, but explained that parties to the transaction could have arranged for a different result.

Since that 1988 decision, other courts have suggested similar steps.

One court implied that parties to a corporate transaction could articulate in the merger agreement whether the privilege was part of the transaction. [FN59]

One court suggested that a parent spinning off a subsidiary should contractually retain access rights to documents the spun company acquires in the spin. [FN60]

One court suggested that a parent may retain the right to veto a newly spun subsidiary's waiver of the attorney-client privilege. [FN61]

As explained above, in 2013 a Delaware Chancery Court not only explained that lawyers negotiating a stock sale could affect the ownership, it even recommended language that would carve out from the sale all privileged communications between the seller and the seller's lawyer about the transaction. Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 161 (Del. Ch. 2013).

Unfortunately, these steps do not provide any real certainty. For instance, a parent arranging for its subsidiary's relinquishment of the privilege would undoubtedly be vulnerable to the former subsidiary's argument that it was compelled to forfeit its privilege rights and therefore should not be bound by any such agreement.

Significantly, very little case law deals with such agreements, which probably means that very few companies enter into such agreements during corporate transactions. In one of the very few decisions dealing with this issue, the District of Delaware noted that the buyer and seller of corporate assets disagreed about the meaning and effect of an agreement that purported to shape the privilege's ownership.

> The express retention of attorney-client privilege rights, to the extent effective, was reserved for the non-related information that might end up in Chase hands because of the transfer of employees to Chase as part of the transaction. . . . That result is, of course, what one would expect, since it would be strange indeed for reasonable business people to negotiate a transaction in which material information concerning the object of the purchase and sale was somehow retained as the property of the seller, with the buyer left as a warehouseman. Advanta has done nothing to demonstrate the documents at issue are, or any particular document is, unrelated to the business. Advanta having failed to carry the burden of establishing that the documents are privileged, the in limine application is denied.

Chase Manhattan Mortg. Corp. v. Advanta Corp., Civ. A. No. 01-507 (KAJ), 2004 U.S. Dist. LEXIS 7378, at *6-7 (D. Del. Apr. 23, 2004) (footnote omitted).

One of the other cases to deal with this situation refused to enforce an agreement that the subsidiary had entered into after it became independent. In that case the court rejected the applicability of a "protocol" entered into by a corporate parent and

a former subsidiary which authorized their joint lawyers to keep confidential from one of the clients' information they had obtained from the other client. [FN62] The court noted that the subsidiary's in-house counsel had ratified the "Protocol" one year after the divestiture, but that the general counsel "had ties to [the parent] and [the law firm which had jointly represented the parent and the subsidiary in the spin-off of the subsidiary]" and therefore had "an interest in maintaining the validity of the transactions involved in the divestiture." [FN63] Thus, even an agreement entered into by a subsidiary after its independence might not have the desired effect.

In 2012, the Northern District of Illinois seemed to reject the notion that parties to a corporate transaction transferring assets could affect the privilege's ownership.

> [N]othing in the assigning documents for the '550 application between the various parties explicitly states that any attorney-client privileged documents were part of the conveyance. That omission is significant. Courts in this district have held that a transfer of assets from one corporation to another is not sufficient for transfer of the privilege, unless there is also a transfer of overall control; 'the right to assert or waive a corporation's attorney-client privilege is an incident of control of the corporation.' . . . Indeed, even when the parties sign a specific agreement to transfer the privilege along with certain assets, a court may nonetheless find that the privilege did not transfer.

Trading Techs. Int'l, Inc. v. GL Consultants, Inc., Civ. A. Nos. 05-4120 & - 5164, 2012 U.S. Dist. LEXIS 34489, at *19 (N.D. Ill. Mar. 14, 2012).

The court seemed to indicate that parties to such a transaction could avoid a waiver only if they met the exacting standards of the common interest doctrine.

> Taken to its logical extreme, plaintiff's argument would imply that the attorney-client privilege attaches to any item conveyed from one party to another so long as the transferring party once spoke to an attorney about the item. Other courts have held that it is not error for a district court to find a lack of common interest and common attorney-client privilege when the sale of a patent is not executed as 'part of a joint legal claim or defense.' . . . This Court sees no reason to hold otherwise.

Id. at *20-21.

For lawyers hoping that they can control their client's privilege after such a transaction, this is a worrisome result. It shows that even lawyers with the foresight to suggest such agreements cannot assure their intended effect.

Given the case law's uncertainty, it is unfortunately unclear whether lawyers representing negotiating parties in a stock or asset sale can define the ownership. This is not to say that lawyers should not consider the privilege's ownership in corporate transactions, and perhaps even try to affect that ownership. As long as they realize the uncertainty, it seems beneficial to at least consider the ownership and make an effort (even if unsuccessful) to retain, convey or share the attorney-client privilege. The judicial analysis of the privilege's ownership in the case of joint representations and asset sales generally does not describe any effort by the transactional parties to affect the privilege's ownership. Courts might be receptive to at least consider (if not enforce) the party's expectations. Although such expectations clearly cannot trump the legal principles governing the privilege, they might color a court's analysis.

Best Answer

The best answer to **(a)** is **(B) THE BANKRUPTCY TRUSTEE**; the best answer to **(b)** is **(B) THE FORMER SUBSIDIARY**; the best answer to **(c)** is **(A) YOUR CLIENT (PROBABLY)**; the best answer to **(d) YES (PROBABLY)**.
B 8/16

Effect of a Joint Representation in Corporate Transactions

Hypothetical 14

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

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

(A) YES (PROBABLY)

Analysis

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

Before turning to joint representations' implications during corporate transactions, it is worth noting the general rule that former joint clients normally may access their joint lawyer's files, and communications with the other jointly represented clients.

- Hall CA-NV, LLC v. Ladera Development, LLC, No. 3:18-cv-00124-RCJ-CBC, 2018 U.S. Dist. LEXIS 203257, at *11-12, *25 (D. Nev. Nov. 30, 2018) (addressing a situation in which two jointly represented clients ended up in litigation against each other; noting that when one sought their joint law firm's file, the other former joint client and the law firm objected on privilege and work product grounds -- withholding communications between the law firm and one client "that did not include [the other client] or its representatives"; rejecting the privilege and work product claims, because "it is widely recognized that the joint representation exception [allowing all now-adverse jointly represented clients to access their lawyer's file] applies to all communications made by a co-client to the joint attorney - regardless of whether both parties are present when the communications occur").
- Estate of Jackson v. General Electric Capital Corp, (In re Fundamental Long Term Care, Inc.), 515 B.R. 874 (Bankr. M.D. Fla. 2014) (addressing a situation in which Kirkland & Ellis represented several corporate affiliates on various matters, including a corporate transaction and Ohio litigation; noting that a state receiver took over one of Kirkland's former clients, and other affiliates in the corporate family declared bankruptcy (and thus had a trustee now calling the shots); carefully scrutinizing Kirkland & Ellis's work for the related corporations when the corporations became litigation adversaries; concluding that Kirkland had not jointly represented two of the affiliated corporations in the transaction - which meant that the trustee (standing in the shoes of the bankrupt joint client) could not obtain the other corporation's responsive but privileged documents about the transaction; holding in contrast that Kirkland had jointly represented two of the affiliated corporations in the Ohio litigation, allowing the trustee to rely on what the court called the "co-client exception" to obtain privileged documents relating to that litigation).
- In re Equaphor Inc, Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129, at *9-10, *15 (Bankr. ED. Va. May 11, 2012) (analyzing the ramifications of a law firm jointly representing a company and two of its executives in a derivative case; noting that the company later declared bankruptcy, and that the bankruptcy trustee moved to compel the turnover of documents the law firm created during the joint representation; inexplicably confusing the joint defense/common interest doctrine and the joint representation situation; ordering the law firm to produce the documents; "WTP and the Individual Defendants place great reliance on the fact that the corporation is named as a 'nominal defendant' in the shareholders' Complaint. In doing so, WTP and the Individual Defendants imply that the interests of the Individual Defendants are entitled to greater weight than those of the Debtor (and now, its creditors). However, while the Debtor may have been named as a nominal defendant, there is no such thing as a nominal client of a law firm. Further, there is no support in the case law for a 'nominal defendant exception' to the principle that all clients are entitled to an attorney's files. The corporation's status as a nominal defendant is of no consequence in considering the common interest privilege of the parties."; "But this is not a discovery dispute in the ordinary sense of the term. It is a motion to compel the turnover of the law firm's files under 11 U.S.C. § 542(e) to the party who now stands in the shoes of the former client, the Debtor. Under these circumstances, the courts have been uniform in holding that the work product doctrine does not prevent the turnover of the files." (emphasis added)).

Thus, one key implication of a joint representation as that if adversity develops any jointly representing client normally can obtain access to all of the joint clients' communications with the lawyer who represented them all. Of course, a joint client already possesses the communications in which she participated. So the real significance of this universally-applied principle is that a joint client can access communications between the other joint clients and their joint lawyer in which the joint client had not participated.

Some lawyers (even one in - house lawyer) have been forced to turn over communications with their lawyer to a third party who almost certainly was not really a joint client.

- DePuy Orthopaedics, Inc. v. Orthopaedic Hospital, Cause No. 3:12-cv-299-JVB-MGG, 2016 U.S. Dist. LEXIS 166537, at *12-13, *13 (N.D. Ind. Dec. 1, 2016) (addressing a situation in which plaintiff DePuy and defendant Hospital had worked together on patent prosecutions - but later become litigation adversaries; noting that DePuy resisted the Hospital's attempt to discover communications to and from DePuy's in-house counsel, which was based on the Hospital's contention that DePuy's in-house lawyer jointly represented her employer/client DuPuy and the Hospital; further noting that DuPuy's in-house counsel claimed that DePuy and the Hospital had only entered into a common interest agreement - noting that O'Melveny & Myers had acted as patent "prosecution counsel" on behalf of both companies; reciting facts that could have proven either a common interest agreement or a joint representation: DePuy and the Hospital shared confidential information and cooperated on a common legal strategy; DePuy's in-house counsel communicated with and gave direction to O'Melveny, etc.; ultimately concluding that DePuy's in-house counsel had jointly represented DePuy and the Hospital - rather than represented just DePuy in a common interest arrangement with the separately represented Hospital; emphasizing that "the evidence does not show that DePuy's in-house counsel . . . provided any kind of disclaimer about representation when answering the Hospital's questions with legal information or consequence regarding the patent prosecution" (emphasis added); delivering the punchline impact -- because DePuy's in-house counsel had jointly represented DePuy and the Hospital, the former joint client Hospital could discover "DePuy's internal communications related to the [patent] prosecution").
- Naturalock Sols., LLC v. Baxter Healthcare Corp., No. 14-cv-10113, 2016 U.S. Dist. LEXIS 66982, at *4, *6, *6 n,1, *7-8, *9, *9-10 (N.D. Ill. May 20, 2016) (analyzing a product inventor's efforts to obtain the files of K&L Gates, which were obtained by Baxter, but which also assisted the inventor in prosecuting a patent; ultimately concluding that K&L Gates jointly represented Baxter and the inventor, which meant that the inventor could obtain the law firm's files in connection with its later dispute with Baxter; "The parties have submitted numerous exhibits that they claim support their respective positions as to whether Naturalock was a client of K&L Gates." (emphasis added); "Given the extensive nature of Baxter's involvement in the patent prosecution, this Court does not find persuasive Naturalock's attempt to cast itself as K&L Gates's sole client. Thus, the question is whether Naturalock was a joint client along with Baxter." (emphasis added); "Baxter asserts that Delaware, not federal, law applies to this privilege dispute. Baxter does not, however, show that the privilege analysis would be different under Delaware and federal law. . . . In fact, Baxter itself cites federal law in support of its arguments."; "Here, based on the record before the Court, it is clear that K&L Gates provided legal advice and services to Naturalock and acted at the direction of Naturalock in addition to Baxter. This is not a situation where there is no evidence of the nature of communications between the licensor and licensee's counsel. . . . It does not matter what K&L Gates or Baxter perceived the relationship to be." (emphasis added); "Baxter focuses on the facts that Naturalock had separate counsel and that all of the parties involved referred to K&L Gates as Baxter's counsel. But those facts do not lead to the conclusion that K&L Gates's representation of Baxter was to the exclusion of Naturalock. Furthermore, Baxter does not contend that Naturalock was ever explicitly informed that K&L Gates represented only Baxter. To the contrary, the record makes clear that K&L Gates had a professional relationship with both Naturalock and Baxter, and that both Naturalock and Baxter manifested an intention to seek professional legal advice from K&L." (second emphasis added); "In sum, it appears that Naturalock and Baxter were joint clients of K&L Gates, and thus there is no basis for Baxter to assert the attorney-client privilege to deny Naturalock discovery regarding correspondence regarding the prosecution of patents for Naturalock's technology. This is true even if Naturalock is correct that Baxter, unbeknownst to Naturalock at the time, was actually acting in a manner that was adverse to Naturalock's interests and even if K&L Gates was complicit in Baxter's scheming." (emphasis added)).

It is not difficult to see how this basic principle can cause great mischief in a corporate transactional context. When a parent company sells or spins off a subsidiary, the same in -house or outside lawyer frequently represents both the parent and the subsidiary in that transaction. If the parent and the now - independent subsidiary become adversaries about some pre- closing or post - closing dispute, the now-independent subsidiary's management can cause it to demand access to communications between the subsidiary (when it was owned by the parent) and the lawyer who had jointly represented the parent and the then - subsidiary. As mentioned above, the now - adverse subsidiary's owner will be most interested in accessing communications between the lawyer and the jointly represented parent in which the then - subsidiary's management had not participated. If the subsidiary's purchaser thinks it had been defrauded in the transaction, those communications are an obvious target.

If the now -- independent subsidiary has declared bankruptcy, the risk to the former parent is even greater. The bankruptcy trustee will be looking for deep pockets - often pursuing a theory that the parent knowingly spun off the subsidiary with insufficient assets, or otherwise acted improperly during the sale or spin.

In the 1980's and 1990's, several courts applied this basic joint representation principle in such settings.

- Fogel v. Zell (In re Madison Mgmt. Grp. Inc.), 212 B.R. 894 (Bankr. N.D. Ill. 1997) (the same lawyers represented a parent and a subsidiary; when the subsidiary went bankrupt, the trustee for the subsidiary sought to give to a third party (a creditor) documents created during the time of the joint representation; the court distinguished the situation from that in Santa Fe (in which the former subsidiary wanted to obtain documents for itself), and held that the parent could block the trustee for the former subsidiary from providing privileged documents to the third party creditor (although the parent and the former subsidiary were now adverse to one another)), rev'd on other grounds, 221 F.3d 955 (7th Cir. 2000).
- Glidden Co. v. Jandernoa, 173 F.R.D. 459 (W.D. Mich. 1997) (Glidden (now called Grow) sold its subsidiary (Perrigo) to the subsidiary's management; Grow then sued its old subsidiary and the subsidiary's management; the court ordered the former subsidiary to produce all of the requested documents to the former parent; the court also rejected the argument that the former subsidiary's management could assert their own privilege).
- Bass Pub. Ltd. Co. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474 (S.D.N.Y. Apr. 25, 1994) (Latham & Watkins represented both the parent (Promus) and a subsidiary (Holiday Inn), which was sold to Bass; the former subsidiary (which was merged into Bass) sought documents from Latham & Watkins dating from the time of the joint representation; although the court found that the documents were not created as part of a joint litigation defense effort, it ordered Latham & Watkins to produce the documents, finding that the jointly-represented subsidiary was entitled to them).
- In re Santa Fe Trail Transp. Co., 121 B.R. 794 (Bankr. N.D. Ill. 1990) (in-house lawyers represented both a parent and a subsidiary; the former subsidiary went bankrupt, and its trustee sought documents from the former parent; although the court found that the situation did not involve a joint litigation defense arrangement (but instead was a joint representation), the court held that the former subsidiary could obtain documents from the parent that were created before the closing of the spin (and certain document created after that date)).
- In re Grand Jury Subpoenas 89-3 & 89-4 & 89-129, 734 F. Supp. 1207 (E.D. Va.) (a parent waives any attorney-client privilege applicable to documents by leaving those documents with the spun subsidiary), aff'd in part, vacated in part, 902 F.2d 244 (4th Cir. 1990).
- Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47 (S.D.N.Y. 1989) (Uniroyal sold its subsidiary (Plastics) to a company called Polycast; Polycast sued Uniroyal for fraud; the court found that communications among the lawyers who jointly represented Uniroyal and its then-subsidiary Plastics did not involve a joint litigation defense, meaning that the new management of Plastics (now owned by Polycast) could obtain the documents).
- Medcom Holding Co. v. Baxter Travenol Labs, Inc., 120 F.R.D. 66 (N.D. Ill. 1988) (the parent (Baxter) sold all of the stock of its subsidiary Medcom to Medcom Holding; Medcom Holding later sued Baxter for securities fraud; the court found that the same lawyers represented Baxter and Medcom during the relevant time; the court held that Medcom's new management had the power to waive the privilege as to some of the documents; however, the court held that documents created during an earlier litigation when Baxter and its subsidiary were jointly represented could not be obtained by the subsidiary's new parent unless Baxter itself consented, even though adversity had developed between Baxter and the new owners of its former subsidiary).

Starting in 2005, several high profile cases and ethics opinions highlighted the frightening implications of such recurring scenarios.

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

joint representation of two clients by an attorney, one client may not invoke the privilege against the other client in litigation between them arising from the matter in which they were jointly represented."

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

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

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

The District of Delaware agreed with this argument, and gave the bankrupt subsidiaries access to all otherwise privileged documents shared with BCE's law department. BCE appealed the district court's decision rather than turn over the documents.

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

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

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

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

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

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

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

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

On remand, the Bankruptcy Court for the District of Delaware ultimately found that there had not been a joint representation. [FN64]

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

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

New York City LEO 2008-2. A 2008 New York City legal ethics opinion thoroughly analyzed this issue, and also warned in-house lawyers of the risk they run by jointly representing corporate affiliates. [FN65] The New York City Bar suggested that an in-house lawyer in this situation could obtain a prospective consent.

> Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the context of a joint representation of a parent and an affiliate, the advance waiver should: [i]dentify for the clients the potential or existing conflicts with as much specificity as possible; [m]ake clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and [o]btain agreement from the affiliate that if inside counsel can no longer represent both parent and affiliate, inside counsel can continue to represent the parent irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate.

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

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

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

Id.

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

The Litigation Trust claimed that Robinson, Bradshaw had jointly represented Crescent and its parent Duke Ventures, LLC -- in a transaction that allegedly left Crescent insolvent after a transfer of over $1 billion to Duke. If there had been a joint representation, universally recognized principles would entitle either of the jointly represented clients to the law firm's files. As the undeniable successor to Crescent Resources, the Litigation Trust would therefore be entitled to the law firm's files -- including all communications between the law firm and Duke about the transaction, even if no Crescent representative participated in or received a copy of those communications.

The court succinctly stated the issue.

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

Id. at 516.

The court also teed up the parties' positions.

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

Id.

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

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

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

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

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

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

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

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

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

Id. at 522.

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

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

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

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

Id. at 519.

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

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

First, the court pointed to evidence clearly establishing that Robinson, Bradshaw had represented Crescent before the transaction. Id. at 518. The court also noted the firm's failure to run conflicts when undeniably representing Crescent in a number of matters before the transaction.

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

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

> Support of Application to Employ (the "Sink Declaration") . . . . Mr. Sink is a shareholder with RBH and the declaration was made on RBH's behalf. In the Sink Declaration, Mr. Sink echoes the Application and states that "RB&H has represented Crescent Resources and many of its debtor and non-debtor subsidiaries in various matters since 1986 and has served as Crescent's primary corporate counsel for several years."

Id. at 517-18 (emphasis added). The court concluded that

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

Id. at 522 (emphasis added).

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

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

Id. at 523.

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

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

Id. at 521 (emphasis added).

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

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

Id. at 518 (emphases added).

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

The court pointed to the Third Circuit's extensive analysis of this very issue in In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007). [FN66] The court noted that

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

Id. at 524. The court also pointedly noted that

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

Id.

The court ultimately concluded that Robinson, Bradshaw had jointly represented Duke and Crescent in the transaction. The court therefore held that the Litigation Trust was entitled to Robinson, Bradshaw's files generated during the firm's joint representation of Duke and Crescent in the transaction. [FN67]

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

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

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

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

Id. at 530. [FN68] The court's conclusions follow the majority rule when joint clients become adversaries. The law generally allows either joint client access to their common law firm's files, and permits either joint client to use any of those documents in litigation with another joint client.

Since this highly-publicized case, another court reached the same conclusion in a similar setting.

- Newsome v. Lawson, 286 F. Supp. 3d 657, 664-65, 665 (D. Del. 2017) (applying the Teleglobe standard, and finding that a liquidating trustee could obtain privileged documents from a lawyer that jointly represented the bankrupt company and its parent; also finding that the Eureka case did not change that result; also finding that the "breach of duty exception" allowed the lawyer for a joint client to obtain privileged communications between either of the joint client and their lawyer; "Several courts have relied on the breach of duty exception to compel disclosure of privileged communications in a lawsuit between a joint client and the joint attorney. . . . The breach of duty exception provides that, '[i]n a lawsuit between an attorney and a client based on an alleged breach of a duty arising from the attorney-client relationship, attorney-client communications relevant to the breach are not protected by the attorney-client privilege.' . . . Delaware has adopted a breach of duty exception in substantially the same form. See Del. R. Evid. 502(d)(3) (stating that there is no privilege '[a]s to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer."' (alterations in original); "[T]he court finds that the magistrate judge erred in concluding that the breach of duty exception does not apply to cases involving a joint representation.").

Best Answer

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

B 8/16

[n--12/15/20]

Intentional Joint Representation of Corporate Employees

Hypothetical 15

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

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

(A) YES

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

MAYBE

Analysis

Introduction

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

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

ABA Model Rule 1.13(g).

Unauthorized Practice of Law/Multijurisdictional Practice Issues

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

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

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

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

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

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

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

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

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

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

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

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

> licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

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

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

Conflicts Issues

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

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

When a law firm explicitly represents both the company and an employee, it might be necessary to determine if the representations are joint or separate. A lawyer who jointly represents a corporation and a corporate employee must consider all of the normal ramifications of such a joint representation on the same matter. First, the lawyer might not be able to keep secrets from either of the jointly represented clients. Second, a joint representation gives the employee equal ownership of and power over the attorney-client privilege. This means that the employee might have later access to the lawyer's file and communications between the lawyer and the corporation. It also means that absent some degree of adversity between the corporation and the employee, the corporation and the employee would have to unanimously vote to reveal any of their privileged communications to outsiders. Third, the development of any adversity between the jointly represented clients almost inevitably requires the withdrawal from representation of both clients. To make matters worse, the imputed disqualification rules applicable to law firms also generally apply to law departments, which means that an in-house lawyer's disqualification from a joint representation of the corporation and an individual employee normally would require the entire law department's disqualification. [FN69]

Lawyers might be able to mitigate some of the risks by arranging for a prospective consent from the employee, attempting to allow the lawyer to withdraw from representing the employee if adversity develops between her and the corporation, while continuing to represent the corporation. [FN70] The efficacy of such prospective consents is outside the scope of this hypothetical, but it is worth noting that courts and bars examine prospective consents both when the lawyers arrange for them and when the lawyers attempt to rely on them. Thus, there is never a guarantee that such a prospective consent will allow the lawyer to continue representing the corporation on the same matter if that would include adversity to the employee who is now the lawyer's former client. Lawyers therefore can never assure their corporate clients with confidence that they can completely mitigate the risks of a joint representation should adversity develop.

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

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

A 2009 decision highlights the risks that a lawyer runs when intentionally entering into separate representations of both a company and one of its employees, who was under investigation for wrongdoing. In that case, the well-known California law firm of Irell & Manella undertook what the court called "three separate, but inextricably related, representations" of Broadcom and its CFO. [FN71] The law firm represented Broadcom in connection with the company's internal investigation of stock option issues, and the CFO in two lawsuits brought by shareholders alleging wrongdoing in connection with stock options. The

law firm interviewed the CFO, and then disclosed information it learned during the interview to the U.S. Attorney's Office, the SEC, and Broadcom's auditor. When the government pursued criminal charges against the CFO, he sought to suppress the statements he had made to the law firm during the interview, and the trial court granted his motion. Among other things, the court noted that the law firm had not advised the CFO before the interview that the firm was wearing only its "Broadcom" hat during the interview, and that it might disclose to third parties what it learned from the CFO. The court explained that "whether an Upjohn [Upjohn Co. v. United States, 449 U.S. 383 (1981)] warning was or was not given is irrelevant" -- because the firm clearly represented the CFO. [FN72] As the court put it, "[a]n oral warning to a current client that no attorney-client relationship exists is nonsensical at best -- and unethical at worst." [FN73] In addition to suppressing the evidence, the court referred the law firm to the State Bar for "appropriate discipline," based on the firm's ethical misconduct that "[t]he Court simply cannot overlook." [FN74]

The Ninth Circuit reversed the district court's holding, but lawyers should not breathe easy. [FN75] The Ninth Circuit (i) found that the law firm had represented both Broadcom and its former CFO Ruehle in connection with possible option backdating; (ii) agreed with Ruehle that the law firm had not provided the proper Upjohn warning to Ruehle, despite the lawyers' contrary claims (pointedly noting that the [law firm] lawyers "took no notes nor memorialized their conversation on this issue in writing"; [FN76] (iii) held that the district court had improperly applied California law rather than federal law to the privilege question (meaning that the district court might have been upheld if it had made the same findings under the federal standard); (iv) noted that Ruehle "was no ordinary Broadcom employee" because he knew that the law firm was sharing information with Broadcom's auditor Ernst & Young (a fact that will not be present in most situations involving law firms representing both corporations and executives); [FN77] (v) labeled as "troubling" the law firm's "allegedly unprofessional conduct"; [FN78] and (vi) emphasized that "our holding today should not be interpreted as carte blanche approval" of the law firm lawyers' testimony about their communications with Ruehle (implying that the law firm's proffer to the FBI might have included impermissible disclosures). [FN79]

In 2007, another lawyer avoided disqualification in a similar setting.

- United States v. White Buck Coal Co., Crim A. No. 2:06-00114, 2007 U.S. Dist. LEXIS 3163, at *29, *39, *41, *42-43 (S.D. W. Va. Jan. 16, 2007) (declining to disqualify a lawyer who formerly represented Massey Energy as an in-house lawyer, and jointly representing Massey's subsidiary White Buck and an individual employee accused of mine safety violations; explaining that the lawyer eventually withdrew from representing the individual employee, but continued to represent White Buck after joining the Spilman Thomas law firm; finding a conflict of interest, but declining to disqualify the lawyer or Spilman; "Heath represented Wine and White Buck during the investigation of the citation, an inquiry that has now blossomed into the criminal prosecution of both Wine and White Buck. Additionally, Wine will be the key witness against White Buck in this criminal action. The two entities have held fast to diametrically opposed positions since the day following the citation. Specifically, Wine has insisted since the morning of June 28, 2002, that his White Buck supervisors instructed him to conduct his pre-shift duties in an unlawful manner. Since that same time, White Buck has engaged in determined efforts to pin all fault upon Wine for the violation. When the case is called for trial, one of the most significant challenges for White Buck will be the utter decimation of Wine's credibility. The architect charged with assembling the strategem designed to achieve that end is none other than the Spilman firm, with which Heath is now associated. The conflict of interest could not be clearer."; "[O]ne can readily discern the two subjects for inquiry under Wheat [Wheat v. United States, 486 U.S. 153 (1988)] when the court is presented, as here, with an actual conflict of interest. First, the court must ascertain whether the conflict will interfere with the proper functioning of the adversarial process, namely, whether counsel's ethical dilemma robs the client of a constitutionally effective advocate. Second, the court must ascertain whether allowing conflicted counsel to proceed will cause observers to question the fairness or integrity of the proceeding."; noting that the individual former client could not point to any privileged or confidential information that the lawyer possessed; "White Buck has offered Robert Luskin, counsel of record from a different law firm, to conduct the Wine cross examination. The government has not challenged White Buck's observations concerning this proposal, which provide as follows: 'First, Mr. Luskin has had minimal contact with Mr. Heath, and possesses no knowledge of confidential communications that could be used in the cross-examination of Mr. Wine. Second, Mr. Luskin will not hesitate to conduct a rigorous cross-examination of Mr. Wine, and cannot possibly fear breaching a confidential relationship because none ever existed. Third, Mr. Luskin does not anticipate that Mr. Wine will ever be his client and, thus, is not encumbered by

the speculative conflict that might arise from the loss of future business.'"; "Additionally, our courts of appeals has tacitly approved such arrangements. See [United States v.] Williams, 81 F.3d 1321, 1325 (4th Cir. 1996). ('While allowing . . . [auxiliary counsel under similar circumstances] might have been within the court's discretion, declining to use it cannot be held an abuse of that discretion.')"; "[I]t is important to note that Wine has never moved to disqualify Heath. Also, Wine has waived any remaining privilege on the apparent subject matter involved in this action. Finally, his former counsel's present firm will be barred from confronting him on cross examination."; explaining a lawyer from another firm would cross-examine the former client).

In 2017, a court declined to disqualify Covington & Burling in this setting, but labeled as "troubling"! that prestigious firm's lack of disclosure to its deposition - related client.

- Adkisson v. Jacobs Eng'g Grp., Inc., No. 3:13-CV-505-TAV-HBG, 2016 WL 6534273, at *2, *4, *5 (E.D. Tenn Nov. 1, 2017) (declining to disqualify Covington & Burling from representing the defendant company and several employees, but criticizing the firm for not having adequately made disclosures to the employees/clients and obtaining their consent; "Covington informed the witnesses of their options for representation at the deposition: to be unrepresented, to be represented by government counsel, or to be represented by Covington free of charge. . . . Each witness chose to have Covington represent them during their depositions."; "During the September 23, 2016, hearing, Kurt Hamrock from Covington represented to the Court that the nonparty-witness clients did not provide oral informed consent and did not sign any consent forms, conflict waivers, potential conflict waivers, or representation agreements. He also informed the Court that no one at Covington explained to these clients what would happen if a conflict arose during the course of the depositions and no one discussed any joint representation confidentiality issues with the clients."; "Plaintiffs argue that Covington should be disqualified from representing any party in these cases for violating several of the Tennessee Rules of Professional Conduct ('TRPC') through its representation of the nonparty witnesses during depositions. . . . In response, Jacobs contends that Covington did not violate any of the TRPC and that there is no legal basis to justify the drastic remedy of disqualification."; "The Court finds that the same concerns about the court raised in Mid-State [Mid-State Aftermarket Body Parts, Inc. v. MQVP, Inc., No. 4:03CV00733, 2009 WL 1211440 (E.D. Ark. May 4, 2009)] also apply here. Many of those concerns, however, could be alleviated if certain precautions are taken. In its response to the motion to disqualify, Jacobs states: 'Plaintiffs ignore much more recent guidance on this subject, however, which has concluded that attorneys are 'ethically permitted' to represent nonparty witnesses at depositions in a litigation where the attorney also represents named party.'"; "During the depositions, while the nonparty witnesses provided information that supports Jacob's defenses, they also provided information to support plaintiffs' position. Specifically, counsel for plaintiffs posed several hypothetical[s] regarding whether Jacobs would be in violation of its contract if it engaged in certain actions. In response to these hypotheticals, the nonparty witnesses replied that such actions would be improper and/or would not be permissible under Jacobs's contract."; "Although Covington's actions do not rise to the level requiring attorney disqualification, the Court emphasizes that it finds Covington's actions troubling and that such actions are inconsistent with the practices in this district. Covington's decision to undertake representation of these nonparty witnesses without first engaging in the barest minimum of precautions to prevent or prepare for conflicts is a practice that is fraught with ethical peril."; "In light of this, the Court ADMONISHES Covington and ORDERS that if any counsel in these actions undertakes the representation of nonparty witnesses in the future, the attorney SHALL first secure informed consent, execute a written waiver of potential or actual conflict, and execute a representation agreement that clearly describes the dual representation and dual loyalty between the party and the nonparty witness as set forth in this opinion.").

Although some lawyers jointly representing companies and their employees dodge the bullet, a Union Pacific in-house lawyer was not so lucky.

- Yanez v. Plummer, 164 Cal. Rptr. 3d 309, 310, 311, 313, 313-14, 314, 315 (Cal. Ct. App. 2013) (holding that a Union Pacific in-house lawyer could be sued by a Union Pacific employee for malpractice; explaining that their lawyer jointly represented Union Pacific and the employee in the employee's deposition as a witness in litigation involving a fellow employee's injury, and that the lawyer did not protect the client/witness -- who was later fired for inconsistency in his testimony and earlier version of the accident; "Union Pacific fired Yanez [Employee] for dishonesty, citing a discrepancy between a witness statement that Yanez wrote and a deposition answer he gave concerning a coemployee's on-the-job injury (the deposition answer occurred in the coemployee's lawsuit against Union Pacific under the Federal Employers

Liability Act . . . . At the deposition, Plummer [Union Pacific in-house lawyer] represented both Union Pacific and Yanez. Yanez claims the alleged dishonesty was a simple miswording in his witness statement that Plummer, during the deposition, manufactured into something sinister for Union Pacific's benefit."; "Yanez expressed concern about his job because his deposition testimony was likely to be unfavorable to Union Pacific, and asked Plummer who would 'protect' him at the deposition. Plummer responded that Yanez was a Union Pacific employee and Plummer was his attorney for the deposition; as long as Yanez told the truth in the deposition, Yanez's job would not be affected. Plummer never told Yanez about any conflict of interest involving Plummer representing Union Pacific and Yanez at the deposition."; "Yanez and Union Pacific occupied adverse positions regarding Garcia's FELA lawsuit against Union Pacific. Yanez -- working with Garcia when Garcia was injured, and the only percipient witnesses to Garcia's accident -- was aware of several unsafe work conditions that may have contributed to Garcia's injury."; "Despite these conflicting interests, Union Pacific's in-house counsel, Plummer, represented both Union Pacific and Yanez at Yanez's deposition in Garcia's lawsuit. Prior to being deposed, Yanez expressed to Plummer his concern about how this state of affairs would affect his job, and Yanez asked Plummer who would 'protect' him at the deposition. Plummer responded that Yanez was a Union Pacific employee and Plummer was Yanez's attorney for the deposition, and stated that if Yanez told the truth at the deposition, his job would not be affected."; "Yanez presented evidence in his summary judgment papers that Plummer neither informed him about conflicts with Union Pacific nor obtained his written consent to represent him despite such conflicts."; "As for Plummer's conduct, it is true Yanez wrote in his second statement that he 'saw' Garcia slip and fall, and it is true Yanez first admitted to Garcia's counsel in the deposition that he did not 'witness' Garcia's 'accident.' But it was Plummer who highlighted Yanez's deposition testimony that he did not 'see' Garcia slip; it was Plummer who presented the second statement at the deposition; it was Plummer who got Yanez, under oath at the deposition, to effectively admit that his deposition testimony conflicted with the second statement; it was Plummer who did not offer Yanez a chance to explain this discrepancy; and it was Plummer who failed to present the first statement as an exhibit at Yanez's deposition."; "Yanez has presented a triable issue of material fact that but for Plummer's alleged malpractice, breach of fiduciary duty and fraud, Yanez would not have been terminated.").

There is a slight bit of good news for lawyers who would like to represent company executives in a very limited way. In a somewhat surprising approach that helps corporations, several courts and one bar have disagreed with the California court's analysis of Yanez (discussed above), and instead held that a company's lawyer's representation of a company executive during depositions or other testimony did not create a joint attorney-client relationship.

- Springs v. First Student, Inc., Case No. 4:11CV00240 BSM, slip op. at 2-3 (E.D. Ark. Nov. 30, 2011) (declining to disqualify Jackson Lewis from representing its client First Student in an action brought by several plaintiffs, on the grounds that the law firm represented the plaintiffs in their role as deponents in an earlier related case; "It appears that Munger's and Barnes's [Jackson Lewis lawyers] representation of plaintiffs was fairly limited and nothing in the record indicates that plaintiffs provided Munger and Barnes with 'confidential factual information' when plaintiffs gave their depositions in the Douglas case. Indeed, Springs did not meet with Munger prior to giving her deposition. . . . Further, while Burnley states that he told Munger that he made an internal FLSA-based complaint to First Student, . . . nothing indicates that Munger received any relevant information regarding that complaint or that Munger advised Burnley regarding that complaint. . . . Finally, nothing indicates that plaintiffs have given Munger and Barnes the type of information that would materially advance First Student's position in this case.").
- Perez v. PetSmart, Inc., No. CV 10-5339 (LDW) (ETB), 2011 U.S. Dist. LEXIS, at *18-19 102229 (E.D.N.Y. Sept. 12, 2011) (finding that a former PetSmart employee could not disqualify the law firm of Littler Mendelson on the grounds that the law firm represented him rather than the company; "[P]laintiff did not form a de facto attorney-client relationship with any Littler Mendelson attorneys he may have spoken to. . . . Rather, plaintiff allegedly revealed confidences to Littler Mendelson attorneys in the context of the firm's defense of PetSmart against allegations of wrongful termination in another action. . . . Knowing that Littler Mendelson represented PetSmart, plaintiff could not have reasonably believed that information he provided to the firm in the course of that representation would be kept confidential and not shared with the corporation.").
- Gary Friedrich Enters., LLC v. Marvel Enters., Inc., No. 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154, at *11-12 (S.D.N.Y. May 20, 2011) ("In situations such as this where a former employee is represented by counsel for a defendant corporation for the purpose of testifying at a deposition at no cost to him, courts have not treated the former

employee as having an independent right to the privilege, even where that employee believes that he is being represented by that counsel.").

• Wisconsin LEO E-07-01 (7/1/07) ("Lawyers for organizations may appear on behalf of the organization when a constituent is deposed, but that does not mean that the lawyer represents that constituent as an individual. This practice is common, but the mere fact that a lawyer accompanies a constituent to a deposition and consults with that constituent does not transform that constituent into a client. . . . The lawyer's client remains the organization and the lawyer is obligated to protect the interests of the organization first. In such a situation, the lawyer should take care to ensure that the constituent does not misunderstand the lawyer's role . . . .").

This forgiving attitude can have two significant implications. First, the lack of a joint attorney-client relationship means the company has the sole power to waive the privilege protecting the communications between the lawyer and the executive. Second, as an ethics matter, the lack of a joint representation allows the company lawyer to later represent the company adverse to the executive whom the lawyer had represented in such a limited way.

Not surprisingly, other courts disagree with this approach.

• Advanced Mfg. Techs., Inc. v. Motorola, Inc., No. CIV 99-01219 PHX-MHM (LOA), 2002 U.S. Dist. LEXIS 12055, at *17-19 (D. Ariz. July 2, 2002) (addressing a motion by a former Motorola employee (Corley) to disqualify the law firm of Lewis & Roca from representing Motorola in taking any action (such as depositions) of the former employee; explaining that a Lewis & Roca lawyer (Irish) had appeared for Motorola at an earlier deposition of the retired Motorola employee; rejecting Irish's argument that he never represented the former Motorola employee -- noting that Corley had testified at the deposition that Irish represented him as well as Motorola, and that Irish had not spoken up at the deposition to indicate otherwise; "Regardless of whether Corley's personal belief that Irish represented him was reasonable prior to the September 20, 2001 deposition, the irrefutable expressed belief by Corley that Irish represented him in his deposition coupled with Irish's silent acquiescence to that representation established an attorney-client relationship ab initio. Irish's failure to timely object to, or otherwise contest, Corley's explicit belief, whether reasonable or not, that Corley was being represented by Irish in his deposition manifested Irish's implied consent to an attorney-client relationship between them. Moreover, at a minimum, Irish should have known that his silence to Corley's expressed belief in the deposition that Irish represented him would cause confirmation and further reliance by Corley to the belief that Irish represented him. An attorney can not [sic] have it both ways: on the one hand to sit by silently at the public expression by a possible client of the existence of their attorney-client relationship, that would preclude adverse counsel from properly inquiring into the nature and substance of their prior communications protected by the attorney-client privilege, and then, at a later date, to permit that silent attorney to disavow and deny that such a relationship existed when the interests of the former employer and employee unexpectedly became adverse. Therefore, on and after this deposition date until expressly told otherwise, Corley's belief that Irish represented both Motorola and him was reasonable." (emphases added, footnote omitted); declining to disqualify Lewis & Roca because the firm had not yet filed a lawsuit against Corley after discovering he had engaged in alleged wrongdoing adverse to Motorola, but noting that the court would entertain a mechanism by which Corley's interests would be protected if Lewis & Roca remained on the case for Motorola.)

In 2016, New York City Bar issued a lengthy and instructive legal ethics opinion providing useful guidance for lawyers seeking to represent a non-party deposition witness while simultaneously representing a party (presumably the witness's current or former employer, in most cases).

> An attorney is ethically permitted to represent a non-party witness at a deposition in a proceeding where that same attorney also represents a party, subject to the following limitations. First, such a representation may constitute a limited scope representation under Rule 1.2(c). If so, the attorney must ensure that any limitations on the scope of representation are reasonable under the circumstances and must secure informed consent from the witness-client. Second, the attorney must evaluate whether representing the witness-client creates a conflict of interest with the party-client. If so, the attorney must determine whether the conflict is waivable and secure written conflict waivers before proceeding with the representation. The attorney also must continue to monitor the representation to ensure that appropriate steps are taken if a conflict of interest arises later in the proceeding. Third, the attorney must explain that both clients in a joint representation are entitled to receive information that is material to the representation. Thus, if one of the joint clients discloses confidential information to the lawyer that is material to the representation of the other joint client, the lawyer is obligated to share that information with the other client, unless an exception applies or the clients agree to a different

> arrangement. Fourth, when communicating with the deposition witness about the prospective representation, the attorney must comply with the ethical rules governing solicitation of clients.

New York City LEO 2016-2 (7/2016). The New York City Bar helpfully offered detailed separate advice on the issues of loyalty and information flow.

> In the context of limited scope representations, informed consent requires, at a minimum: (i) adequate disclosure of the limitations of the scope of engagement and matters excluded; and (ii) disclosure of the reasonably foreseeable consequences of the limitations, including the complications of having to retain separate counsel later if services outside the scope of the representation become necessary."; "To meet Rule 1.2(c)'s requirements when representing a witness solely for the purposes of a deposition, an attorney should, at a minimum, disclose the following information: What services are included in the representation (see supra at Part I.A discussing the services that may be involved in representing non-party deposition witnesses); What services are excluded from the representation (see id.); The implications of excluding certain services from the representation, such as the possible need to retain separate counsel to advise on those matters and the risk that the witness may face liability or other consequences if she does not secure legal advice with respect to an exclude service; Who will be responsible for paying the lawyer's fees; The identity of the attorneys' other client(s) in the matter; Whether there are any conflicts of interest between the witness and the lawyer's other client(s) and the implications of those conflicts of interest; What will happen if a conflict of interest arises in the future, including who the attorney will continue to represent (see id.); How confidential information will be treated in connection with the joint representation; That the witness is not required to accept the limited scope representation and is free to retain separate counsel.

Id. Fortunately for lawyers seeking guidance on the equally important but often overlooked information flow issue, the New York City LEO provided detailed guidelines.

> Among joint clients, there is a presumption that confidential information that is material to the joint representation will be shared among the joint clients unless some exception applies."; "Importantly, this presumption of shared confidences applies only to confidential information received from one joint client that is material to the other joint client's representation. Therefore, in our scenario, the lawyer is not necessarily obligated to share all confidential information he receives from the party-client with the witness-client. He is only obligated to share information that is material to the lawyer's representation of the witness-client for the purposes of her deposition. Confidential information that relates generally to the litigation, but is not material to the deponent's representation, is not subject to the presumption of shared confidences and need not be shared with the witness-client."; "Although the presumption of shared confidences is the default rule, that rule may be modified by agreement with the clients, under certain circumstances. R. 1.17, Cmt. [31]. Thus, the clients may agree that the attorney will not share confidential communications between the two joint clients, provided this limitation on shared confidentiality does not preclude the attorney from providing competent and diligent representation to both clients. . . . Lawyers who choose to represent deposition witnesses would be wise to avail themselves of this contractual option, by obtaining the witness's informed consent not to receive confidential communications that the party-client shares with the attorney about the case. If the attorney is unable to secure the witness's informed consent to this limitation, he should seriously consider declining the representation. Otherwise, the lawyer could find himself in a situation where the party-client instructs him not to share confidential information that the lawyer believes is material to the witness-client. If that occurs, the lawyer may be forced to withdraw from both representations."; "A thornier issue is whether the attorney should agree not to share confidential information that he receives from the witness-client with the party-client. One of the risks of such an arrangement is that the witness may disclose confidential information to the attorney that would have a significant adverse effect on the party-client or on the case itself. Under those circumstances, the attorney would be prohibited from disclosing that information to the party-client and may be forced to withdraw from one or both of the representations. In light of this potential harm to the party client, a lawyer should agree to withhold confidential information from the party-client only in rare circumstances, and only after the lawyer has explained to the party-client the significant risks of such an arrangement.

Id.

In 2014, a New York City legal ethics opinion analyzed an issue that many lawyers may not even have considered -- whether offering to represent a company employee violated the anti-solicitation rule. The New York City LEO eventually determined that it did not.

• New York Cnty. LEO 747 (6/9/14) (holding that a corporation's lawyer does not act unethically if the lawyer offers to also represent corporate employees, because the purpose of the meeting between the lawyer and the employee does not generate business for the lawyer; "Under Rule 7.3(b), the question of whether the lawyer properly may offer in-person (rather than in writing) to represent the corporation's employee following the conclusion of the interview depends on whether the 'primary purpose' of the lawyer's 'private communication' with the employee 'is the retention of the lawyer or law firm, and a significant motive for [the communication] is pecuniary gain.' We conclude that conveying the corporation's offer, and following up if the employee expresses interest, would not constitute a 'solicitation' for several reasons." (footnote omitted); "First, the primary purpose of the in-person meeting at its inception is not to offer the lawyer's services to the employee, but to interview the employee as a potential witness. Indeed, in many cases, that may turn out to be the exclusive purpose of the meeting, if the lawyer concludes that the employee does not require legal representation or that the lawyer cannot provide it. Second, when the lawyer initially offers to represent the employee, the lawyer is acting on behalf of the corporation, as its lawyer and agent, primarily for purposes of conveying the corporation's offer to secure legal representation for an employee in need of legal assistance. The corporation could, of course, have one of its non-lawyer officers or its in-house counsel extend the offer on behalf of the corporation. But, as the corporation's lawyer and agent, the lawyer may be in a better position to do so, because the lawyer may be better qualified to answer questions and provide information about the implications of the representation. Moreover, in conveying the corporation's offer and, if the employee is interested, following up by offering representation, the lawyer's 'primary purpose' is not to secure legal fees from a new client but to render competent representation to a current corporate client by enabling it to fulfill its objective (and, in some cases, its statutory or contractual obligation or internal policy) of making legal assistance available to an employee who may need counsel." (footnote omitted); "When a corporation's lawyer conveys in person or by telephone an offer to represent a corporate employee in connection with a lawsuit, the application of the solicitation rule, Rule 7.3(a), depends on the factual context and the lawyer's motivation. Under Rivera [Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520 (N.Y. Sup. Ct. 2008)], the communication would be improper if the lawyer's motivation was exclusively 'to gain a tactical advantage in th[e] litigation by insulating [witnesses] from any informal contact with plaintiff's counsel.' However, we conclude that an offer of representation at the corporation's request would be proper where the lawyer initially interviews the employee as a non-client witness in order to learn relevant information and subsequently determines that the individual is in need of legal services as a party or potential testifying witness and that the concurrent representation would be permissible.").

An earlier New York state court case took a frighteningly different approach.

• Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520, 525, 526 (N.Y. Sup. Ct. 2008) (in an opinion by Supreme Court of New York, Kings County, Judge Michael A. Ambrosio, analyzing defendant hospital's law firm Morgan Lewis's conduct in soliciting as separate clients of the firm: two executives of the defendant hospital; one current lower level employee who was involved in the alleged sexual harassment; two other current lower level hospital employees, apparently not involved in the incident; two former hospital supervisory employees; recognizing that the first three individuals would be considered "parties" under New York's ex parte communications rule, and therefore not "subject to informal interviews by plaintiff's counsel"; explaining that the last four witnesses would have been fair game for ex parte communications from the plaintiff's lawyer; "These [four] witnesses are not parties to the litigation in any sense and there is no chance that they will be subject to any liability. They were clearly solicited by Morgan Lewis on behalf of LMC to gain a tactical advantage in this litigation by insulating them from any informal contact with plaintiff's counsel. This is particularly egregious since Morgan Lewis, by violating the Code in soliciting these witnesses as clients, effectively did an end run around the laudable policy consideration of Niesig in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court."; ultimately disqualifying Morgan Lewis from representing the four witnesses, because of the firm's improper solicitation of the witnesses, and reporting Morgan Lewis to the bar's Disciplinary Committee).

Conclusion

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

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

Best Answer

The best answer to **(a)** is **(A) YES**; the best answer to **(b)** is **MAYBE**.
B 8/16

Accidental Creation of a Joint Representation of a Corporate Employee

Hypothetical 16

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

"We represent the company but we could represent you as well, as long as no conflict appeared."

"We can represent you until such time as there appears to be a conflict of interest."

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

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

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

MAYBE

Analysis

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

Theoretically this should never happen. As a matter of ethics, lawyers dealing with company executives who might misunderstand the lawyer's role must "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." [FN80] The standard Upjohn warning includes essentially the same disclosure.

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

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

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

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

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

An earlier example highlighted the dangers of ambiguity. In that case, [FN81] a court criticized (but ultimately found effective) what it called a "watered down 'Upjohn warning[]"' that a company's in house lawyers and outside lawyers gave to executives they were interviewing. The lawyers had made the following statements to the three executives that they interviewed:

"[T]hey represented [the company] but that they 'could' represent him as well, 'as long as no conflict appeared."'

"We can represent [you] until such time as there appears to be a conflict of interest."

"We represent [the company], and can represent [you] too if there is not a conflict." [FN82]

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

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

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

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

Thus, the test essentially amounts to a "default" standard in the absence of some explicit memorialization of a relationship or the lack of a relationship. Careful lawyers have already taken care of this issue, and therefore do not need a "default" standard. However, the large number of cases dealing with such a "default" situation highlights many lawyers' inattention to this important issue.

A 1986 Third Circuit case articulated the most widely recognized standard -- the Bevill standard. [FN83] Under the Bevill standard, a corporate employee seeking to prove an attorney-client relationship with a corporation's lawyer (thus carrying both privilege and other ethics implications) must establish that:

The employee approached the corporation's attorney for legal advice;

The employee made it clear that the request had to do with matters that arose in his or her individual capacity;

The attorney understood this request and advised on the matter even though there was a potential for conflict;

These communications were confidential;

The subject matter of the communication did not concern a more general corporate matter.

The critical element is the last one: The communication usually may not relate to the employee's duties on behalf of the corporation. [FN84]

Most courts now adopt the Bevill standard. For instance, in 2010, the Ninth Circuit explicitly adopted the Bevill standard. [FN85] Other courts have adopted variations of the Bevill standard, but with essentially the same bottom line. [FN86]

Most courts applying the Bevill standard refuse to recognize an attorney-client relationship between a corporation's lawyer and individual corporate constituents. [FN87] For instance, a 2010 Eastern District of Pennsylvania decision analyzed the issue, ultimately concluding that the corporation's lawyer did not also represent an executive.

> [A]t no time did Keany [company lawyer] think that he was representing [executive] individually. In fact, at some point during Keany's representation of [company], he advised [executive] that he should retain separate counsel. . . . [T]he conversations between [executive] and Keany only involved matters within [company] or the business affairs of [company]. At the hearing, [executive] failed to adduce any conversation with Keany which was confidential or which

dealt with [executive's] personal liability or criminal exposure as opposed to [company's]. . . . Under these circumstances, Defendant can claim no attorney client privilege which would bar Keany's testimony at trial or which would trump [company's] waiver of the attorney-client privilege.

United States v. Norris, 722 F. Supp. 2d 632, 639-40 (E.D. Pa. 2010).

Many courts take this approach. [FN88]

• United States v. Blumberg, Crim. A. No. 14-458 (JLL), 2017 U.S. Dist. LEXIS 47298, at *7, *12, *13, *14, *14-*15 (D.N.J. Mar. 27, 2017) (addressing a situation in which defendant Blumberg claimed that the Bracewell law firm represented both his employer and him individually -- meaning that he co-owned the privilege protecting his communications with Bracewell lawyers; noting competing affidavits about whether Bracewell lawyers gave an Upjohn warning; applying "the five-factor Bevill analysis"; explaining that the Bevill doctrine requires employees seeking to claim personal privilege protection for communications with the company's lawyer to prove on a communication-by-communication basis that: (1) they sought legal advice from the lawyer; (2) if so, they "'made it clear that they were seeking legal advice in their individual rather than in their representative capacities"'; (3) the company lawyer agreed to provide such individual advice regardless of possible conflicts; (4) such communications were confidential; and (5) the communications' substance "'did not concern matters within the company or the general affairs of the company"'; in assessing the fifth factor, acknowledging Blumberg's claim that he and Bracewell lawyers discussed his "'potential for criminal exposure,"' and that the lawyers said that employee was a "'fact witness"'; concluding that this one possible exchange did not allow Blumberg to assert a blanket claim of "privilege over all statements made during the Bracewell Meetings"; ultimately holding that the company rather than Blumberg owned the privilege covering his communications with the Bracewell lawyers, and thus could waive it (presumably over his objection)).

• United States v. Drake, Nos. 1:16CR205-2 to -4, 2018 U.S. Dist. LEXIS 63798, at *25-26 (M.D.N.C. Apr. 16, 2018) (finding that Smith Moore represented a bank and not an individual executive, so the bank could disclose the documents to the government; "[T]his court finds that in September 2012, no attorney-client relationship was established between Earnest, individually, and Smith Moore. This court first finds that Earnest did not seek to become a client; instead, Earnest engaged Smith Moore to represent the Bank, of which he was President. Based upon Earnest's statements to the Bank's board of directors, this court finds Earnest understood and believed that he engaged Smith Moore to represent the Bank and was consulting with Smith Moore on behalf of the Bank in his capacity as an officer of the Bank. . . . Any suggestion by Earnest now that he believed Smith Moore was engaged to represent him individually in September 2012 or that he held such an understanding . . . is not credible and is, at a minimum, subjectively unreasonable.").

However, some courts permit those relationships and therefore recognize the privilege in limited circumstances. [FN89] Perhaps more importantly, a court finding that the law firm had established an attorney-client relationship with an employee might disqualify the firm from representing the company if adversity develops between it and the employee. [FN90]

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

Starting in 2012, Penn State's former General Counsel and former Pennsylvania Supreme Court Justice Cynthia Baldwin found herself embroiled in a high-profile question about whether she had simultaneously represented the University and two high-level officials appearing before a grand jury.

• Catherine Dunn, Court Weighs Admissibility of Ex - Penn State General Counsel Testimony in Criminal Cases, Corporate Counsel, Nov. 27, 2012 ("Can Cynthia Baldwin, the former general counsel of Penn State University (PSU), testify against two former Penn State officials in upcoming criminal proceedings?"; "That's the question before a Dauphin County, Pennsylvania, judge as former PSU senior vice president Gary Schultz and athletic director Tim Curley, who's on leave from the university, prepare their defense against charges stemming from the Jerry Sandusky sexual abuse scandal."; "Last week, attorneys for Curley and Schultz filed their second motion in a month related to Baldwin's counsel and the cases being brought against them by the Pennsylvania Attorney General. This latest filing seeks to bar Baldwin's testimony from a preliminary hearing scheduled for next month on new charges of conspiracy, endangering the welfare of children, and obstruction of justice."; "Curley and Schultz have also faced charges of perjury and failure to report suspected child abuse since November 2011. They are scheduled for trial in January."; "In the latest set of papers, filed last Tuesday, defense attorneys argue that testimony by Baldwin would violate Curley and Schultz's attorney-client privilege with the ex-general counsel, who left Penn State in June, having established the school's first in-house legal department in 2010."; "Curley and

Schultz's lawyers argue that Baldwin acted as their attorney during a grand jury investigation into allegations that Sandusky molested children on Penn State's campus."; "Though just what role Baldwin played in the grand jury investigation has itself been an ongoing source of controversy -- particularly since the release of a Penn State internal investigation last summer."; "According to the Patriot News, which cited grand jury transcripts, both Curley and Schultz identified Baldwin as their legal counsel during their grand jury appearances in January 2011. But according to the Freeh Report, Baldwin has maintained that she represented the university during those appearances -- and not Curley or Schultz."; "Baldwin told the Special Investigative Counsel that she went to the Grand Jury appearances as the attorney for Penn State, and that she told both Curley and Schultz that she represented the University and that they could hire their own counsel if they wished,' the report states."; "The defense teams for Curley and Schultz have taken a different view. In a motion to dismiss the charges against the two men filed earlier this month, defense attorneys argued that Baldwin's counsel to Curley and Schultz constituted a conflict of interest, and that they were deprived of their right to counsel."; "Prosecutors countered in a November 14 filing, arguing that 'at the time that Attorney Baldwin represented the Defendants, there was no actual conflict of interest,' according to court papers. 'Based on their interviews prior to testifying, it appeared that the Defendants intended to cooperate with the investigation. Such an action would not conflict with the interests of the other witnesses represented by attorney Baldwin, who also were cooperating."').

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

• Dan Packel, Sandusky Defendants Say State Knew Of Attorney Conduct, Law360, Jan. 8, 2013 ("Two former Pennsylvania State University administrators charged with covering up sexual abuse committed by former assistant football coach Jerry Sandusky argued Friday that the state knew that because of a conflict of interest, they were deprived of their right to counsel prior to going before a grand jury. Former Penn State Vice President Gary Schultz and former Athletic Director Tim Curley allege the prosecution conceded that Penn State's former general counsel Cynthia Baldwin represented both the university as well as the administrators, leading to a conflict of interest. They seek to suppress their grand jury testimony prior to their upcoming criminal trial. They contended in separate filings that Pennsylvania's Office of the Attorney General (OAG) was also aware of the conflict of interest. The circumstances in this case lead to the unavoidable conclusion that although aware of Ms. Baldwin's conflict, the OAG chose to ignore it in order to hear the testimony of her clients,' Curley said. 'Bluntly put, Ms. Baldwin and the OAG put their own interests before the interest[s] of the witnesses they were meant to protect."'; "They contended that Baldwin, in her role for the university, was obligated to work to minimize its civil and criminal liability, and that as a consequence she was incapable of representing them as well since the parties had differing interests. In October motions, Schultz and Curley argued that Penn State's interests were best served by cooperation, while their own interests would have been better served by invoking their own Fifth Amendment rights. In Friday's filings, Curley

and Schultz allege that in its response to their motions, the state conceded that while both defendants had the right to counsel before testifying, Baldwin did not consider herself to be their counsel, even though she represented herself as such to the judge and the defendants.").

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

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

In January 2015, the trial court declined to dismiss criminal charges based on Penn State's General Counsel's alleged improper action and resulting confusion about the existence of an attorney-client relationship with the three former Penn State executives.

• Commonwealth v. Curley, Nos. 5164- & 5165 CR 2011 & 3614-, 3615-, & 3616 CR 2013, slip op. at 27, 30, 34, 34-35, 35, 39 (Pa. C.P. Dauphin Jan. 18, 2015) (in a Memorandum Opinion and Order, refusing to dismiss criminal charges against three Penn State officials, despite Penn State's general counsel's alleged improper activity; noting that Penn State general counsel Cynthia Baldwin attended Grand Jury testimony from defendants Curley and Schultz on January 12, 2011, and herself appeared before the Grand Jury on October 26, 2012, to give testimony adverse to them; rejecting defendants' argument that Baldwin represented them personally, and therefore had acted improperly by testifying herself before the Grand Jury; "Central to disposition of Defendants' claims and theories for relief is determination of the scope of the attorney-client privilege asserted by each Defendant. We must determine whether the record demonstrates the existence of an individual attorney-client privilege between each Defendant personally and Ms. Baldwin."; "We find that, in all matters related to their appearances before the grand jury, including preparation for such appearances, Ms. Baldwin represented each Defendant in his capacity as an agent of the University conducting University business, not in an individual, personal capacity. Thus, in their roles as agents of the University, the Defendants received representation and no denial of counsel occurred."; "We further find that the University, as the holder of the privilege, waived its attorney-client privilege, and that any disclosure of information related to the ongoing investigation of Sandusky fell within the terms of the waiver.

Therefore, no violations of the attorney-client privilege occurred."; "Defendants assert, however, that Ms. Baldwin represented each Defendant individually and, because of alleged failures of or conflicts in representation, they were deprived of the right to counsel throughout the proceedings, which failures or conflicts entitle them to relief."; relying on the Bevill case (In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 124 (3d Cir. 1988)); "Defendants presented no evidence that they sought representation in their individual rather than their organizational

capacities."; "Defendants chose to proceed with Ms. Baldwin as their counsel, aware of her role as University counsel and made no request that she represent them individually."; "[T]here exists no evidence that Ms. Baldwin communicated with the officials in their individual capacities, knowing that a conflict could arise. We cannot conclude that Ms. Baldwin was aware of the facts which raised a conflict between the interests of the University and the Defendants personally; that is, potential personal exposure to criminal charges. In response to Ms. Baldwin's request to gather information required by the subpoena duces tecum directed to the University, Defendants responded that they had none. If Defendants possessed personal knowledge which created either personal criminal exposure or a conflict of interest, we have no evidence upon which we could conclude that Ms. Baldwin was or should have been aware of such information and communicated with them in their individual capacities in spite of such knowledge."; "Defendants have not alleged that conversations occurred with Ms. Baldwin which related to private individual matters outside of their roles as University officials."; "We find that the interests of the University and the individuals appeared aligned at the time the Defendants met with Ms. Baldwin and testified before the grand jury, that is, the interests in providing truthful information within their knowledge, as agents of the University, regarding the apparent target of the investigation, Sandusky."; "We disagree with the assertion that Ms. Baldwin knew or should have known that the interests of the individual Defendants would diverge from the interests of the University, such that an inevitable conflict existed, which denied Defendants of representation.").

Almost exactly one year later, the appellate court reversed -- and dismissed several criminal counts against the three former Penn State executives based upon the General Counsel's conduct.

- Commonwealth v. Spanier, 132 A.3d 481, 485, 487, 496, 497, 498 (Pa. Super Ct. 2016) (dismissing charges against Penn State's former president, because they were based on grand jury testimony during which he reasonably believed that he was being personally represented by Penn State's general counsel Cynthia Baldwin; "Subsequently, after discussions regarding compliance with the Subpoena 1179 were coming to a close, Judge Feudale inquired, 'Cindy, [Ms. Baldwin] just for the record, who do you represent? . . . Outside the presence of Spanier, and for the first time on the record, Ms. Baldwin responded, 'The university.' . . . Judge Feudale followed up, 'The university solely?' Ms. Baldwin answered, 'Yes, I represent the university solely.'" (internal citation omitted); "Upon entering the grand jury room, the OAG queried, 'Sir, you're represented by counsel today?' . . . Spanier responded, 'Yes.' The OAG then asked, 'Could you just identify counsel?' . . . Spanier answered, 'Cynthia Baldwin setting behind me.'" (internal citations omitted); "After entering the courtroom, Ms. Baldwin indicated that she was present with and accompanied by two attorneys. Those attorneys were representing her personally. Despite the foregoing representations by Mr. Fina, a significant number of the Commonwealth's questions to Ms. Baldwin before the grand jury implicated potential confidential communications.'"; "Consistent with our decision in Schultz [Commonwealth v. Schultz, No. 280 MDA 2015, 2016 Pa. Super. LEXIS 30 (Pa. Jan. 22, 2016)], we find that Ms. Baldwin did not adequately explain to Spanier that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests. Although Spanier knew Ms. Baldwin was general counsel for Penn State, this knowledge does not ipso facto result in Spanier understanding that she represented him solely in an agency capacity before the grand jury. Spanier was not aware that Ms. Baldwin was not appearing with him in order to protect his interests and therefore unable to provide advice concerning whether he should answer potentially incriminating questions or invoke his right against self-incrimination. In line with our holdings in Schultz and Curley [Commonwealth v. Curley, No. 299 MDA 2015, 2016 Pa. Super. LEXIS 31 (Pa. Jan. 22, 2016)], we conclude that Ms. Baldwin was incompetent to testify at the grand jury hearing as to communications between her and Spanier."; "As we discussed in both Schultz and Curley, communications between a corporate attorney and an employee of a corporation may be personally privileged. It simply does not follow that, if Ms. Baldwin represented Spanier as an agent of Penn State, none of his communications with her were privileged."; "Instantly, Spanier met with Ms. Baldwin to discuss subpoenas served on Curley, Schultz, Paterno, the University, and later himself. His meetings with Ms. Baldwin relative to his own subpoenas did not pertain to a subpoena for the University. He consulted Ms. Baldwin for the purpose of securing legal advice. The issues discussed between Ms. Baldwin and Spanier were not general business matters related to the operation of the University, but concerned the criminal investigation into Jerry Sandusky and Spanier's own response to learning of certain information in 1998 and 2001."; "[W]e agree that an attorney-client relationship existed between Spanier and Ms. Baldwin before and during his grand jury testimony, thereby giving rise to an attorney-client privilege.

Ms. Baldwin's grand jury testimony regarding communications with Spanier constituted a violation of the attorney-client privilege, rendering her incompetent to testify. Accordingly, and in light of our holdings in Schultz and Curley, we quash the challenged charges of perjury, obstruction of justice, and conspiracy to commit those crimes.").

• Commonwealth v. Schultz, 133 A.3d 294, 301, 303, 321 n.22, 323, 324, 325, 326, 326-17, 328 (Pa. Super. Ct. 2016) (dismissing charges against Penn State's former senior vice president for finance and business, because they were based on grand jury testimony during which he reasonably believed that he was being personally represented by Penn State's general counsel Cynthia Baldwin; "Ms. Baldwin did not advise Schultz regarding his Fifth Amendment right against self-incrimination. Ms. Baldwin also did not explain the difference between her representation of Schultz in his individual capacity or as an agent of his former employer, Penn State. Nonetheless, she did inform Schultz that any information he told her was not confidential insofar as she could relay it to the University Board of Trustees."; citing Ms. Baldwin's statement; "'I told him that as long as there was no conflict, that I could go in with him."' (internal citation omitted); "Schultz then entered the courtroom with Ms. Baldwin, who was seated beside him during his testimony. At the outset, a deputy attorney general asked Schultz, 'You are accompanied today by counsel, Cynthia Baldwin, is that correct?' . . . Schultz answered, 'That is correct.' . . . Ms. Baldwin did not indicate at that time that she represented Schultz solely in an agency capacity due to his prior employment at Penn State or that she was not representing him in a personal capacity."; "Both the Tenth Circuit Court of Appeals and the First Circuit of Appeals have explained the fifth aspect of Bevill [In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1988)] as follows, 'The fifth prong of In the Matter of Bevill, properly interpreted, only precludes an officer from asserting an individual attorney client privilege when the communication concerns the corporation's rights and responsibilities. However, if the communication between a corporate officer and corporate counsel specifically focuses upon the individual officer's personal rights and liabilities, then the fifth prong of In the Matter of Bevill can be satisfied even though the general subject matter of the conversation pertains to matters within the general affairs of the company. In re Grand Jury Subpoena, 274 F.3d 563, 572 (1st Cir. 2001) (citing Grand Jury Proceedings v. United States, 156 F.3d 1038, 1041 (10th Cir. 1998))."; "Ms. Baldwin also communicated with Schultz and expressed her belief that no conflict prevented her from representing Schultz and Curley. Thus, ostensibly, Ms. Baldwin was aware of the potential for a conflict of interest between Schultz and other individuals. The communication between Schultz and Ms. Baldwin occurred one-on-one and she did not reveal those communications to the Board of Trustees of Penn State, outside of possibly Spanier.

The communications concerned the rights and responsibilities of Schultz relative to appearing before a criminal investigating grand jury and not Penn State's corporate rights." (footnote omitted); "Moreover, Ms. Baldwin did not adequately explain to Schultz that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests. Although Schultz was certainly aware that Ms. Baldwin was general counsel for Penn State, it is unreasonable to conclude that this awareness by a lay person ipso facto results in Schultz knowing that she represented him solely in an agency capacity."; "Ms. Baldwin's after-the-fact justifications for her own testimony were not expressed on the record prior to Schultz's testimony, nor is there sufficient evidence that she properly advised Schultz of the limits of her representation. Simply stating that she could reveal communications to the Penn State Board of Trustees and was general counsel to the University was decidedly inadequate."; "Insofar as Ms. Baldwin has repeatedly maintained that she did not represent Schultz's individual interests, absent an adequate colloquy or other evidence reflecting acquiescence to such limited representation for purposes of her presence during his grand jury testimony, we find that Schultz's statutory right to counsel during his grand jury testimony was infringed. Indeed, we agree that Ms. Baldwin's acknowledged agency representation of Schultz during his grand jury testimony, without proper and adequate explanation and informed consent to allow limited representation, left Schultz constructively without personal counsel for purposes of his grand jury appearance."; "As Schultz consulted with Ms. Baldwin for purposes of preparing for his grand jury testimony relative to a criminal investigation into Jerry Sandusky, and reasonably believed she represented him, and Ms. Baldwin neglected to adequately explain the distinction between personal representation and agency representation, and give appropriate warnings to Schultz, we conclude that all the communications between Schultz and Ms. Baldwin were protected by the attorney-client privilege. Consequently, Ms. Baldwin breached that privilege by testifying before the grand jury with respect to such communications."; "[W]e preclude Ms. Baldwin from testifying in future proceedings regarding privileged communications between her and Schultz, absent a waiver by Schultz."; "Since Schultz was constructively

without counsel during his grand jury testimony, and he did not provide informed consent as to limited representation, we agree that his right against self-incrimination was not protected by Ms. Baldwin's agency representation, and the appropriate remedy is to quash the perjury charge arising from the first grand jury presentment."; "The charges of perjury, obstruction of justice, and conspiracy are hereby quashed.").

• Commonwealth v. Curley, 131 A.3d 994, 998, 1006-07, 1007 (Pa. Super Ct. 2016) (dismissing charges against Penn State's former athletic director, because they were based on grand jury testimony during which he reasonably believed that he was being personally represented by Penn State's general counsel Cynthia Baldwin; "Curley entered the courtroom with Ms. Baldwin, who was seated beside him during his testimony. At the outset, a deputy attorney general asked Curley, 'You have counsel with you?' . . . 'Yes, I do.' . . . The prosecutor then asked, 'Would you introduce her, please?' . . . Curley responded, 'My counsel is Cynthia Baldwin.' . . . Ms. Baldwin did not indicate at that time that she represented Curley solely in an agency capacity or that she was not representing him in a personal capacity."; "In the present case, Curley met with Ms. Baldwin to discuss the subpoena served on him to testify before a criminal grand jury investigating Jerry Sandusky. The subpoena was not for the University. This meeting was for the purpose of securing legal advice. The trial court itself found that Curley sought legal advice from Ms. Baldwin related to appearing before the grand jury investigation into Jerry Sandusky."; "Moreover, Ms. Baldwin did not adequately explain to Curley that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests. Although Curley was certainly aware that Ms. Baldwin was general counsel for Penn State, this awareness did not result in Curley knowing that she represented him solely in an agency capacity. Indeed, it is illogical to conclude that Curley was aware of this critical distinction when there is no evidence to suggest that at the relevant time, the OAG and the supervising grand jury judge, experts in the law, were able to distinguish Ms. Baldwin's representation of Curley as being so limited."; "Curley's final issue, that Ms. Baldwin violated his attorney-client privilege by testifying at a grand jury hearing regarding communications between him and her, flows from his prior positions. For the reasons already outlined, we agreed that Ms. Baldwin's grand jury testimony was improper. Ms. Baldwin was not competent to testify. Accordingly, and in light of our holding and discussion in Schultz [Commonwealth v. Schultz, 133 A.3d 294 (Pa. Super Ct. 2016)], we quash the obstruction of justice and related conspiracy charge and find that Ms. Baldwin is precluded from disclosing privileged communications between herself and Curley.").

In April 2016, the Pennsylvania Attorney General (who then was not able to practice law, because she had been suspended) determined not to appeal these rulings.

• Dan Packel, Pa. To Drop Appeals In Penn State Sex Abuse Cover-Up Case, Law360, Apr. 29, 2016 ("Pennsylvania Attorney General Kathleen G. Kane announced Friday that the state would not appeal rulings that slashed the charges faced by three former Pennsylvania State University administrators accused of interfering with the investigation into assistant football coach Jerry Sandusky's sexual abuse."; "Kane pointed to a legal opinion from recently appointed state Solicitor General Bruce Castor, who acknowledged concerns about how the trio were represented when they testified in front of a grand jury."; "The state's Superior Court in January found fault with the conduct of university general counsel Cynthia Baldwin, concluding that she should not have been permitted to testify against former Penn State President Graham Spanier, former Athletic Director Tim Curley and former Senior Vice President Gary Schultz, as their communications with her were protected by attorney-client privilege."; "The court also found that Schultz and Spanier were not properly represented during their testimony before a grand jury, as Baldwin had advised them that she was serving as their counsel when she had a stronger duty to the university."; "'Attorney General Kane recognizes the efforts of members of her office to get the cases to this point, but now directs her staff shall proceed in accordance with the opinions of the Superior Court, and prepare the cases for trial,' she said in a release."; "The state had initially asked the Superior Court for an en banc rehearing, but the court denied the request at the end of March. As a result of the decision not to appeal the rulings to the state's Supreme Court, Spanier and Schultz will no longer face perjury, obstruction of justice and conspiracy charges. Curley will no longer face obstruction of justice and conspiracy charges."; "The three men still face charges of failure to report suspected abuse and endangering the welfare of children, and Curley also faces a perjury charge. The state's decision not to appeal paves the way for a trial on these remaining charges, which had originally been anticipated for the spring of 2014, before the questions surrounding the grand jury testimony halted the process.").

This eight year long saga did not end well for the former Penn State General Counsel and former Pennsylvania Supreme Court Justice. The Court on which she formerly served publicly publicly admonished her for undertaking the joint representation of Penn State (her institutional client/employer) and the three executives.

• Office of Disciplinary Counsel v. Baldwin, 225 A.3d 817, 832, 840-41, 849 (Pa. 2020) (publicly reprimanding former Penn State General Counsel and Pennsylvania Supreme Court Justice Cynthia Baldwin for improperly representing Penn State and three Penn State executives accused of covering up the Sandusky sex abuse scandal; "Based upon the entirety of the evidence or record, we agree with the conclusions of both the Hearing Committee and the Disciplinary Board that Respondent represented Curley, Schultz and Spanier in their personal capacities at the time of their grand jury testimony."; "By agreeing to undertake the concurrent representation of Penn State, Curley, Schultz and Spanier, Respondent committed multiple violations of Pa.R.P.C. 1.7. Rule 1.7 requires attorneys to avoid conflicts of interest in the representation of multiple clients. A conflict of interest exists under Rule 1.7(a)(1) when the representation of one client is materially adverse to the interests of another client or where there is a 'significant risk' that the representation of one client will be materially limited by the lawyer's responsibilities to another client as proscribed by Pa.R.P.C. 1.7(a)(2). A client may waive a conflict of interest, but only upon providing informed consent. Pa.R.P.C. 1.7(a)(2). In the present circumstance, the Disciplinary Board properly concluded that Respondent's concurrent representation of Penn State and Curley, Schultz and Spanier 'undoubtedly created a significant risk that her ability to consider, recommend or carry out an appropriate course of action for each client could be materially limited by her representation of Penn State.'"; "Respondent asserts a number of defenses to ODC's claims of violations of Rule 1.6(a). As an overarching defense, Respondent relies on the concept of waiver applicable to the attorney-client privilege. In this regard, we note that Respondent offers no legal analysis to explain the alleged interplay between the attorney-client privilege, an evidentiary privilege, and the duty of confidentiality embodied in the Rules of Professional Conduct, specifically Rule 1.6(a). Pertinently, Respondent does not explain how the waiver of an evidentiary privilege can be the basis of an ex post facto defense to a disciplinary claim when the client, the holder of the claim, was not heard in the evidentiary proceedings before the allegedly waived communication is discussed.").

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

Best Answer

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

B 8/16

[FNa1]. These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

[FN1]. ABA LEO 405 (4/19/97) (Determining whether a lawyer may represent one government entity while being adverse to another depends upon "whether the two government entities involved must be regarded as the same client" or whether one representation may be "materially limited" by the other, in which case the conflict might be curable with consent. Determining if governmental entities are the same client is a "matter of common sense and sensibility" including such factors as: entities' understandings and expectations; any understanding between the entities and the lawyers; whether the government entities have "independent legal authority with respect to the matter for which the lawyer has been retained"; and the entities' stake in the substantive issues or shared concerns about the outcome. Determining if one representation would be "materially limited" by another representation depends on whether the matter would affect the "financial well-being or programmatic purposes" of either client. In some situations, a lawyer's representation of a government entity "on an important issue of public policy so identifies her with an official public position" that the lawyer could not oppose the government, even on an entirely unrelated matter. (internal quotations and citations omitted)).

[FN2]. ABA LEO 361 (7/12/91) (explaining that a lawyer who represents a partnership does not automatically represent all of the individual partners, although the lawyer can establish a separate representation of the partners with disclosure and consent about the possible conflicts; also answering the following question: "Under what circumstances does information received by the partnership's lawyer from an individual partner constitute 'information relating to representation' of the partnership within the meaning of the Rule 1.6(a) so as to give the partnership a right to access to that information; and conversely, to what extent is each partner entitled to know whatever information has been conveyed on the partnership's behalf to the partnership's

lawyer?"; concluding that "the Committee believes that information received by a lawyer in the course of representing the partnership is 'information relating to the representation' of the partnership, and normally may not be withheld from individual partners"; noting that this general rule would not apply "if the lawyer were representing the partnership in a dispute between the partnership and one or more individual partners"; noting that the issue of confidentiality "will often arise when the lawyer for a partnership also represents an individual partner, or a client adverse to the interests of an individual partner"; citing several cases in which a lawyer representing a partnership could not withhold information from any partner in an action by one of the partners to dissolve the partnership; holding that a lawyer representing a closely held corporation could not claim attorney-client privilege in withholding information about the communication between a lawyer and one of the officers (and co-owners) in an action brought in connection with the ouster of a second officer (and other co-owner); "The mandate of Rule 1.6(a), not to reveal confidences of the client, would not prevent the disclosure to other partners of information gained about the client (the partnership) from any individual partner(s). Thus, information thought to have been given in confidence by an individual partner to the attorney for a partnership may have to be disclosed to other partners, particularly if the interests of the individual partner and the partnership, or vis-a-vis the other partners, become antagonistic."; explaining that lawyers should define their role at the beginning of the representation; "If an attorney retained by a partnership explains at the outset of the representation, preferably in writing, his or her role as counsel to the organization and not to the individual partners, and if, when asked to represent an individual partner, the lawyer puts the question before the partnership or its governing body, explains the implications of the dual representation, and obtains the informed consent of both the partnership and the individual partners, the likelihood of perceived ethical impropriety on the part of the lawyer should be significantly reduced.").

[FN3]. ABA LEO 365 (7/6/92) (a lawyer representing a trade association must first determine whether an attorney-client relationship exists with the individual members of the association; Rule 1.13 generally indicates that the lawyer represents the entity, and a comment to that rule "notes that the duties it defines apply equally to unincorporated associations. Thus the approach taken in this opinion is not affected by whether or not the trade association is recognized as a separate jural entity."; explaining that although generally a trade association's lawyer does not represent individual members, "circumstances in a particular instance" might support a finding that such a relationship exists (for instance, the smaller the association, the more likely the relationship); noting that even if the lawyer does not represent the individual association members, the members might be considered "derivative" clients or "vicarious" clients for conflicts purposes; "For example, and most typically, if the member has disclosed relevant confidential information to the association's counsel (a factor that may indicate the existence of an actual lawyer-client relationship, but which in the Committee's view is also one of the particular facts that can require disqualification in the 'derivative' client analysis), disqualification is required.").

[FN4]. Florida Rule 4-1.7 cmt. ("The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.").

[FN5]. Philadelphia LEO 2008-11 (2008) ("It is the Committee's understanding that the inquirer is defense counsel for an individual who was the driver of a car involved in a one-vehicle accident in which her husband and one son were injured and another son killed. The inquirer has been retained in this role by the client's liability insurer."; "The inquirer's client's husband has instituted suit against her. The client is said to have $25,000/50,000 (presumably per claim and in the aggregate, respectively) in liability insurance limits. The client is the sole defendant and it is the inquirer's belief that there are no liability defenses."; "The client has expressly instructed the inquirer not to 'vigorously defend against my family's injuries' and not to hire expert witnesses. At the same time, the inquirer is concerned because 'the insurance policy obligates me to defend the insured.'"; "It is the Committee's further understanding that the client has discussed with the inquirer and understands the potential adverse consequences of such a 'limited defense' position and has directed the inquirer to continue to proceed as directed. Under the circumstances, therefore, it is the Committee's opinion that the inquirer is bound to honor the client's decision in this regard.").

[FN6]. 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971).

[FN7]. Id. at 1104.

[FN8]. Ryskamp v. Looney, Civ. A. No. 10-cv-00842-WJM-KLM, 2011 U.S. Dist. LEXIS 98644 (D. Colo. Sept. 1, 2011) (finding that the Garner doctrine did not apply because a small number of shareholders had filed a lawsuit and could not establish good cause); Kosachuk v. Harper, C.A. No. 17928, 2000 Del. Ch. LEXIS 176, at *3 (Del. Ch. Dec. 9, 2000); Weiser v. Grace, 683 N.Y.S.2d 781, 786 (N.Y. Sup. Ct. 1998) (assessing plaintiff shareholders' efforts to obtain documents from the special litigation committee of defendant company; "The court recognizes that some of the documents sought may contain privileged matter which may be immune from discovery, notwithstanding their relevance to issues of good faith and the reasonableness of the investigation. Thus, an in camera review is the appropriate procedural vehicle to ensure that those privileges are not violated, while permitting plaintiffs to obtain the discovery necessary to challenge the SLC's [Special Litigation Committee] good faith. However, the court notes that the application of the attorney-client privilege is problematic. The SLC's counsel represents both the SLC and the corporation as a whole (e.g., the plaintiff shareholders). Under such circumstances, the attorney-client privilege would not bar discovery of all communications between counsel and the SLC."; noting that the Garner doctrine might entitle plaintiffs to review the documents, and ordering an in camera review to assist in that determination).

[FN9]. Milroy v. Hanson, 875 F. Supp. 646, 651-52 (D. Neb. 1995).

[FN10]. Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412 (N.D. Ill. 2006).

[FN11]. In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 475 (S.D.N.Y. 1996).

[FN12]. Monfardini v. Quinlan, No. 02 C 4284, 2004 U.S. Dist. LEXIS 4054, at *18-19 (N.D. Ill. Mar. 11, 2004); Bairnco Corp. Sec. Litig. V. Keene Corp., 148 F.R.D. 91 (S.D.N.Y. 1993).

[FN13]. In re Fuqua Indus. S'holder Litig., Consol. Civ. A. No. 11974, 2002 Del. Ch. LEXIS 52 (Del. Ch. May 2, 2002).

[FN14]. Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412 (N.D. Ill. 2006).

[FN15]. Weil v. Investment/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 23 (9th Cir. 1981) ("Without passing on the merits of Garner, we find it inapposite to the case before us. Weil is not currently a shareholder of the Fund, and her action is not a derivative suit. The Garner plaintiffs sought damages from other defendants in behalf of the corporation, whereas Weil seeks to recover damages from the corporation for herself and the members of her proposed class. Garner's holding and policy rationale simply do not apply here.").

[FN16]. In re Omnicom Grp. Inc., Sec. Litig., 233 F.R.D. 400, 412 (S.D.N.Y. 2006).

[FN17]. Monfardini v. Quinlan, No. 02 C 4284, 2004 U.S. Dist. LEXIS 4054, at *16, *18 (N.D. Ill. Mar. 11, 2004; Fausek v. White, 965 F.2d 126 (6th Cir.), cert. denied, 506 U.S. 1034 (1992); Sandberg v. Va. Bankshares, Inc., 979 F.2d 332 (4th Cir. 1992), vacated on settlement, No. 91-1873, 1993 U.S. App. LEXIS 32286 (4th Cir. Apr. 7, 1993); Deutsch v. Cogan, 580 A.2d 100, 106, 108 (Del. Ch. 1990).

[FN18]. Sigma Delta, LLC v. George, Civ. A. No.: 07-5427 SECTION: "A" (5), 2007 U.S. Dist. LEXIS 94213 (E.D. La. Dec. 20, 2007).

[FN19]. Id. at *9.

[FN20]. Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412 (N.D. Ill. 2006).

[FN21]. Weiser v. Grace, 683 N.Y.S.2d 781, 786 (N.Y. Sup. Ct. 1998) (assessing plaintiff shareholders' efforts to obtain documents from the special litigation committee of defendant company; "The court recognizes that some of the documents sought may contain privileged matter which may be immune from discovery, notwithstanding their relevance to issues of good faith and the reasonableness of the investigation. Thus, an in camera review is the appropriate procedural vehicle to ensure that those privileges are not violated, while permitting plaintiffs to obtain the discovery necessary to challenge the SLC's [Special Litigation Committee] good faith. However, the court notes that the application of the attorney-client privilege is problematic. The SLC's counsel represents both the SLC and the corporation as a whole (e.g., the plaintiff shareholders). Under such circumstances, the attorney-client privilege would not bar discovery of all communications between counsel and the SLC."; noting that the Garner doctrine might entitle plaintiffs to review the documents, and ordering an in camera review to assist in that determination).

[FN22]. SEC v. Roberts, 254 F.R.D. 371, 378 n.4, 378 (N.D. Cal. 2008) (assessing privilege issues in connection with an internal corporate investigation of possible options backdating at McAfee, conducted by the Howrey law firm; concluding that the McAfee Board and the Special Committee did not share a common interest; "The court notes that not only is the Board not Howrey's client such that the attorney-client privilege does not attach, the Board also does not have a common interest with the Special Committee since it was the Special Committee's mandate to ascertain whether members of the Board . . . may have engaged in wrongdoing. In this respect, this court disagrees with the conclusion reached in In Re BCE West, L.P., No. M-8-85, 2000 U.S. Dist. LEXIS 12590, 2000 WL 1239117 (S.D.N.Y. Aug. 31, 2000)."; finding that Howrey's disclosure to the Board triggered a waiver; "Certain instances of waiver are straightforward. When Howrey 'detailed for the Board the various stock option issues, improprieties and erroneous option grant dates that were discovered in the investigation,' . . . it waived the work product privilege with respect to its conclusions regarding which option grant dates were improper or erroneous."; ultimately finding a broad scope of waiver, although applied on an interviewee-by-interviewee basis -- so that Howrey's disclosure of its opinions about the interview or the interviewee triggered a subject matter waiver covering materials that the law firm created during that interview; allowing discovery by McAfee's former executive, who was defending against an SEC action).

[FN23]. Ryan v. Gifford, Civ. A. No. 2213-CC, 2008 Del. Ch. LEXIS 2, at *3, *10, *10-11, *11, *12, *12 n.9, *16, *17-18 (Del. Ch. Jan. 2, 2008) (unpublished opinion) (addressing a situation in which the law firm of Orrick Herrington and forensic accounting firm LECG conducted an investigation into possible options backdating by executives and directors of Maxim; noting that Maxim's board established a Special Committee composed of a single director, which was not an "independent Special Litigation Committee" under Delaware law; explaining that the single-member Special Committee retained Orrick, who did not provide a written report but instead presented an oral report to a Maxim board meeting attended by three directors represented by the law firm of Quinn Emanuel in the derivative action that prompted Orrick Herrington's investigation; noting that Maxim's board found that some directors received backdated options, but did not take any action to recover any damages; further explaining that Maxim "provided details of this work to third-parties, including NASDAQ and publicly to investors (through the SEC Form 8-K). Moreover, the Special Committee itself provided a number of documents to the SEC, the United States Attorney's Office, and Maxim's current and former auditors."; also noting that "the director defendants in this case have specifically made use of the Special Committee's findings and conclusions for their personal benefit and have argued to this Court that the Special Committee's exoneration of them should be accorded deference. The director defendants have made these arguments in a brief, opposing plaintiffs' motion to amend the complaint, in which coincidentally Maxim has expressly joined. Further, the director defendants have extensively relied upon the Special Committee's findings both in opposing plaintiffs' motion for summary judgment and in support of their own motion for summary judgment.

At the time of the November 30 decision, in their unamended summary judgment brief, the director defendants explicitly rely upon the unwritten 'findings' of the Special Committee that purport to absolve the director defendants of liability." (footnote omitted); "[T]he director defendants have submitted an amended brief in support of their motion for summary judgment that purports to disavow reliance on the Special Committee's findings, despite their explicit reliance thereon in the first brief in support of their motion."; noting that in an earlier opinion "the Court ruled that Maxim, its Special Committee and Orrick

must produce all material[s] related to the Special Committee's investigation that were withheld on grounds of attorney-client privilege."; "The Court also directed Orrick to turn over its work-product, including its interview notes, for in camera review. Orrick does not seek to appeal any aspect of this Court's ruling, including the ruling that plaintiffs have made a showing of good cause to obtain its non-opinion work product."; "[I]t is worthwhile to repeat that the relevant factual circumstances here include the receipt of purportedly privileged information by the director defendants in their individual capacities from the Special Committee. The decision would not apply to a situation (unlike that presented in this case) in which board members are found to be acting in their fiduciary capacity, where their personal lawyers are not present, and where the board members do not use the privileged information to exculpate themselves."; noting that Maxim did not appeal the court's earlier decision that the Garner doctrine overcame any privilege claim; after explaining that the court's Garner determination "provides an independent basis" for its conclusion requiring Maxim to disclose the documents; also noting the directors' essentially inaccurate description about whether they were relying on Orrick Herrington's report; "At the time of the November 30 decision, however, the director defendants explicitly asserted that the findings of the Special Committee were entitled to deference from this Court. Moreover, even if this Court ignores the suspicious timing of the director defendants' purported disavowal of reliance on the investigation, Maxim seeks to further avail itself of the Special Committee's report, which will redound to the benefit of the director defendants."; declining to certify an appeal. (emphasis added)).

[FN24]. Id. at *23.

[FN25]. Krys v. Paul, Weiss, Rifkind, Wharton, & Garrison LLP (In re China Med. Techs., Inc.), 539 B.R. 643, 654, 655, 656, 658 (S.D.N.Y. 2015) (holding that a bankruptcy liquidator could waive the attorney-client privilege that belonged to a company's Audit Committee, but could not waive the Audit Committee's work product protection, which belonged solely or jointly to the Audit Committee's lawyer's at Paul Weiss; "The issue now before the Court is whether the capacity of the Audit Committee to retain independent counsel and to conduct unfettered internal investigations that implicate corporate management should thwart the statutory obligation of a trustee in bankruptcy to maximize the value of the estate by conducting investigations into a corporation's prebankruptcy affairs."; "Weintraub [CFTC v. Weintraub, 471 U.S. 343 (1985)] did not squarely address the circumstances here. Its analysis was limited to whether privileges asserted by a corporation's counsel were waivable by that corporation's trustee in bankruptcy. The asserted privileges here relate to an investigation by Appellees on behalf of a corporation's audit committee, and the precise relationship between that committee and the corporation is disputed. Despite these factual distinctions, however, the same considerations that weighed in favor of the trustee in Weintraub weigh in favor of Appellant here."; "It is true that the Audit Committee was 'independent' in some sense. It could retain counsel, and it legitimately expected that its communications with counsel would be protected against intrusion by management. But the Audit Committee is not an individual, nor is its status analogous to that of an individual. Instead, it was a committee constituted by CMED's Board of Directors, and thus a critical component of CMED's management infrastructure."; "[T]he justifications for protected attorney-client communications dissipate in bankruptcy. Prebankruptcy, audit committees 'play a critical role in monitoring corporate management and a corporation's auditor.' . . .

Without the prebankruptcy protection of attorney-client privilege, audit committees could not provide 'independent review and oversight of a company's financial reporting processes, internal controls and independent auditors,' nor could they offer a 'forum separate from management in which auditors and other interested parties [could] candidly discuss concerns.' SEC Release No. 8220, 'Standards Relating to Listed Company Audit Committees,' File No. 87-02-03, 79 SEC Docket 2876, 2003 WL 1833875, at *19 (Apr. 9, 2003). But as the Bankruptcy Court noted in its Opinion, 'any miscreants have left the company' in bankruptcy, . . .; corporate management is deposed in favor of the trustee, and there is no longer a need to insulate committee-counsel communications from managerial intrusion. Without a legitimate fear of managerial intrusion or retaliation in bankruptcy, Appellees' assertions as to a potential chilling effect ring hollow."; "Although the Court recognizes that this is a difficult issue in a largely ill-defined area of the law, it nevertheless respectfully disagrees with the legal determination of the Bankruptcy Court below. The Court finds that Appellant, as CMED's Liquidator, now owns and can thus waive the Audit Committee's attorney-client privilege, regardless of the Committee's prebankruptcy independence. The Bankruptcy Court's ruling to the contrary is hereby reversed."; "The Court's ruling as to attorney-client privilege does not extend, however, to Appellees' assertion of work product protections, which the Bankruptcy Court Opinion only peripherally addressed. . . . Importantly, because 'work product protection belongs to the Audit Committee's counsel and cannot be waived by the client' . . .

it does not fall within the ambit of Weintraub. . . . Thus, even assuming that the Liquidator owns those documents for which Appellees have asserted work-product protection, he cannot waive this protection unilaterally. Appellant, at the very least, has not cited any cases suggesting otherwise.").

[FN26]. In re Suprema Specialties, Inc., Ch. 7 Case No. 02-10823 (JMP), 2007 Bankr. LEXIS 2304 (Bankr. S.D.N.Y. July 2, 2007) (not for publication).

[FN27]. AP Links, LLC v. Russ, 299 F.R.D. 7 (E.D.N.Y. 2014).

[FN28]. Kirschner v. K&L Gates LLP, 46 A.3d 737, 742, 743, 744, 749, 749 n.3, 749, 749-50, 750, 751, 753, 753 n.6, 754 (Pa. Super. Ct. 2012) (holding that a liquidation trustee can pursue malpractice, breach of fiduciary duty, and other claims against K&L Gates on behalf of a bankrupt company, despite a retainer letter explicitly indicating that K&L Gates did not represent the company, but instead represented only the special committee of a board of directors; explaining that after several of its senior financial executives resigned after accusing CEO Podlucky of financial improprieties, Le-Nature's board of directors determined that it was "in the best interest of the Company to appoint a special committee of independent directors" to investigate matters; noting that the Special Committee determined that "it was critical to retain on behalf of the company, legal counsel with experience in conducting such investigations; noting that K&L Gates's retainer letter contained the following provision: "'We understand that we are being engaged to act as counsel for the special committee and for no other individual or entity, including the Company or any affiliated entity, shareholder, director, officer or employee of the Company not specifically identified herein. We further understand that we are to assist the Committee in investigating the facts and circumstances surrounding the aforementioned resignations and assist the Special Committee in developing any findings and recommendations to be made to the full Board of the Company with respect thereto. The attorney - client relationship with respect to our work, including our work product, shall belong to the Committee. Only the Committee can waive any privilege relating to such work.'"; noting that K&L Gates hired P&W as a financial expert pursuant to a retainer letter that contained the following sentence: "'P&W shall provide general consulting, financial accounting, and investigative or other advice as requested by K&L [Gates] to assist it in rendering legal advice to Le [-]Nature's." (alterations in original); explaining that K&L gave a draft of its investigation report to Podlucky, even though he was not a member of the Special Committee; reciting the report as finding no evidence that Podlucky had engaged in impropriety; pointing out that Poducky later hired K&L Gates on behalf of the company to prepare an initial public offering, but that eventually a custodian found "massive fraud" at the company, which caused it to declare bankruptcy; acknowledging that the trial court had dismissed the liquidation trustee's legal malpractice/negligence claim against the firm, because the firm had been retained to protect the interests of the shareholders rather than the company itself; reversing the trial court's finding, concluding "[t]he averments of the Amended Complaint, taken as true, establish that Le-Nature's, acting through its Board and the Board's Special Committee, sought the legal advice and assistance of K&L Gates's.

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

damages, we conclude that the Complaint before this Court does not, under Pennsylvania law."; "According to the Amended Complaint, these damages were reasonably foreseeable and K&L Gates's malpractice enabled Podlucky and the interested directors to continue their fraudulent activity.").

[FN29]. Id. at 742.

[FN30]. Id.

[FN31]. Kirschner v. K&L Gates LLP, 46 A.3d 737, 749 (Pa. Super. Ct. 2012).

[FN32]. Id. at 749 n.3.

[FN33]. Id. at 749.

[FN34]. Id. at 749-50.

[FN35]. Id. at 750.

[FN36]. Id. at 750.

[FN37]. The court pointed to the theory of "deepening insolvency," but found that the complaint did not allege such a theory. "Despite the fact that other courts may have determined that similar complaints involving Le-Nature's have alleged deepening insolvency as damages, we conclude that the Complaint before this Court does not, under Pennsylvania law." Id. at 753 n.6.

[FN38]. ABA Model Rule 1.13(a).

[FN39]. When this issue arises in the context of the attorney-client privilege, most courts have held that all members of the corporate family are within the scope of the privilege. See, e.g., Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989); United States v. AT&T, 86 F.R.D. 603, 616-17 (D.D.C. 1979); Weil Ceramics & Glass, Inc. v. Work, 110 F.R.D. 500, 503 (E.D.N.Y. 1986).

[FN40]. ABA LEO 390 (1/25/95) ("A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter. However, a lawyer may not accept such a representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer; or if there is an understanding between the lawyer and the corporate client that the lawyer will avoid representations adverse to the client's corporate affiliates; or if the lawyer's obligations to either the corporate client or the new, adverse client, will materially limit the lawyer's representation of the other client. Even if the circumstances are such that client consent is not ethically required, as a matter of prudence and good practice a lawyer who contemplates undertaking a representation adverse to a corporate affiliate of a client will be well advised to discuss the matter with the client before undertaking the representation."; explaining that "[c]learly, the best solution to the problems that may arise by reason of clients' corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer's clients, or are to be so treated for conflicts purposes"; noting that "considerations of client relations will ordinarily dictate the lawyer's course of conduct" without addressing ethics issues; noting that "circumstance of only partial ownership . . . is a variable that might affect the result in a particular case," but does not fundamentally change the analysis; holding that "in the absence of a clear understanding otherwise, the better course is for a lawyer to obtain the corporate client's consent before the lawyer undertakes a representation adverse to its affiliate"; also noting that lawyers must follow whatever retainer contract they enter into with clients, but that "a client that has such an expectation [that its lawyer will not be adverse to its affiliate] has an obligation to keep the lawyer apprised of changes in the composition of the corporate family"; addressing various factors in determining the propriety of a lawyer taking matters adverse to the affiliate of a corporate client; "[T]he nature of the lawyer's dealings with affiliates of the corporate client may be such

that they have become clients as well. This may be the case, for example, where the lawyer's work for the corporate parent -- say, on a stock issue or bank financing -- is intended to benefit all subsidiaries, and involves collecting confidential information from all of them. Even if the subject matter of the lawyer's representation of the corporate client does not involve the affiliate at all, however, the lawyer's relationship with the corporate affiliate may lead the affiliate reasonably to believe that it is a client of the lawyer. For example, the fact that a lawyer for a subsidiary was engaged by and reports to an officer or general counsel for its parent may support the inference that the corporate parent reasonably expects to be treated as a client. . . . A client-lawyer relationship with the affiliate may also arise because the affiliate imparted confidential information to the lawyer with the expectation that the lawyer would use it in representing the affiliate. . . .

Additionally, even if the affiliate confiding information does not expect that the lawyer will be representing the affiliate, there may well be a reasonable view on the part of the client that the information was imparted in furtherance of the representation, creating an ethically binding obligation that the lawyer will not use the information against the interests of any member of the corporate family. Finally, the relationship of the corporate client to its affiliate may be such that the lawyer is required to regard the affiliate as his client. This would clearly be true where one corporation is the alter ego of the other. It is not necessary, however, for one corporation to be the alter ego of the other as a matter of law in order for both to be considered clients. A disregard of corporate formalities and/or a complete identity of managements and boards of directors could call for treating the two corporations as one. . . . The fact that the corporate client wholly owns, or is wholly owned by, its affiliate does not in itself make them alter egos. However, whole ownership may well entail not merely a shared legal department but a management so intertwined that all members of the corporate family effectively operate as a single entity; and in those circumstances representing one member of the family may effectively mean representing all others as well. Conversely, where two corporations are related only through stock ownership, the ownership is less than a controlling interest and the lawyer has had no dealing whatever with the affiliate, there will rarely be any reason to conclude that the affiliate is the lawyer's client"; also distinguishing between direct and indirect adversity; "The paradigm situation here is presented by a lawyer's bringing a lawsuit, unrelated in substance to the lawyer's representation of a corporate client, seeking substantial money damages against a wholly owned subsidiary of the client: if the suit is successful, this will affect adversely not only the subsidiary but the parent as well, in the sense that one of its assets is the equity in the subsidiary, and its consolidated financial statements may (unless the subsidiary has applicable insurance coverage) reflect the impact of material adverse judgments against the subsidiary"; explaining that a lawyer's representation that involves "attacking the conduct or credibility of the second client or seeking to compel resisted discovery from the client" is directly adverse, but that positional adversity is not directly adverse; including that financial impact on another member of a corporate family is only indirect adversity; nevertheless finding that even such an indirect adversity might be a "material limitation" under Model Rule 1.7(b) ultimately shifting the burden of proof on the lawyers seeking to undertake the representation; "[I]n any instance where the lawyer concludes that no client consent is required, under either paragraph of Rule 1.7, the lawyer should be prepared to show how he was able to make the various determinations required without contacting the client for information or consent -- particularly determinations (a) that the client does not have an expectation that the corporate affiliate will be treated as a client, and (b) that the proposed representation adverse to the affiliate will not have a material adverse effect on the representation of the client.").

[FN41]. Restatement (Third) of Law Governing Lawyers § 121 cmt. d, illus. 6 (2000) ("Lawyer represents Corporation A in local real-estate transactions. Lawyer has been asked to represent Plaintiff in a products-liability action against Corporation B claiming substantial damages. Corporation B is a wholly owned subsidiary of Corporation A; any judgment obtained against Corporation B will have a material adverse impact on the value of Corporation B's assets and on the value of the assets of Corporation A. Just as Lawyer could not file suit against Corporation A on behalf of another client, even in a matter unrelated to the subject of Lawyer's representation of Corporation A . . ., Lawyer may not represent Plaintiff in the suit against Corporation B without the consent of both Plaintiff and Corporation A under the limitations and conditions provided in § 122.").

[FN42]. Restatement (Third) of Law Governing Lawyers § 121 cmt. d, illus. 7 (2000) ("The same facts as in Illustration 6, except that Corporation B is not a subsidiary of Corporation A. Instead, 51 percent of the stock of Corporation A and 60 percent of the stock of Corporation B are owned by X Corporation. The remainder of the stock in both Corporation A and Corporation B is held by the public. Lawyer does not represent X Corporation. The circumstances are such that an adverse judgment against Corporation B will have no material adverse impact on the financial position of Corporation A. No conflict of interest is presented; Lawyer may represent Plaintiff in the suit against Corporation B.").

[FN43]. Bd. of Managers v. Wabash Loftominium, L.L.C., 876 N.E.2d 65, 74 (Ill. App. Ct. 2007); Avocent Redmond Corp. v. Rose Elecs., 491 F. Supp. 2d 1000 (W.D. Wash. 2007); UCAR Int'l, Inc. v. Union Carbide Corp., No. 00 Civ. 1338 (GBD), 2002 U.S. Dist. LEXIS 21766 (S.D.N.Y. Nov. 7, 2002); Travelers Indem. Co. v. Gerling Global Reinsurance Corp., No. 99 Civ. 4413 (LMM), 2000 U.S. Dist. LEXIS 11639 (S.D.N.Y. Aug. 14, 2000); Discotrade Ltd. v. Wyeth-Ayerst Int'l, Inc., 200 F. Supp. 2d 355 (S.D.N.Y. 2002); Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789 (S.D.N.Y. 1991); In re Blinder, Robinson & Co., 123 B.R. 900, 909-10 (Bankr. D. Colo. 1991); Teradyne, Inc. v. Hewlett-Packard Co., No. C-91-0344 MHP ENE, 1991 U.S. Dist. LEXIS 8363 (N.D. Cal. June 6, 1991).

[FN44]. Whiting Corp. v. White Mach. Corp., 567 F.2d 713 (7th Cir. 1977); Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court, 70 Cal. Rptr. 2d 419 (Cal. Ct. App. 1997); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264 (D. Del. 1980).

[FN45]. Soc'y of Prof'l Eng'g Emps. in Aerospace v. Boeing Co., Case Nos. 05-1251- & 07-1043-MLB, 2010 U.S. Dist. LEXIS 27093 (D. Kan. Mar. 22, 2010).

[FN46]. Id. at *12.

[FN47]. Id. at *18.

[FN48]. Id. at *21.

[FN49]. Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 156, 160, 161 n.27, 161 (Del. Ch. 2013) (addressing a situation in which the buyer of a company's stock claimed that the seller shareholders had defrauded it in the purchase transaction; noting that the buyer discovered privileged communications between the seller and its outside counsel Perkins Coie in the company's computer system because the seller had not removed those documents from its computer system before the closing, and had "done nothing to get these computer records back" since the closing a year earlier; explaining that the seller claimed that the attorney-client privilege nevertheless protected those communications "on the ground that it, and not the surviving corporation [buyer], retained control of the attorney-client privilege," rejecting the seller's privilege claim -- relying on the Delaware General Corporation Law's clear statement that after a merger the surviving company (the buyer here) owns "'all'" property, privileges, etc.; concluding that the buyer could read and use the intimate privileged communication between the seller's executives and Perkins Coie about the transaction; noting that sellers can "negotiate[] special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger"; noting that pointing to a 2008 Delaware decision approving a purchase transaction provision specifically excluding from such a sale "'all rights of the Sellers under this Agreement and all agreements and other documentation relating to the transactions contemplated hereby.'" (citing Postorivo v. AG Paintball Holdings, Inc., Consol. Civ. A. Nos. 2911- & 3111-VCP, 2008 Del. Ch. LEXIS 17, at *6 n.5 (Del. Ch. Feb. 7, 2008) (unpublished opinion)); reiterating that "the answer to any parties worried about facing this predicament in the future" is to "exclude from the transferred assets the attorney-client communications they wish to retain as their own." (emphasis added)).

[FN50]. HunterHeart Inc. v. Bio-Reference Laboratories, Inc., Case No. 5:14-cv-04078-LHK, 2015 U.S. Dist. LEXIS 123921, at *2, *5, *6, *7 (N.D. Cal. Sept. 16, 2015) (addressing a situation in which Hunter Laboratories sold "the bulk of its assets" to defendant; noting that the asset purchase agreement explicitly identified the transferred assets as including Hunter's "computer equipment," software, e-mail addresses and "other records, data and communications . . . in the cloud." (alteration in original) (internal citation omitted); explaining that Hunter's owner used the company email system both before and after the asset sale; further explaining that Hunter's remaining business (now called HunterHeart) later sued defendant, and sought a protective order preventing defendant from using privileged communications on the servers and other systems the defendant had purchased; denying the protective order, finding that as for the pre-transaction privileged communications: (1) Hunter waived its privilege

"when it agreed to hand over all of its servers, files and communications"; and, if not, (2) the "[privilege] passed from Hunter to [Defendant] by virtue of the [asset purchase agreement]'s transfer of the other company assets"; *holding* that post-transaction communications never deserved privilege protection, because Hunter's owner who continued to use the email system "could not have expected these emails to remain confidential").

[FN51]. Parus Holdings, Inc. v. Banner & Witcoff, Ltd., 585 F. Supp. 2d 995, 1002-03 (N.D. Ill. 2008).

[FN52]. Goodrich v. Goodrich, 960 A.2d 1275 (N.H. 2008).

[FN53]. John Crane Prod. Solutions, Inc. v. R2R & D, LLC, Civ. A. No. 3:11-CV-3237-D, 2012 U.S. Dist. LEXIS 67457 (N.D. Tex. May 15, 2012).

[FN54]. Orbit One Commc'ns, Inc. v. Numerex Corp., 255 F.R.D. 98 (S.D.N.Y. 2008).

[FN55]. Postorivo v. AG Paintball Holdings, Inc., Cons. Civ. A. No. 2991-VCP, 2008 Del. Ch. LEXIS 17 (Del. Ch. Feb. 7, 2008) (unpublished opinion).

[FN56]. The parent and the lawyer might argue that the parent and the subsidiary had entered into a "common interest" agreement that avoided waiver of any privilege during the transaction, but this would be a difficult argument to win.

[FN57]. Furthermore, the work product doctrine presumably would not provide an alternative protection for these communications. It would be difficult for the parent or the subsidiary to claim that they anticipated litigation involving the transaction. Even if they could do that, the communications at issue presumably would have been created even in the absence of such anticipation.

[FN58]. Bass Pub. Ltd. Co. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474, at *6-7 (S.D.N.Y. Apr. 25, 1994) ("Had Promus [parent] wished, it could have sold only Holiday Inn's [subsidiary's] physical assets, which would have avoided the consequences [of allowing new management of the subsidiary to waive the privilege].").

[FN59]. Girl Scouts - Western Okla., Inc. v. Barringer - Thomson, 252 P.3d 844, 847, 849 (Okla. 2011) (holding that a successor after a merger owned the entities' attorney-client privilege; "Western [plaintiff] alleged ownership of all of Sooner's documents and materials based on the merger. In support of its counter-motion for summary judgment, Western attached the merger agreement, annual meeting minutes of Sooner and Red Lands adopting the merger agreement, the Certificate of Merger submitted to the Secretary of State and the Certificate of Merger issued by the Secretary of State. The merger agreement provides that all of the assets, properties, rights, privileges, immunities, powers and franchises of Sooner shall vest in the surviving entity. Likewise, under the merger agreement, all debts, liabilities and duties of Sooner shall become the debts, liabilities and duties of the surviving entity. Thus, under the merger agreement, what belonged to Sooner now belongs to Western. Western recognizes that matters that were confidential in the hands of Sooner must remain confidential in the hands of Western."; explaining that "[i]f the client is a corporation, the privilege may be claimed by the successor, trustee, or similar representative."; implying that the companies could have altered this general rule in the agreement; "Sooner did not exempt or exclude confidential or any other materials from the merger agreement; it adopted a merger agreement that transferred all assets, properties and privileges to the surviving corporation. Ownership of Sooner's assets, as well as its attorney-client privilege, has now transferred to Western by operation of law as a result of the merger. To allow Attorney to assert Sooner's attorney-client post-merger would be in derogation of the merger agreement transferring ownership to Western.").

[FN60]. Bass Pub. Ltd. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474, at *6-7 (S.D.N.Y. Apr. 25, 1994).

[FN61]. In re Grand Jury Subpoenas, 734 F. Supp. 1207 (E.D. Va.), aff'd in part, vacated in part, 902 F.2d 244 (4th Cir. 1990).

[FN62]. In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005).

[FN63]. Id. at 652.

[FN64]. Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), Ch. 11 Case No. 02-11518 (MFW), Adv. No. A-04-53733 (MFW), 2008 Bankr. LEXIS 2130 (Bankr. D. Del. Aug. 7, 2008).

[FN65]. New York City LEO 2008-2 (9/08) (addressing an in-house lawyer's representation of corporate affiliate in the face of conflicts of interest; explaining that "[i]t is inevitable that on occasion parents and subsidiaries will see their interests diverge, particularly in spin-off, sale, and insolvency situations. When this happens, it is wise for the parent to secure for the subsidiary outside representation. Maintaining a joint representation for the spin-off transaction too long risks the outcome of Polycast [Tech. Corp. v. Uniroyal, Inc.], 125 F.R.D. [47, 49 (S.D.N.Y. 1989)], and Medcom [Holding Co. v. Baxter Travenol Lab.], 689 F. Supp. [842, 844 (N.D. Ill. 1988)] -- both cases in which parent companies were forced to turn over documents to their former subsidiaries in adverse litigation -- not to mention the attorneys' potential for running afoul of conflict rules."; first analyzing an in-house lawyer's representation of a parent and one or more wholly owned affiliates; explaining that in their scenario "inside counsel's representation is not of entities whose interests may differ because the parent's interests completely preempt those of its wholly owned affiliates"; also analyzing an in-house lawyer's representation of a parent and an affiliate that is only partially owned by the parent, or several affiliates controlled by, but not wholly owned by, a common parent; explaining that in that situation "inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests"; concluding that in the second scenario in-house lawyers must analyze whether they can jointly represent affiliates with conflicting interests; "Inside counsel should consider carefully these conflict-of-interest rules. Sometimes, a potential conflict will be apparent from the outset of the representation. At other times, the conflict may not become apparent until after the joint representation has begun. To pick just one example, at the outset of a litigation in which a parent and a majority-owned affiliate have been sued, their positions may appear identical and they may choose to be jointly represented by inside counsel.

Then discovery may unexpectedly reveal that there is a basis for the parent to offload responsibility onto the affiliate."; also saluting the "disinterested lawyer" test, which determines if an objective lawyer would believe that he or she could adequately represent multiple affiliate corporations in the joint representation; noting that the in-house lawyer might consider obtaining prospective consents from the various clients; "Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the context of a joint representation of a parent and an affiliate, the advance waiver should: [i]dentify for the clients the potential or existing conflicts with as much specificity as possible; [m]ake clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and [o]btain agreement from the affiliate that if inside counsel can no longer represent both parent and affiliate, inside counsel can continue to represent the parent irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate."; explaining that in some circumstances the in-house lawyer might conclude that separate lawyers should represent the affiliates; also noting that "[i]t also bears emphasis, as stated above, that the person giving informed consent to the advance waiver on behalf of the affiliate must have the degree of independence from the parent, or from other affected affiliates, required by applicable corporate law"; also noting that an in-house lawyer might alternatively limit the representation to one or more affiliates in order to avoid conflicts; "Limiting the representation of an affiliate is at times accompanied by retaining other counsel -- for example, outside counsel -- to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients."; warning that "[s]ensitivity to conflicts between represented affiliates will help forestall judicial criticism and avoid unnecessary curtailment of inside counsel's continued functioning in their expected capacity").

[FN66]. Id. at 516 ("The various cases cited by both the Trust and Duke involve cases where a parent corporation and subsidiary were represented by the same attorney during a spin-off, sale, or divestiture. See e.g. In re Teleglobe Commc'ns Corp., 493 F.3d 345 (3rd Cir. 2007) (in-house counsel of the parent corporation represented both the subsidiary and parent companies); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47 (S.D.N.Y. 1989) (in-house counsel of the parent corporation represented

both the subsidiary and parent in the sale of the subsidiary); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841 (N.D.Ill. 1988); In re Mirant Corp.[,] 326 B.R. 646 (Bankr. N.D.Tex. 2005) (same law firm representing both parent and subsidiary in a public stock offering of the subsidiary). In those cases, the courts determined the parties were joint clients. The issue remaining before this Court is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.").

[FN67]. Id. at 524.

[FN68]. Id. at 529-30 ("The Restatement [Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000)] says co-client communication is not privileged as between the co-clients. The Trust's reading of the Restatement appears to state that if co-client communication is then used in an adversary [sic] between the former co-clients, it would then waive the privilege as to third parties. This would effectively make the privilege superfluous. Protections can be placed on any future hearings between Duke and the Trust, and any co-client privileged information can remain privileged as to third parties even if used in a future adversary proceeding between Duke and the Trust.").

[FN69]. ABA Model Rule 1.0(c).

[FN70]. For instance, one court refused to disqualify a firm from representing a company in litigation adverse to a former company executive whom the firm had also represented -- finding that the firm had adequately described its role and obtained a valid prospective consent from the executive. Laborers Local 1298 Annuity Fund v. Grass (In re Rite Aid Corp. Sec. Litig.), 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001).

[FN71]. United States v. Nicholas, 606 F. Supp. 2d 1109, 1111 (C.D. Cal. 2009), rev'd and remanded sub nom. United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

[FN72]. Id. at 1117.

[FN73]. Id.

[FN74]. Id. at 1112.

[FN75]. United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

[FN76]. Id. at 604 n.3.

[FN77]. Id. at 610.

[FN78]. Id. at 613.

[FN79]. Id. at 613 n.10.

[FN80]. ABA Model Rule 1.13(f).

[FN81]. Under Seal v. United States (In re Grand Jury Subpoena: Under Seal), 415 F.3d 333, 340 (4th Cir. 2005).

[FN82]. Id. at 336.

[FN83]. In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986).

[FN84]. In re Grand Jury Subpoena, 274 F.3d 563, 573-74 (1st Cir. 2001).

[FN85]. United States v. Graf, 610 F.3d 1148 (9th Cir. 2010) (the court ultimately determined that a company consultant did not meet that standard).

[FN86]. United States v. Stein, 463 F. Supp. 2d 459 (S.D.N.Y. 2006).

[FN87]. United States v. Norris, 753 F. Supp. 2d 492 (E.D. Pa. 2010), aff'd 419 F. App'x 190 (3d Cir. 2011); Grunstein v. Silva, 2010 Del. Ch. LEXIS 68 (Del. Ch. Apr. 13, 2010); In re Paul W. Abbott Co., Inc., 767 N.W.2d 14 (Minn. 2009).

[FN88]. Kennedy v. Gulf Coast Cancer & Diagnostic Center at Se., Inc., 326 S.W.3d 352, 358 (Tex. Ct. App. 2010) (in a TRO proceeding, ordering a former in-house lawyer to return privileged documents that he had taken with him when he left the client's employment; holding that the company rather than any individual executives or directors own the privilege; "Kennedy's subjective intent notwithstanding, no evidence objectively manifests that EBGWH [Epstein Becker Law Firm, who represented the in-house lawyer even before he left the client's employment] secured the parties' consent or undertook any of the other steps that Texas law requires for dual representation of Gulf Coast and either the officers and directors or Kennedy individually. . . . We therefore hold that the trial court did not abuse its discretion in determining that Gulf Coast alone holds the attorney-client privilege applicable to the memo."); In re Grand Jury Proceedings, 469 F.3d 24 (1st Cir. 2006); United States ex rel. Magid v. Barry Wilderman, M.D., P.C., Civ. A. No. 96-CV-4346, 2006 U.S. Dist. LEXIS 56116 (E.D. Pa. Aug. 10, 2006); Applied Tech. Int'l, Ltd. v. Goldstein, Civ. A. No. 03-848, 2005 U.S. Dist. LEXIS 1818, at *11-12 (E.D. Pa. Feb. 7, 2005); In re Grand Jury Subpoena, 274 F.3d 563, 573 (1st Cir. 2001); United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997); United States v. Aramony, 88 F.3d 1369, 1390 (4th Cir. 1996).

[FN89]. Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 659 (10th Cir.), cert. denied, 525 U.S. 966 (1998).

[FN90]. Home Care Indus., Inc. v. Murray, 154 F. Supp. 2d 861, 869 (D.N.J. 2001) (disqualifying Skadden, Arps from representing a company in an action against its former CEO; agreeing with the CEO that, because the lawyers created an environment in which he comfortably confided in them, his "belief that the [law] firm represented him personally was reasonable.").

VCFJ0713 ALI-CLE 1

End of Document

95 Ill. B.J. 212

Illinois Bar Journal
April, 2007

Column

Loss Prevention
Karen Erger [a1]

HEED THE WARNING OF THE “BAD FEELING”
Keep Your Practice Safe and Sound by Heeding the Warning Signs That Presage Problem Clients and Malpractice Claims

Be afraid. Be very afraid.

The Fly, directed by David Cronenberg.

Devotees of thriller movies are familiar with the classic scenes that signal imminent doom. A teenaged couple decides to “park” in a sinister cemetery, even though they've just hear a radio report that a murderous madman has escaped from a nearby penitentiary. (Really, if you go by cinematic experience, it's axiomatic that every creepy old Boot Hill will abut a facility housing--but not very securely--a cadre of homicidal escapees-elect.). Or a group of friends, exploring a haunted house, discovers that one of their number is missing and makes the supremely irrational decision to “split up and look for her” rather than face the ghouls *en masse*. Our collective spine tingles with delicious dread as we watch the screen--we've got a *ba-aa-ad* feeling about this!

That “bad feeling” is a familiar theme to defense counsel and those who handle lawyers' malpractice claims, too. The rueful phrase “I had a bad feeling about this one from the beginning” begins many a report to lawyers' professional liability insurance carriers. The lawyer knew from the first that something didn't “feel right” about the client or the matter; she could almost hear the eerie music in the background-- *dah-DUH! dah-DUH! dah-DUH!*--but she went down into the creepy haunted basement anyhow.

Let's look at a few of the harbingers of doom that are easy to spot from our comfy seats at the movies but less easy to identify when we're in the “heat of battle” with a practice to run and bills to pay.

Scary clients

Clients who are not worthy. I'm not quoting “Wayne's World” (“We are not worthy!”) but rather the ABA Standing Committee on Lawyers' Professional Liability, who say that “Claims by unworthy clients whom the lawyer should not have taken on in the first place” are a trend in severe claims. I *really* like that word “unworthy,” which conveys the idea that your time and talent have worth and should not be squandered on those who do not appreciate their value.

Some clients are truly unworthy of your legal talents. Here's a short list:

• the client who does not believe your legal services are worth your fees;

• the client who second-guesses you constantly;

• the client who unreasonably demands constant access to you;

• the dishonest client;

• the client who presses you to overstep your bounds as a lawyer, for example, by demanding that you make decisions properly made by the client alone.

These traits are often apparent in your very first meeting with the unworthy client. It is *not* wimpy to refuse to represent a client who is virtually certain to distract you from other worthy clients and make you crazy. That same client is also quite likely to stiff you for your fees, beef you to the ARDC, and sue you for malpractice in the bargain.

And, in the case of the dishonest client, you may be sucked into a fraudulent scheme that ruins your reputation and your finances in one life-altering swoop. It can and does happen, and frequently the lawyer is the only solvent party within the jurisdiction when it comes time to compensate the defrauded parties.

Clients with out-of-this-world expectations. Other clients, while not unworthy, have unreasonable ***213** expectations for your legal services, including

• clients with unreasonable expectations regarding the likely outcome of the matter, the cost of pursuing it, or the time needed to reach a result;

• clients who want justice or victory "at any cost"--at least until your first bill is presented;

• clients who come to you at the eleventh hour, expecting miracles.

If you cannot bring a client's goals in line with reality, heed the spooky music and decline the representation. No matter how superlative your services, you're headed for a claim if you cannot meet your client's expectations. Claims folks say--rightly--that the *only* essential ingredient for a malpractice claim is a dissatisfied client.

Friends and family. I'm sure your mom is nothing like Norman Bates' mom, but listen for that scary *Psycho* music-- *reet! reet! reet! reet! reet!*--before agreeing to perform legal services for your family and friends. It's not wrong for them to ask--but it may well be wrong for you to agree, because you are terribly likely to

• undertake matters in areas of law in which you are not competent,

• cut corners because you are not charging a fee (or an adequate fee),

• fail to follow normal procedures such as using engagement letters or documenting the client's informed consent,

• otherwise fail to treat the matter like a "real" matter, for example, by procrastinating, and/or

• jeopardize an important relationship if the outcome is poor.

Don't kid yourself--friends and family can and do sue you. Even if they don't, is the relationship worth the risk?

Scary matters

The unfamiliar. This one is a classic. A lawyer who knows little or nothing about wills, or personal injury cases, or divorce law, undertakes such a representation because

• "any good lawyer" can handle a simple will, or trial, or divorce, or whatever;

• it was for an important client the lawyer didn't want to lose;

• a friend or family member asked (see "friends and family" above).

Sadly, lawyers who venture into the unknown often emerge scratched and bleeding, with a malpractice claim as an unwelcome souvenir of their journey. If you cannot resist the call of unknown territory, find a "guide"--an experienced lawyer--and associate with him or her on the matter (after, of course, obtaining written consent from your client if the guide is not a member of your law firm).

Caution must also be exercised when voyaging into an unfamiliar jurisdiction. Aside from the obvious licensing issues, you risk being ignorant of that jurisdiction's rules, procedures, and black letter law. Again, if you must go, find a guide in the form of experienced local counsel, with proper consent from your client.

The high stakes claim. Here's another claim trend identified by the ABA as one to watch: "Advising clients in complex business and litigation matters where the client equates high stakes matters with high expectations for the outcome." This is not to say that such matters should not be undertaken, but it does signal the need for extreme caution in accepting and handling such matters. Ask yourself the following questions.

• Am I competent to handle the matter? Do I have the expertise, as well as the time and financial resources to do so?

• Are the client's expectations reasonable? If not, can I change those expectations to something more realistic? See "clients with out-of-this-world expectations," above.

• Will I be vigilant in managing the client's expectations? In particular, will I be able to deliver the bad news "early and often"?

• Am I committed to carefully documenting my work and my communications with my client?

In a sense, this "scary matter" is just a variant of the "scary client" with unreasonable expectations. When the stakes are high, however, even the best client can have inflated expectations that, if unrealized, result in inflated claims.

Heed the bad feeling

Get your thrills at the movies--heeding the warning signs that presage dissatisfied clients and malpractice claims can save your firm's reputation, your finances, and your sanity.

Footnotes

a1 *Attorney Karen Erger, former vice president and director of loss prevention with ISBA Mutual in Chicago, now works with Holmes, Murphy & Associates in Cedar Rapids, Iowa.*

95 ILBJ 212