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You Told Our JV Partner What?!?!
Ethical Issues in Creating, Maintaining, and Operating Joint Ventures

Danielle J. Cole, Esq.
Burr & Forman LLP
Atlanta, Georgia

Bennett J. Lee, Esq.
Watt, Tieder, Hoffar & Fitzgerald, LLP
San Francisco, California

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ETHICAL ISSUES IN CREATING, MAINTAINING, AND OPERATING JOINT VENTURES

I. Introduction

Notwithstanding the type of legal entity created (LLC, LLP, corporation, etc.), a joint venture ("JV" or "Joint Venture") arises where two or more entities (the “JV Partners”) contribute their individual resources toward a common project -- often forming a single-purpose entity for the performance of the project. Joint ventures typically involve the temporary alliance of companies otherwise in competition, each of which retains its individual corporate identity and operations outside the venture. Joint ventures are therefore less integrated than companies involved in a partnership or merger, which limits the participants’ ability to achieve overall cohesion despite their common interest in the project.1 As a result, joint ventures are typically governed by negotiated agreements identifying the respective rights and obligations of each participant on a variety of issues, including shared resources and limits on contributions.

When questions, concerns, or disputes arise involving the JV or its Partners, the attorneys representing the parties face a myriad of issues implicating various areas of legal ethics, including conflicts of interest, loyalty, confidentiality, required disclosures, and informed consent. This paper addresses some of the ethical issues encountered by attorneys representing project participants in the creation, operation, and maintenance of a joint venture, and recommends action that may assist counsel in avoiding a breach of the standards of professional conduct.

II. The Increased Use of Joint Venturing and Other Forms of Strategic Alliances

In the early 1990s, many legal commentators speculated that the popularity of joint ventures would increase in the coming decades due to their flexibility and efficient use of resources.2 The merit of those prognostications has since been proven -- the use and
complexity of joint venturing has dramatically increased since the early 1990s. Within the past decade alone, joint ventures and other strategic alliances have accounted for more than twenty percent (20%) of the total revenues generated by large companies. The distinct benefits characterizing joint ventures explain their increased use and popularity in the construction industry, particularly in the performance of a large-scale project.

A. Diversification of Risk

Every company develops areas of skilled expertise and a geographic presence, but, no matter the size, companies always face disciplines outside their skill set and locations where they lack a physical presence. Through joint venturing, participants capitalize on the expertise brought to the alliance by each JV Partner, thereby enabling the participants to contract for work outside their “comfort zone” while simultaneously limiting the risk associated with that undertaking. The "pooled" resources of joint venturing parties affords access to more resources with which to address adverse events, pay settlements, or allocate responsibility for issues related to project performance. Collaboration with the proper partners reduces the risk of project performance and spreads risk among the participants.

B. Increased Bonding Capacity and Access to Resources

Sureties view joint ventures favorably due to the diminishment of project-related risk. “There has been only one surety bond loss involving a project performed under a formal joint venture agreement. In a surety industry that has paid out $6.5 billion in direct losses on bonded jobs over the past 10 years, this speaks volumes about the merits of employing joint ventures as a risk-mitigation technique.”

The sureties’ benefit is symbiotic with that of the Joint Venture entity and its Partners. The Joint Venture benefits from the established relationships between each Partner and its sureties. By extension, the individual Partners to the JV benefit through increased access to
available projects and, potentially, a reduction of some of the attendant costs of project performance, including those related to bonding. Drawing upon the historical relationships of each Partner and its sureties allows the Joint Venture to both maximize bonding capacity and influence the underwriting process to secure favorable bond rates. The ability to secure larger bonds at more favorable rates and access greater resources frequently enables joint ventures to secure contracts for larger projects than would be awarded to most JV Partners in their individual capacity.

C. Increased Efficiency

Joint ventures often enable the JV Partners to deliver projects in a more efficient manner than can be achieved independently. Several factors bear on increased efficiency, including:

- participants with local knowledge of reputable subcontractors and tradesmen;
- access to business in previously unavailable or untapped locations;
- combining specialized talents and abilities reduces time and money expended researching subcontractors and working through related bid and contracting processes; and,
- access to additional capital sources limits time otherwise expended to identify and develop new sources of funding.

The JV Partners and their counsel should recognize the relative strengths and weaknesses of each participant and draft the Joint Venture Agreement in a manner that not only reflects each Partner's individual contribution to the alliance, but which strives to achieve overall efficacy in the alliance and the project for which it is formed.

D. Increased Ability to Meet Project Eligibility Requirements

Joint ventures are frequently formed where the participants would otherwise be precluded from bidding the work -- often because they are either too large or small to meet
federal, state, or local regulations and bidding requirements. Pooling of the JV Partners’ resources enables some participants to meet requirements for bidding and bonding capacity on projects otherwise out of reach. Conversely, participation in the Small Business Administration’s Mentor/Protégé Program allows large businesses to compete for federal work reserved for small businesses by joint venturing with a small business. The Program allows small business "protégés" to gain experience with complex projects while the large business serving as "mentor" broadens its market penetration.9

III. The Effect of the Model Rules of Professional Conduct on the Representation of Joint Ventures

Notwithstanding the benefits of joint venturing, the temporary alliance of self-interested entities with individual agendas and distinct cultures is fraught with potential hazards -- even when the alliance is for a limited purpose. These hazards multiply when the relationship ends. An estimated eighty percent (80%) of all strategic business alliances eventually dissolve, with the average lifespan of a joint venture estimated at approximately seven years.10

Attorneys engaged to provide legal representation in connection with a joint venture or other strategic alliance should expressly identify and confirm the scope of the representation at its outset to avoid the pitfalls resulting from subsequent disputes between the participants. Though each state is different, the Model Rules of Professional Conduct (sometimes referred to hereinafter as the "Model Rules" or "Rules") generally provide the foundation for identifying and analyzing duties owed to the client.

A. Basic Concepts of Confidentiality Under the Model Rules

As a starting point, there are two basic concepts with which every attorney is familiar:

(1) a duty of confidentiality is owed to the client; and,

(2) the attorney-client privilege protects “confidential disclosures by a client to an attorney made in order to obtain legal assistance.”11
With respect to an organizational client (such as a Joint Venture or JV Partner), the second concept expands to protect communications between the attorney and the client's "constituents" undertaken at the client's direction, as well as communications with a constituent in his/her capacity on behalf of the organization. "Constituents" of an organizational client include officers, directors, employees, or shareholders of a corporation, and other individuals holding equivalent positions with organizational clients other than corporations.12

Attorneys engaged to represent clients in connection with a joint venture should familiarize themselves with the provisions of Model Rule 1.6 governing the confidentiality of information related to the representation.

Rule 1.6   Confidentiality of Information

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

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm;

(2) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) To secure legal advice about the lawyer's compliance with these Rules;

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

(6) To comply with other law or a court order.

The duty of confidentiality extends to former clients under Model Rule 1.9(c), thereby prohibiting an attorney from using or revealing information gained in a prior representation to the disadvantage of a former client except where permitted by the Rules.¹³

As noted above, the attorney-client privilege protects representation-related communications between counsel and the client (or its constituents) from discovery by third parties. With respect to a multi-party representation, practitioners should advise all jointly represented clients of the inapplicability of such privilege in disputes between such clients. As applied to the joint representation of multiple parties to a joint venture (such as the JV entity and one of its Partners), no privilege attaches to protect their communications with counsel in the event of any adversarial proceedings between such clients.¹⁴ “[I]t must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.”¹⁵

Issues of joint representation aside, if litigation with a third party is filed in a jurisdiction recognizing the “Common Interest Doctrine”, the separate counsel of the JV Partners and JV entity may share information without waiving the attorney-client privilege. The “Common Interest Doctrine” generally applies to protect communications between various parties and their counsel where such parties share a "commonality of interest" with respect to the matter.¹⁶ Though certain elements vary by jurisdiction, courts typically require parties invoking the protection of the “Common Interest Doctrine” to demonstrate that:

(1) an underlying privilege (such as the attorney-client privilege) protects the communication;

(2) the parties disclosed the communication at a time when they
shared a common interest;

(3) the parties shared the communication in furtherance of that common interest; and,

(4) the parties have not waived the privilege.  

The parties’ "common interest" must be legal, as opposed to solely commercial, and must relate to their collaboration in pending or future litigation. The availability and application of the doctrine varies by jurisdiction, so counsel should become familiar with relevant legal authority prior to engaging in communications that risk waiving the attorney-client privilege.

B. Multi-Party Representations Are Permissible Under the Model Rules

Prior to creating the Joint Venture, the Partners should determine how the new entity will be represented, including whether it will jointly represented with a JV Partner by its General Counsel or Outside Corporate Counsel. In the construction industry, it is not uncommon for the General Counsel or Corporate Counsel of a JV Partner to undertake the representation of the Joint Venture entity as an “accommodation” to the JV participants and the project as a whole. Such representations are “typically for a limited purpose [and are undertaken] in order to avoid [any] duplication of [legal] services and consequent higher fees.”  

Though JV Partners are well advised to retain separate counsel for themselves and the JV entity, they often prefer to save legal fees and increase communication efficiency by arranging for the Joint Venture to be jointly represented by counsel for one of the JV Partners with whom an established relationship already exists.

An attorney should be mindful of Rule 1.7’s guidance on conflicts of interest prior to undertaking the joint representation of a Joint Venture entity and JV Partner:
Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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

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

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

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

(2) The representation is not prohibited by law;

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

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

Rule 1.7(b)(3) would likely not bar the joint representation of a JV Partner and the JV in the early stages of the Partners' alliance following the JV's creation. Despite a potential conflict of interest, an attorney may jointly represent a JV Partner and the Joint Venture entity if the other two requirements of Rule 1.7(b) are met.

Pursuant to subsection (b)(1), the representation is permissible if the attorney reasonably believes each affected client can be represented competently and diligently -- which means "the [attorney] must reasonably believe that his new assignment will not adversely affect his relationship with his existing client."21 Subsection (b)(4) requires the attorney to obtain written, informed consent to the proposed representation from each client.

Providing the existing client (JV Partner) and potential client (JV entity) with information fully disclosing the attorney’s loyalties and relationship to the existing client,
allows the clients to negotiate, define, and establish the terms and limitations of their joint 
representation based on informed consent. This preemptive effort may resolve foreseeable 
conflicts prior to the commencement of the joint representation, thereby mitigating any adverse 
impact on the representation and the relationship of the parties. At a minimum, the attorney 
and clients should endeavor to clearly identify any specific circumstances or common 
components of similar representations expressly excluded from the scope of the joint 
representation. An attorney jointly representing multiple parties (such as a JV Partner and the 
JV entity) “may limit the scope of the [joint] representation specifically for the purpose of 
avoiding a future conflict.” 

A high potential for conflict exists in joint representations. Prior to undertaking a joint 
representation, the attorney must consider the scope of the proposed representation as it relates 
to each client, including any overlap of the attorney-client relationship, each client’s interests 
and obligations with respect to the project, and the obligations owed to each client. Where the 
JV Partners have largely overlapping responsibilities or a unity of interest in the project, the 
immmediate potential for conflict may appear small. The fact that two contractors align to 
pursue a common goal does not in any way portend their continued harmony over the life of 
the project -- particularly when it relates to sharing profits or addressing liabilities later 
incurred. The attorney should recognize the potential for conflict (even where seemingly 
remote), apprise the clients accordingly, and obtain their informed consent before undertaking 
the joint representation.

As the scope of work performed by the JV Partners becomes more distinct, the 
possibility of conflict between the members and the entity increases. For example, as 
compared to a contractor/contractor JV, a designer/contractor JV intuitively increases the
number of foreseeable conflicts potentially impacting the JV Partners and the JV entity. The distinct responsibilities of the participants to a designer/contractor JV facilitates more clearly defined allocations of responsibility among the project participants for delays, cost overruns, defects, or misconduct in connection with a project.

The Restatement (Third) of the Law Governing Lawyers addresses an attorney’s ability to concurrently represent multiple parties with distinct interests and the action required to permit the joint representation of such parties:

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. 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.23

The conflict analysis required to jointly represent parties with distinct interests is not easy, even where the parties are related. Representations of this nature require multi-faceted conflict analyses, including assessment of each client’s representation (and that of their affiliated entities and potential opponents) in transactional matters and litigation.24 The Restatement offers further guidance on addressing conflicts of interest involving an organization:

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other.25

Following this approach, an attorney must determine whether the proposed representation presents “a substantial risk” of conflict and, if so, take steps to not only apprise the clients of
that risk, but to have any conflicts waived, nullified, or avoided before undertaking the representation.

Consider the following example:

Attorney has represented A (a developer) on multiple cases for a number of years. A partners with B (a hard-money lender) to form a Joint Venture, C, which exists solely to acquire and develop a parcel of land. The Joint Venture Agreement grants B a purchase option for the most favored portion of the parcel, but is ambiguous as to the size of the portion optioned. During the course of development, Attorney often provides legal advice to B concerning B's administration of the purchase loan to C. Additionally, Attorney assists in drafting purchase contracts on behalf of C when C sells portions of the developed land. When B attempts to exercise its option, A contests the boundaries of the proposed purchase. B sues A and C, demanding a right to purchase a larger portion than A is willing to sell. A wants to retain Attorney to represent both A and C in the litigation.

• Attorney cannot undertake the representation because it would be directly adverse to B. Attorney should counsel A, B, and C to retain independent counsel for the dispute.

• Attorney should have clearly defined the scope of his representation at the outset of the joint venture. Attorney should have advised B to seek independent counsel. Attorney also should have advised A and B that his representation of C would be limited to the administration of the JV and that he could not represent C in any later dispute arising between A and B.

The state filed a claim against A, B, and C for not maintaining adequate storm water protection at the parcel during development. A, B, and C enter into a joint defense agreement by which they agree that Attorney will represent their uniform interest.

• Attorney should advise A, B, and C that he can only represent them to the extent their interests remain uniform and that if their exposure becomes disparate, each should retain independent counsel.

C. Identification of the "Client"

The Model Rules do not specifically address whether the Joint Venture is a client of the attorney representing a JV Partner; however, “in light of the general proposition embodied by Model Rule 1.13 [Organization as Client] that an organization is separate from its constituents…establishing that all of a corporate client’s affiliates should be considered clients
of a lawyer is unwarranted.” The existence of an attorney-client relationship is principally a question of contract law. The contract upon which the relationship is predicated may be express or implied; however, “whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.” The Restatement (Third) of the Law Governing Lawyers, § 26 Formation of Client-Lawyer Relationship states:

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

2. (a) the lawyer manifests to the person consent to do so, or (b) fails to manifest lack of consent to do so, when the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services, or (c) a tribunal with power to do so appoints the lawyer to provide the services.

Ultimately, the key question is whether the attorney representing a Joint Venture represents not only the entity itself, but one or more of the JV Partners as well. The attorney retained to represent a Joint Venture must reach an accord with the JV Partners that clearly identifies all clients to the representation to eliminate any ambiguity that may otherwise exist – whether in the mind of the attorney or a JV Partner. It may well be that “[t]he best response to the morass of corporate affiliations [comprising a joint venture] is an engagement letter clearly delineating the scope of the representation in accordance with [Model] Rule 1.2”, including the identification of the client(s) to be represented. As is discussed more fully in Section VI(A) below, an attorney’s accurate identification of the "true client" is crucial for many reasons, including the ability to fully comply with the duties of loyalty and confidentiality owed to all represented "clients".
IV. Considerations Related to Legal Representations Involving a Joint Venture

As joint venturing has become more common in the marketplace, the form and structure of such alliances have increased in complexity. The design-build process continues to rise in popularity, reflecting a demand by owners for single point efficiency on projects. Joint venturing by contractors, architects, engineers, and other professionals has become more common as professionals adapt to meet owner demands. As the number of joint venture participants increases and their respective interests become more distinct and fractional, more complex agreements are required to govern not only the creation, operation, and maintenance of the new entity, but the relationship of the Partners.

Heightened levels of complexity in the formation and governance of the JV adds complexity to the analysis of ethical obligations implicated thereby, particularly with respect to identifying clients to whom duties are owed, conflicts (and potential conflicts) of interest, and required disclosures related to the representation. Though attorneys with relationships to a JV Partner may participate in the negotiation of the Joint Venture Agreement, upon creation the JV entity obtains a distinct legal existence with interests that may oppose those of its Partners. Though every application is different, the attorney's obligation to disclose conflicts (and potential conflicts) and obtain written waivers remains uniform. Attorneys should evaluate the unique characteristics of joint ventures in connection with drafting the disclosures to be contained within the engagement agreement or separate conflict waivers.

A. Shared and Divergent Interests of the JV Partners and JV Entity

In the construction industry, many joint ventures exist solely for a single project. Though the JV and its Partners share the goal of obtaining and successfully completing the project -- this is the sole purpose and goal of the Joint Venture. The same cannot be said of
each JV Partner whose corporate existence, purpose, and goals extend beyond the short-term life of the JV and the project for which it was formed. These diametrically opposed factors (shared and divergent goals; temporary and permanent corporate status; limited alliance and long-standing competition) may complicate or confuse the attorney's ability to accurately identify duties owed in connection with the representation.

Attorneys should remember that, despite the initial presence of a unity of interest among the JV Partners, the Joint Venture is a temporary, limited alliance. The potential exists for divergent interests, expectations, and positions to develop between the Partners over time. All represented clients should be advised of this reality prior to the commencement of the representation.

B. The Joint Venture's Financial Dependence on the JV Partners

The Joint Venture entity rarely retains substantial assets or revenue, instead relying on the revenue of the JV Partners to support its operations. As a result, independent companies with separate and distinct budgets, balance sheets, procedures, and policies make decisions that impact the Joint Venture’s viability. Attorneys engaged to jointly represent a Joint Venture and JV Partner often find the entity's financial reliance on its Partners creates difficulties in conceptually distinguishing between the clients' interests. Counsel must not lose sight of the Joint Venture’s separate legal existence and of the distinct attorney-client relationship with such entity as “the onus is squarely on the lawyer to anticipate and resolve conflicts of interest involving corporate affiliates.”

C. Payment of Legal Fees Associated with Representation of the Joint Venture

JV Partners typically pay the legal fees associated with the representation of the Joint Venture entity. This may exacerbate any confusion associated with the identification of clients to whom duties are owed. The payment of such fees by the JV Partners does not, in and of
itself, create an attorney-client relationship between such Partners and the attorney representing the Joint Venture. As discussed above in Section III(C), an attorney-client relationship may be created by express written contract or by implication based on the conduct of the parties.34

An attorney may only accept payment of a client’s bills from a non-client if the client consents. As stated in Model Rule 1.8(f):

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

(1) the client gives informed consent;

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

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

Comment 13 to Model Rule 1.7 states that when the client and the entity paying the client's legal fees are not one-in-the-same, the duties are owed to the client:

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.

The payment of the JV's legal fees by its Partners may result in unintended effects or implications relating to the attorney's representation if care is not taken to comply with the requirements of Model Rule 1.8(f). Where the attorney has been retained to represent the Joint Venture entity, but legal fees associated with the representation are to be paid directly by the JV Partners, the attorney must:
(i) obtain informed consent to such payment arrangement by all represented parties; and,

(ii) remain cognizant that his loyalty runs to the JV, not the JV Partners paying the bills.

The referenced consent to this payment arrangement must be obtained prior to commencing the representation.

V. Ethical Considerations During Formation of the Joint Venture Entity

Too often, legal services are seen merely as overhead.

Unfortunately, many business people doubt that lawyers add value to strategic alliances; they accuse lawyers of impairing the trust and cooperation needed for a successful alliance. Accordingly, executives often admit lawyers to negotiations as late as possible and even then minimize their role. Some alliances eschew contracts altogether and consign lawyers to handling regulatory issues, which may be minor. This treatment could be viewed as desirable: legal services are costs, and efficiency is usually served when costs of economic activity are lowered…this abasement reflects a failure of lawyers that damages not only their own wallets but also the quality of strategic alliances. Skillful crafting of alliances can earn handsome legal fees while improving their operation and profitability.  

Attorneys should strive to add measurable value to the Joint Venture during each phase of its existence. Considering the relatively short lifespan of most Joint Ventures, an attorney’s representation of the client’s interests during the formation of the JV plays a pivotal role in whether the client ultimately receives favorable treatment upon its dissolution.

A. Multi-Party Representations During JV Formation

Several states considering whether an attorney can ethically represent multiple parties in the formation of a business entity have found such representations permissible where the attorney makes full disclosure to all parties of the potential for conflicts and the boundaries of the representation. Where joint representation is requested, the attorney must evaluate any adverse consequences associated with such representation and advise the clients accordingly within the engagement agreement. Though not an exhaustive list, the attorney should
anticipate that the ability to effectively represent jointly represented clients may be impacted where:

- The clients have divergent objectives;
- The facts require the attorney to advocate antagonistic positions between two or more clients in the same matter;
- The attorney receives conflicting instructions from each client;
- One client requests that information be withheld from the other;
- A preexisting relationship with one client causes the attorney to favor that client’s interests over another's;
- One client has agreed to pay the fees for another; or,
- The attorney has been requested to represent the second client as an "accommodation" to the first.\(^{37}\)

Counsel's full, pre-representation disclosure of any foreseeable conflicts makes the clients aware of any inherent limitations to the representation, thereby affording such clients the opportunity to seek separate counsel as to the advisability of the proposed representation. The disclosures also protect the attorney from post-representation claims that he failed to disclose any conflicts identified therein.

Attorneys providing multi-party representation may find it beneficial to narrow the scope of their representation to only those components or issues common to all clients.\(^{38}\) By anticipating these issues and taking steps to avoid their negative consequences, attorneys may avert problems before they arise.

B. Topics to be Addressed Within the Joint Venture Agreement

To ensure clients are properly advised during the JV’s formation, the attorney should evaluate and advise of the five potential “deal-busters” that historically trigger the failure of a strategic alliance:

(1) uneven levels of commitment;
(2) changing strategic objectives;
(3) inadequate internal structures;
(4) insufficient executive attention; and
(5) lack of internal consensus.39

The common thread of these “deal-busters” demonstrates how the JV Partners impact the JV’s viability based on their individual, and ever-evolving, interests and expectations. This underscores an inherent problem in the joint representation of multiple parties to a Joint Venture – the future of Partners’ relationship cannot be predicted, nor can the administration of their responsibilities to the JV.

JV Partners often fail to adequately define the management of the JV in the Joint Venture Agreement. Conflict frequently arises between the JV Partners regarding the direction of the Joint Venture when control has not been adequately assigned or delineated in the Agreement, or where the course of conduct employed by the parties during project performance differs from the control measures described in the Agreement. To minimize this potential conflict, great care should be taken to draft language that properly identifies and defines the Partners’ agreement as to the individuals empowered to make decisions on behalf of the JV and the method by which such decisions are to be made.

As projects evolve and progress, parties often encounter unforeseen costs and expenses. Though the Joint Venture Agreement should contemplate such events and define the contribution of each Partner with respect thereto, no contract can contemplate all circumstances that may potentially arise over the life of a project. JV Partners often blame one another when unanticipated costs are encountered on a project -- thereby placing the attorneys squarely in the middle of their disputes. The attorney should anticipate disputes of this nature prior to the
commencement of a joint representation and should disclose the limitations on his representation resulting from the ethical obligations owed to each client.

Although not exhaustive, the following list identifies several of the disputes most frequently encountered between JV Partners, and provides a brief description of how each topic should be addressed in the drafting of the Joint Venture Agreement:

a. Control – clearly identify which JV Partner has decision-making power in specific enumerated situations which the parties anticipate may arise over the course of the project;

b. Capitalization, Costs, and Profit Sharing – specify in detail how the JV is funded and how profits are divided;

c. Disputes/Liability – detail how liability is to be allocated for particular matters which may arise with respect to the project;

d. Indemnity for Bonding – identify which parties are required to execute general indemnity agreements with the sureties and the amounts to be covered by each such agreement;

e. Proprietary Information and Intellectual Property – identify with specificity the individuals or entities that own information acquired, used, or created over the course of the project.

Attorneys representing the JV Partners should be familiar with problems commonly encountered by Joint Ventures and address these issues in the Joint Venture Agreement.

Proper structuring of the JV helps avoid some of the conflicts that may otherwise arise during the representation. Clearly defining the Partners’ shared responsibilities; requiring the Partners to maintain their individual identities; assuring the continual transfer of resources; and, prohibiting divisibility of the project adds a measure of certainty to the relationship of the JV Partners. This effort also assists the attorneys in better predicting potential conflicts, refraining from inadvertent disclosures of confidential information, and advising the clients as to the limits of their representation.
C. Joint Defense/Prosecution Agreements Between Project Participants

JV Partners share a common, but limited, interest in the project that instigated the Joint Venture’s creation. When that interest is attacked by a third party, or action must be taken to preserve that interest, the JV Partners often choose one lawyer/law firm to represent their shared interest. When the Partners and/or the entity are not jointly represented in a matter pertaining to their shared interest in the project, their separate counsel may share information and assist one another in advocating for their common interest.

As previously noted, “[t]he ‘common interest doctrine’ permits persons with joint goals to coordinate their positions without destroying the privileged status of their communications with their respective lawyers.”40 In a joint venture setting, the doctrine allows the separate counsel of the JV Partners and the entity to share privileged information concerning their joint goals and interests without the risk that such information will become subject to discovery by third parties.

To minimize the risk of waiver and define the scope of the parties’ obligation to share information, JV Partners are well advised to enter into joint defense/prosecution agreements as part of, or in addition to, their execution of the Joint Venture Agreement. Attorneys should draft joint defense/prosecution agreements with an understanding of the potential claims and litigation the JV Partners may face in the future. With proper foresight, research, and drafting, a joint defense/prosecution agreement helps eliminate ethical concerns regarding the disclosure of confidential information and any concomitant waiver of privilege.

The joint defense/prosecution agreement should state whether the parties have an affirmative duty to share information or if the agreement merely creates a permissive atmosphere of cooperation between the parties.41 The agreement should further identify any
attorneys with authority to make representations on behalf of the group as a whole and should specifically identify the clients represented by each attorney. Joint defense/prosecution agreements protect the interests of the JV Partners, but also impart the secondary benefit of protecting their counsel.

VI. Representing the JV Participants During Project Performance

In recent years, the parties and attorneys involved in large-scale construction projects have confronted progressively complex ethical dilemmas. These escalations directly correlate to the rising popularity and use of complex joint ventures in the design and construction of such projects. While joint ventures involve many permutations in corporate form and structure, the foundation of a true JV typically involves an enterprise created for "a single business transaction rather than a general and continuous transaction" which requires its participants to:

- make separate contributions (whether of capital, services, skills, knowledge, materials, money or some combination thereof) toward the joint enterprise;
- split profits derived from the joint enterprise (in the manner agreed); and,
- share a "joint proprietary interest and a right of mutual control over the subject matter of the enterprise."

The Partners joint venturing on a large construction project are, most often, sophisticated business entities with a reputation and track record that supports the award of a competitive contract. The business acumen of the participants in matters of contracting and construction processes is not necessarily an indicator of their awareness or understanding of the esoteric issues of legal ethics born of their alliance and imbedded into its fabric. Legal ethics do not routinely rise to the forefront of consideration when corporate executives discuss their joint pursuit of a project. Nor is it likely that parties new to joint venturing, or those whose
past alliances ended without incident, appreciate the potential significance of these issues in the absence of counsel.

Without regard to the JV Partners' knowledge or appreciation of these issues prior to the creation of the Joint Venture, once the entity exists it must be maintained and operated until the project objective has been completed and the entity is dissolved. The creation of the Joint Venture does not extinguish the ethical obligations of counsel retained to represent the project participants or the entity itself. Issues with respect to communication, confidentiality, disclosures, decision-making, and conflicts of interest require counsel’s continuous evaluation and compliance throughout the operational phase of the venture.

A. Representing the Joint Venture or Other “Organizational Client”

The attorney representing a Joint Venture or other "organizational client" may inadvertently violate the rules governing attorney conduct by failing to accurately identify the client to whom duties of loyalty and confidentiality are owed. Ethical violations may also result from counsel’s failure to effectively and accurately communicate with the client (and constituents of the client) regarding the representation. These concepts, though simple, become more complex when applied to the operational phase of a Joint Venture – and that complexity further compounds when applied to the joint representation of multiple participants to a Joint Venture. The discussion that follows addresses both the sole representation of the JV entity and the joint representation of multiple project participants.

1. Who is the "Client"?

The attorney retained to represent only the Joint Venture entity represents the entity itself -- not its Partners. As noted above in Section III(C), Joint Ventures are legal entities that act through their "constituents". The attorney representing the JV must communicate
with its constituents to effectuate the representation, but such communication does not create an attorney-client relationship with such constituents.\(^\text{46}\) Even where an organizational client is "related" to other corporate entities within its overall corporate structure (e.g. JV Partners or other parent, subsidiary, or affiliated corporations), unless the attorney and the JV have expressly agreed otherwise, the attorney representing the Joint Venture does not represent any "related" entity.\(^\text{47}\)

2. To Whom is the Duty of Loyalty Owed?

An attorney owes a duty of loyalty and diligent representation to all clients, including each client to a multi-party representation (e.g. the joint representation of a Joint Venture and JV Partner).\(^\text{48}\) The duty of loyalty and diligent representation includes a fiduciary duty to communicate with each client and keep them reasonably informed of any facts and developments important to the representation.

In this respect, Model Rule 1.4, provides that an attorney must reasonably and promptly:

(1) inform the client of any issue or circumstance requiring informed consent;
(2) consult with the client about achieving the objectives of the representation;
(3) inform the client about the status of the representation;
(4) comply with any requests for information; and,
(5) when the attorney knows the client expects assistance in a manner prohibited by law or by the Rules, to consult with the client concerning limitations on the attorney's conduct imposed by same.

The duty of loyalty owed under Model Rule 1.4 extends to former clients under Rule 1.9(c), thereby prohibiting an attorney from using or revealing information gained in a prior
representation to such client's disadvantage unless the information has become "generally known" or its use or disclosure is otherwise permitted by the Rules.49

3. To Whom Is the Duty of Confidentiality Owed?

Where the attorney represents only the Joint Venture, the duty of confidentiality is owed only to such entity -- not to its JV Partners or its constituents. Under these circumstances (or where permitted by Model Rule 1.6), the attorney representing the Joint Venture may disclose to its constituents only that information which the JV has explicitly authorized or which is impliedly authorized as necessary to carry out the representation.50 As with the duty of loyalty under Rule 1.4, the duty of confidentiality extends to former clients under Model Rule of Professional Conduct 1.9(c).51

The attorney representing the Joint Venture “is not required to keep confidential from others in the organization information obtained from [a constituent of the JV] that is personally harmful to the individual who communicated it. Every employee or agent is legally required to provide information to the organization concerning matters within the scope of employment. Thus, the individual may not assert attorney-client privilege for communications made to the [Joint Venture’s] lawyer, even if the communications prove to be harmful to the person.”52

As previously noted, communications between constituents of the Joint Venture (in their capacity on behalf of the organization) and the JV’s attorney are privileged and protected from disclosure to third parties.53 Privilege likewise protects communications between the attorney and constituents of the Joint Venture, undertaken in furtherance of the representation or at the JV’s direction.54 Where jointly represented clients later engage in adversarial proceedings against one another, the attorney-client privilege does not apply to
communications related to the joint representation -- even if the privilege would apply in proceedings with a third party.

B. **Conflicts of Interest and Other Ethical Considerations During Project Performance**

Ethical obligations relating to conflicts of interest, required disclosures, prompt communication, and confidentiality continue throughout the representation. The distinct interests of the Joint Venture and JV Partners result in various conflicts over the life of a project. Conflicts of interest may also arise during the operational phase of the venture due to changes in circumstance, including "[u]nforseeable developments, such as changes in corporate and other organizational affiliations."55 The attorney representing multiple parties to a Joint Venture should anticipate conflicts arising over the life of the alliance and be vigilant in identifying circumstances triggering conflict in the representation.

As noted above, Model Rule 1.7 governs concurrent conflicts of interest.56 Though conflicts may arise over the course of the project, as long as the respective interests of all clients to a joint representation are "generally aligned", no conflict of interest exists solely due to their interests being less than identical.57 The inquiry thus becomes:

- Are the interests of the clients "generally aligned" such that no inherent conflicts are present?
- If not, can action be taken by the attorney or by the clients to eliminate the conflict?
- Is the conflict one to which the clients can consent so as to allow the multi-party representation to continue?

As is the case with most legal analysis, there will not be a "one size fits all" answer that can be applied to every joint representation involving a Joint Venture. The analysis and outcome of the inquiry depends on the specific facts and circumstances pertaining to the representation at issue. In conducting this inquiry, it must be acknowledged that the JV entity
and its Partners typically have different interests in the project -- often with respect to key issues such as risk-allocation, profit-sharing, and control. Nonetheless, the attorney jointly representing such parties may avoid conflicts by mitigating the clients’ "potentially adverse interests" and developing their "mutual interests", thereby keeping the parties' interests "generally aligned".58

Approaching conflict resolution in this manner often appeals to clients because it eliminates the need "each party might have to obtain separate representation, [as well as] the possibility of incurring additional cost, complication or even litigation."59 The parties may also avoid conflicts by narrowing the scope of the joint representation to remove issues that create conflict, thereafter addressing and resolving such issues among themselves or with the assistance of separate counsel.60

Despite the best intentions and efforts to eliminate or avoid conflicts, circumstances adversely impacting the joint representation may arise over the life of the project. An attorney facing a new conflict should evaluate whether the conflict was prospectively waived or is otherwise "consentable".61 The evaluation should begin by analyzing the joint venture agreement, engagement agreement, and any advance conflict waivers to determine if the conflict is addressed and resolved therein. Even if the conflict was waived by prior agreement of the parties, joint representation may no longer be possible where the clients’ interests become "fundamentally antagonistic to one another".62 Over the life of a project, the attorney jointly representing the Joint Venture and a JV Partner may face unforeseen circumstances resulting in "direct" or "indirect" adversity of the clients’ interests.63

Though it focuses on conflicts of interest in representing corporate affiliates, much of the discussion in the ABA Standing Committee on Ethics and Professional Responsibility’s
Formal Opinion 95-390 is relevant to analyze conflicts associated with joint representations. The Committee states that an attorney may not move forward with a representation involving "direct adversity" under Model Rule 1.7(a) unless two tests are met. First, the lawyer must reasonably believe that [the representation] will not adversely affect his relationship with his existing client[s]. The lawyer's subjective judgment is not necessarily dispositive: his belief must be a reasonable one. Second, both clients must consent after consultation, which means that there has been communication of information reasonably sufficient to permit the client[s] to appreciate the significance of the matter in question.

The Committee's opinion went on to address an attorney’s obligation to evaluate conflicts for "indirect adversity" under Model Rule 1.7(b). In this regard, the Committee's opinion states that

[even if the provisions of Rule 1.7(a) do not apply . . . the lawyer must nonetheless consider, under Rule 1.7(b), whether . . . [the] representation [of either client] . . . may be materially limited by the lawyer's responsibilities to [the other] client or to a third person. Loyalty to a client is impaired not only when a lawyer undertakes a representation directly adverse to the client, but also "when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."64

"Indirect" conflicts commonly arise where "there is a significant risk that" the representation "will be materially limited" by the attorney's "other responsibilities or interests."65 As noted above, Model Rule 1.7(b) permits the representation where four criteria are met:

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.66
During the operational phase of a Joint Venture, "indirect conflicts" may be encountered where the General Counsel or Outside Corporate Counsel of a JV Partner also represents the Joint Venture entity. Under these circumstances (and depending on the jurisdiction), the JV entity may be deemed an “accommodation client”. If the relationship between the JV Partners begins to disintegrate on a project, the perceived benefit of joint representation likely diminishes in the eyes of counsel attempting to maintain neutrality between his company (or "long-standing, primary client") and an "accommodation client". Though attorneys must comply with ethical obligations owed to all clients, the identification of clients as “primary” or “accommodation” (in jurisdictions recognizing this distinction) is important as counsel may be permitted to withdraw from the representation of the “accommodation client” while continuing to represent the “primary client”, even where direct adversity exists between such clients' interests relating to the matter involved in the common representation.67

1. Conflicts Related to the Negotiation of Agreements

An attorney jointly representing a Joint Venture entity and JV Partner owes a duty of loyalty to each client, including the duty to refrain from representing interests adverse to either of them. The practical application of complying with this duty limits the attorney’s ability to advocate for each client in circumstances that would trigger a conflict between the clients’ respective interests. An attorney should advise each client of this limitation in conjunction with obtaining informed consent to the joint representation. Doing so memorializes their understanding of the effect of this “dual duty” on counsel’s ability to advocate for their individual interests, and assists the parties in adjusting their expectations accordingly before the representation begins. The clients should be advised that the attorney’s "role is not that of
partisanship normally expected in other circumstances . . . thus, the clients may be required to assume greater responsibility for decisions than when each client is separately represented."{68}

As noted above, attorneys have an ethical obligation to continually evaluate whether conflicts have arisen affecting the representation. While the negotiation and drafting of an agreement on behalf of a Joint Venture and JV Partner may present an unwaivable conflict of interest in some circumstances and a consentable conflict in others, such a task may also involve circumstances of little (or no) ethical consequence. For example, during project performance the attorney may negotiate or draft any number of agreements with third parties that "affect" the rights of the jointly represented clients, including subcontracts, equipment rental agreements, assignments in favor of lenders, licensing agreements, etc. Despite their differing interests in the overall project, with respect to these types of ancillary agreements, the interests of the JV and its Partners are typically either "generally aligned" (and thus, largely "conflict-free") or the resulting conflict is of a type that may be avoided by mitigating their "potentially adverse interests" in the agreements and developing their "mutual interests".

In order to ensure that ancillary agreements between the JV and third parties comport with the individual rights and obligations of all jointly represented clients, the attorney should be intimately familiar with the terms and conditions of the Joint Venture Agreement and any other obligation of each client that may affect the project or the joint representation. Familiarity with such agreements, and adherence thereto, will assist the attorney in avoiding conflicts, and potentially, civil claims.{69}

The requirements of the "Aggregate Settlement Rule" present a unique challenge for an attorney representing multiple parties to the Joint Venture -- with yet another opportunity for conflicts. The Rule effectively requires informed, unanimous, consent by all clients to any
settlement. Attorneys engaged for multi-party representations are prohibited by subsection (g) from "participat[ing] in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client", which consent first requires disclosure of "the existence and nature of all the claims . . . involved and of the participation of each person in the settlement."  

2. Conflicts Arising from One Client's Directive to Withhold Information from Another

Where an attorney represents multiple parties to a Joint Venture, the duty of loyalty requires him to communicate with each client regarding any matters that affect the joint representation. If one client to a joint representation directs the attorney to withhold relevant information from the other, a conflict of interest arises, preventing the attorney from continuing the joint representation and, under most circumstances, requiring his withdrawal from the representation of both clients. "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." Potential exceptions to the requirement to withdraw from the representation of both clients will be discussed further in the sections that follow.

In the event such a situation arises, the attorney has a duty, to consult with the client directing that information be withheld and to advise such client of the attorney's inability to comply due to the limitations on his conduct imposed by the Model Rules and other relevant laws. Counsel should likewise remind the client that no confidentiality exists with respect to communications relating to the joint representation -- including the client's directive to withhold relevant information from the other client. The attorney must fulfill the duty owed to
the “non-breaching” client by disclosing the information and the directive received. Following the attorney’s disclosure of this information, he must withdraw from the representation of both clients unless the Rules, the clients, or governing legal authority permits the continued representation of the “non-breaching” client.

3. Conflicts Resulting from Detrimental Action by a JV Partner or Constituent

While individuals commonly joint venture in many areas of business, the JV Partners on a large-scale construction project are typically corporate entities. The Joint Venture and each of its Partners must, by definition, act through constituents who often serve in similar capacities for both the JV and a JV Partner. Over the course of the project these individuals are required to act, react, and make decisions on behalf of each "master" in a manner that fulfills their obligations to each.

Before facing the ever-evolving realties of a project and the interests of the JV participants, the dual roles served by these individuals may seem simple to balance and effectuate – in theory anyway. In reality, the result can be quite the opposite. An individual's ability to balance the interests of the JV Partner (in which he has a more permanent, vested interest) against those of the JV (a temporary, shared interest) is a tricky proposition -- one that can easily lead a constituent to take action that favors the interests of the JV Partner over those of the Joint Venture.

Where the client is an organization (such as a Joint Venture), Model Rule 1.13 governs the representation, including the attorney's duty to protect the organization's best interests. The attorney for an organizational client effectuates this duty by evaluating the conduct of its constituents under Model Rule 1.13 and taking the action identified therein if necessary. The provisions of Rule 1.13 do not stand alone in guiding the attorney's representation of the Joint
Venture nor do they limit or expand any duty owed to such client under the other Model Rules. 74

The attorney for the JV is not required to question every action or decision by its constituents. To the contrary, "[w]hen constituents of the [Joint Venture] make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." 75 However, if the attorney learns that a constituent has acted in a manner (or has failed to take action) which may result in substantial injury to the Joint Venture, the duty of loyalty requires the attorney to take action to protect the best interests of the JV, including by reporting such conduct to a person or entity with higher authority, such as its Board of Directors. 76 Subsections (b)-(d) of Model Rule 1.13 address this situation and require that if the attorney for the Joint Venture

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

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

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

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the [JV], then the lawyer may reveal information relating to the [JV] whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the [JV].
(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of [a JV] to investigate an alleged violation of law, or to defend the [JV] or an officer, employee or other constituent associated with the [JV] against a claim arising out of an alleged violation of law.\textsuperscript{77}

The attorney's "knowledge" of the actions, omissions, or intentions of an individual triggering the duty to take action "may be inferred from [the] circumstances."\textsuperscript{78} The attorney representing a Joint Venture cannot "ignore the obvious" when faced with circumstances indicating the JV is likely to sustain substantial injury as a result of a constituent's conduct.\textsuperscript{79}

The Comments to Model Rule 1.13 give additional insight into the obligations of the attorney faced with circumstances potentially requiring action under subsections (b) and (c). The attorney must carefully evaluate the "responsibility in the [JV] and the apparent motivation of the person involved, the policies of the [JV] concerning such matters, and any other relevant considerations" which may require the attorney to refer the matter "to a higher authority in the [JV]", "even if the lawyer has not communicated with the constituent", if "the matter is of sufficient seriousness and importance or urgency to the [JV]".\textsuperscript{80}

The attorney's services are not required to have been used in furtherance of the violation to permit the second tier of disclosure under Rule 1.13(c); however, the "matter [must] be related to the lawyer's representation."\textsuperscript{81} Though Rule 1.13 does not specifically address a scenario where the services of the JV's attorney "are being used . . . to further a crime or fraud", "Rules 1.6(b)(2) and 1.6(b)(3) may permit the [attorney for the JV] to disclose confidential information" if faced with those circumstances.\textsuperscript{82}

Though the preceding discussion has focused on the conduct of a JV constituent undertaken on behalf of the Joint Venture, even where the obligations of Model Rule 1.13(b)-(c) are not implicated, an attorney jointly representing the JV and one of its Partners must comply with the duty owed to each client to disclose any information bearing on the
representation. If the attorney learns that one client has acted in a manner that affects the representation, he must advise the other client of these circumstances and the conflict created by it. As previously noted, this disclosure does not constitute a breach of confidentiality. When the attorney is engaged to jointly represent the JV and one of its Partners, the clients have no expectation that their interests will be directly adverse in the future. Nor do the clients have a legitimate expectation that communications concerning the representation are confidential, or that information will be withheld from either client. Some jurisdictions permit an attorney faced with such conduct to immediately terminate the representation of the breaching client and continue the representation of the remaining client. Courts permitting such action have stated that, inasmuch as it is the client, not the attorney, who has changed position and created the conflict, the substantial relationship test and other prohibitions related to former clients do not apply to an analysis for disqualification.84

4. Other Acts or Circumstances Triggering Conflicts of Interest or Ethical Obligations of Counsel

a. Changes in Structure or Dissolution of the Joint Venture

Changes in the Joint Venture's corporate structure may trigger additional conflicts, including those that impact the viability of the joint representation of parties to the JV. Model Rule 1.9 addresses the duties owed to a former client, including the duty to protect information related to the representation and to refrain from representations that are materially adverse to such client absent consent. These duties prevent the attorney from representing one client to the former joint representation against the other "client in the same or a substantially related matter after a dispute arise[s] among the clients in that matter, unless all affected clients give informed consent." If one client to the former joint representation wants the attorney to
continue the representation, the attorney must analyze her ability to do so while complying with the duties owed to the former client.87

Concerns over counsel's ability to continue the representation of a client to a former joint representation can be particularly problematic when applied to Joint Ventures. As previously discussed, the JV Partners often select the General Counsel or Outside Corporate Counsel of one of the Partners to represent the JV entity as an "accommodation" to the Partners and the project. That attorney thereafter serves the dual-role of counsel for the Joint Venture and for the JV Partner by whom he/she is customarily employed. In the event of a conflict of interest between such clients, the attorney and JV Partner have an interest in the attorney’s continued representation of the JV Partner.

Despite the Model Rules’ prohibition of representations against a former client in the same or a substantially related matter, the facts must be analyzed on a case-by-case basis to determine if the continued representation of one client to a former joint representation is permissible. The representation is permissible if all clients consent.88 Consent may be provided after the conflict arises, prior to such conflict arising (through the terms of the Joint Venture Agreement, the attorney's engagement agreement, or by advance conflict waiver), or it may be implied from the circumstances of the representation. The terms of the Joint Venture Agreement and/or the engagement agreement signed by the jointly represented clients should clearly define:

- the scope of the attorney's representation, including the intended tasks associated with the representation;
- the relationship between the attorney, the JV, and the JV Partners (including his/her employer), delineating the intended clients to the joint representation;
- any reasonably foreseeable conflicts;
• the intended expiration of the joint representation and attorney-client relationship with each client; and,

• the clients’ consent to the attorney’s continued representation of one client (identified therein) in the event a conflict or other circumstance terminating the joint representation.

The client's consent to the continued representation may be able to be established where these steps have been taken prior to the commencement of the representation.89

Consent may also be established by implication in some circumstances, including those discussed hereinabove with respect to the attorney’s representation of an “accommodation client” in jurisdictions recognizing this distinction. Where an attorney undertakes the representation of the Joint Venture as an "accommodation" to the attorney's “primary” client (with the informed consent of both) and "adverse interests later develop between the clients, even if the adversity relates to the matter involved in the common representation, circumstances might warrant the inference that the 'accommodation' client understood and impliedly consented to the lawyer's continuing to represent the regular client in the matter."90

“Circumstances most likely to evidence such an understanding are that the lawyer has represented the [JV Partner] for a long period of time before undertaking representation of the [Joint Venture], that the representation was to be of limited scope and duration [i.e for the duration of the JV project], and that the lawyer was not expected to keep confidential from the [JV Partner] any information provided to the lawyer by the [Joint Venture].”91

It should be noted that even where a client gives informed consent to an otherwise conflicted representation, the client may revoke that consent at any time. “Revoking consent to the client’s own representation . . . does not necessarily prevent the lawyer from continuing to represent other clients [to the joint representation]. . . Whether the lawyer may continue the other representation depends on whether the client was justified in revoking the consent . . .
and whether material detriment to the other client or lawyer would result.”  Withdrawal of consent may be justified where there has been “[a] material change in the factual basis on which the client originally gave informed consent.”  “Courts have, however, refused to permit a client to repudiate informed consent previously given when the situation that later was said to constitute an impermissible conflict was in fact reasonably contemplated and thus within the objecting client’s previous consent.”

b. Disputes or Litigation Involving or Concerning the Joint Venture

While an attorney may represent multiple parties whose interests "may conflict" in litigation, such as co-plaintiffs or co-defendants, an attorney is prohibited from simultaneously representing parties whose interests are directly adverse in litigation. This is a non-consentable conflict.

Even where the jointly represented clients are not adverse to one another in litigation, conflicts may arise with respect to their positions on a claim or settlement. "Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer.”  The clients may not agree on how, or even if, a claim should be settled. Model "Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement" while the "Aggregate Settlement Rule" of Model Rule 1.8(g) effectively requires informed, unanimous, consent of all clients to any settlement or the offer of any settlement of claims. While various pre-representation agreements may include terms reflecting the clients’ agreement as to the resolution of claims with third parties, the disclosure requirements in Rule 1.8(g) essentially invalidate and nullify any such agreement. The attorney will therefore be bound by the obligations of Rule 1.8(g) despite the presence of any contrary language contained in a prior
agreement between the clients. As each client has separate and complete authority over settlement, a disagreement concerning the resolution of a claim results in a conflict of interest.

c. The Attorney's Obligation to Third Parties

The Model Rules impose ethical obligations on an attorney beyond those related directly to the attorney-client relationship, yet these obligations may directly impact the attorney’s relationship with the client. For example, Model Rule 4.1 obliges an attorney to be truthful in making statements to third parties.

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

An attorney’s obligation to be truthful in making statements to third parties under Rule 4.1 does not result in an "affirmative duty to inform an opposing party of relevant facts[; however, a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." As Comment 2 to Model Rule 4.1 notes, the "Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances."

C. Addressing and Resolving Conflicts of Interest Arising During Project Performance and After Completion

If a conflict is present, the attorney should review the Joint Venture Agreement and any ancillary agreements executed by the clients, including the advance conflict waivers and the
attorney's retention agreement, to determine if the conflict was prospectively waived or if a method of conflict resolution was previously established. Did the clients agree at the outset of the representation that if a conflict of this nature were to arise it would be waived? Did they agree that if a conflict of this nature were to arise one specified client would obtain separate counsel and would agree to the attorney's continued representation of the remaining client(s)? If such an advance conflict waiver was obtained -- is it valid?

"There is, as a general matter, no ethical bar to seeking a waiver of future conflicts". 102 “Under [Model] Rule 1.2(c), advance waivers may be used to restrict any aspect of the scope of the representation so long as the limitation ‘is reasonable under the circumstances and the client gives informed consent.’” 103 Valid advance conflict waivers can be obtained where the client is provided information regarding potential conflicts of interest that may arise in the future. The information and disclosures provided to the client must be of sufficient detail as to permit the client to make an intelligent decision as to their willingness to appreciate the risks and consent to the waiver.

Inherent in the consideration of the validity of such a waiver is the attorney's separate consideration (and belief) under Rule 1.7 that the continued representation will not adversely affect the interests of the clients. "In order to best ensure the likelihood that such waivers will be effective, however, it is advisable to put them in writing and they should otherwise meet all the requirements for contemporaneous waivers." 104 Advance conflict waivers that are open-ended and agree to waive all conflicts are typically ineffective. 105 Such waivers are often more effective where clients have a history of utilizing the contemplated type of legal services, have been informed about the potential for conflict, and where the client’s independent counsel has approved the waiver. 106
If the conflict presented has not been resolved by any pre-established procedures agreed upon by the parties or by advance conflict waivers, the attorney must assess whether the conflict is "consentable". When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.107

If the conflict is "consentable", the attorney must provide full written disclosures to the clients and obtain written consent to conflict. No "form" exists to fit every situation in which an attorney must provide full written disclosure to clients to a joint representation. The disclosure should be prepared by the attorney and should be signed by all clients to evidence and acknowledge their understanding of the conflict(s) and the impact on the representation, as well as their informed consent to the attorney's representation despite the presence of such conflict.108 While "[Model Rule 1.7] (b) requires the [attorney] to obtain the informed consent of the client, confirmed in writing. . . [t]he requirement of a writing does not supplant the need in most cases for the [attorney] to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.109

Any time the individual rights of jointly represented clients are potentially affected by a newly arising circumstance, the attorney should obtain the express, informed consent of each client. The written disclosure should contain content similar to that prepared and submitted to the clients prior to the commencement of the joint representation, including:

- the specific identification of all clients to the joint representation;
- the detailed identification of the conflict of interest affecting the representation;
- the attorney's detailed analysis and opinion of why the conflict is "consentable"/"waivable";
• an identification of the duties owed by the attorney to each client;

• the attorney's advice and warning to the jointly represented clients as to the absence of confidentiality with respect to information conveyed to, and communications with, the attorney that concern or affect the joint representation;

• the attorney's advice and warning to the jointly represented clients that, in the event they later become involved in adversarial legal proceedings, the attorney-client privilege will not apply to prevent the disclosure of information concerning the joint representation in proceedings between the clients;

• a detailed, full disclosure of the advantages and disadvantages of continuing the joint representation, including the advantages and risks involved for the clients collectively and individually;

• a detailed disclosure of all possible effects the joint representation may have on the attorney's ability to exercise independent, professional judgment on behalf of each client;

• the attorney's articulation of any salient points from oral discussions with the clients preceding the submission of the disclosure, including advantages and disadvantages of the joint representation and any discussion of the "implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved;,"[110]

• documentation of any agreement between the clients concerning the joint representation conveyed to the attorney, including any limitations as to the scope of the joint representation, action to be taken in the event of an irreconcilable conflict of interest, and the continued representation of one client in the event of termination of the joint representation;

• the attorney's recommendation that the clients each consult separate counsel as to the conflict encountered, the disclosures made by the attorney, the possible effects of continuing the joint representation on each client, and any proposed agreements between the clients with respect to the joint representation; and,

• documentation of each client's informed consent given after full disclosure and consideration of the matters detailed therein.

"[I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective,
particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.” 111

When a conflict of interest affecting the individual rights of jointly represented clients arises during project performance, the clients are best served (and the attorney, best protected) by recommending each client consult separate counsel as to those aspects of the representation impacted by the conflict. This is particularly important when the conflict concerns the client's individual rights in a dispute or litigation, including any proposed settlement of claims.

Whether or not a client consults separate counsel, if a proposed settlement falls within the scope of the attorney's representation and affects (or potentially affects) the individual rights of jointly represented clients, the attorney must comply with the requirements of Model Rule 1.8(g)'s Aggregate Settlement Rule. As previously discussed herein, the Rule requires the attorney to make detailed, written disclosure to the clients of the terms, requirements, and effect of the proposed settlement on the clients (collectively and individually), which disclosure must:

- evidence the attorney's recommendation that each client consult separate counsel as to the settlement and its effect on such client's individual rights;
- inform each client of their individual right to make the ultimate and final decision of whether to accept or reject the offer of settlement; 112
- inform each client of the existence and nature of all claims involved in the settlement;
- inform each client of all material terms of the settlement;
- inform each client of the specific participation of each person and/or client in the settlement, including amounts to be received or paid by each client if the settlement is accepted; and,113
- inform each client of the effect of the settlement on each individual client.
Thereafter, the attorney must obtain the express, informed consent of each individual client to any settlement affecting its’ individual rights. If the attorney cannot secure express, informed consent from all affected clients, the conflict cannot be resolved (or the settlement achieved), as the attorney cannot meet the requirements of Model Rule 1.8(g). As a result, settlement may be lost and the attorney may be required to withdraw from the representation.

Non-consentable conflicts are addressed in other sections of the Rules as well. For example, Model Rule 1.7(b)(2) "describes conflicts that are nonconsentable because the representation is prohibited by applicable law. . . . In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.” An attorney may also be faced with a situation where the information required to be disclosed to obtain consent cannot be given, thereby preventing consent and the representation. If the conflict is not "consentable", or if consent is not given after the appropriate disclosures are made, the attorney must withdraw from the representation.

VII. Consequences of an Ethical Breach by Counsel

The breach of an ethical obligation affects both the client and attorney in a variety of ways. Where the representation involves multiple parties, a breach triggers the dissolution of the joint representation. Everyone loses when the joint representation fails -- clients lose the benefit of assistance of counsel familiar with the project, issues, and relationships; clients incur additional fees and costs to obtain new counsel and get them up-to-speed; the timing of the failed representation may be detrimental to pending litigation or other critical deadlines impacting the clients or the project; and, the parties may be forced to endure "embarrassment and recrimination" arising from the failed representation, the impact of which may linger long after the project is completed and the JV dissolved.
A. Dissolution of the Joint Representation

The joint representation is dissolved when one client terminates the attorney’s services.\textsuperscript{118} Clients to a multi-party representation are jointly represented, but each retains the right to terminate its representation by discharging such counsel.\textsuperscript{119}

The joint representation may also be terminated by the attorney's withdrawal from the representation, either unilaterally or by permission of a court or other tribunal.\textsuperscript{120} Model Rule 1.16 addresses the termination of legal representation and the attendant duties of an attorney with respect to such termination.\textsuperscript{121}

B. Withdrawal

The mandatory versus permissive nature of an attorney's withdrawal from representation is detailed in sections (a) and (b) of Model Rule 1.16, both of which are subject to the application of section (c) requiring the attorney to continue the representation when ordered by a tribunal, notwithstanding good cause for termination. The circumstances requiring a withdrawal from representation are identified in Model Rule 1.16(a) which mandates withdrawal if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

Circumstances allowing for the permissive withdrawal of representation by the attorney under Model Rule 1.16(b) are those where:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

When required by applicable law, approval of an attorney's withdrawal from representation must be obtained from a court or tribunal. Upon withdrawal, the attorney must take steps to minimize harm and protect the interests of the former client "such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred."123

When a conflict arises between clients to a joint representation, the attorney must typically withdraw from the entire representation unless all clients give informed consent as provided in Rule 1.7(b). Depending on the circumstances, the attorney may have the option of withdrawing from the representation of the client creating the conflict while continuing the representation of the other. If one of the clients to a joint representation wishes for the attorney to continue its representation, the attorney must analyze whether the continued representation is permissible under the circumstances. In performing this analysis, the attorney must evaluate his/her ability to continue the representation of the client while complying with any duties owed to the former client.126
C. Preclusion of Representation by Counsel Through Disqualification or Injunction

An attorney undertaking "a representation adverse to an affiliate of an existing corporate client" (such as the representation of the Joint Venture against a JV Partner) faces ethical questions concerning the permissibility of the representation that may result in a legal challenge to the representation. Likewise, where an attorney continues the representation of one client to a former joint representation, the former client may challenge the continued representation. The likelihood of such a challenge being asserted (and being successful) depends on the circumstances unique to that representation. Challenges are asserted through motions seeking injunctive relief or disqualification of counsel, both of which result in additional cost and delay to the clients. As discussed in more detail herein below, the sanction of professional discipline may also be available with respect to a representation that continues in the presence of a conflict of interest.

Where a former client wishes to prevent the attorney's continued representation of the other client to the joint representation, but such parties are not involved in a proceeding in which disqualification could be pursued, the former client may file an action seeking an injunction against the representation. “[A]n injunction against a lawyer’s further participation in the matter is a comparable remedy” to disqualification under such circumstances.

Where the parties are engaged in a proceeding before a court or tribunal, challenges to the attorney's continued representation are made by motion seeking the disqualification of counsel. Only a former client of an attorney (or law firm) has standing to move for disqualification based on the existence of an alleged conflict of interest. In the context of an attorney representing a Joint Venture, the constituents of the JV are not clients of the attorney and therefore lack standing to establish the first element required for disqualification.
In considering a motion to disqualify, federal courts evaluate state and local rules, but because motions of this nature "are [considered] substantive motions affecting the rights of the parties [they] are determined by applying standards developed under federal law." Courts also "often seek guidance from the American Bar Association and state disciplinary rules, though 'such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification.'"[133]

"[D]isqualification from continued representation is a prophylactic measure that courts have invoked in appropriate circumstances to prevent improper disclosure of clients' confidences, or to ameliorate the effects of such disclosures where they have occurred. . . . [A] court must attempt to prevent confidential information that might have been gained in the first representation from being used to the detriment of the former client in the subsequent action."[134] In the context of an attorney representing a Joint Venture, the constituents of the JV are not clients of the attorney and therefore lack standing to establish the first element required to support disqualification.[135]

Under the Model Rules of Professional Conduct (and the rules of various states based on such Rules), disqualification motions are based upon Rule 1.9, which evolved from the precursor to the Model Rules, the Model Code of Professional Responsibility. "The Model Rules, in most respects, do not differ significantly from the previous standards set forth in the Model Code of Professional Responsibility."[136] A party seeking to disqualify counsel "must show that: 1) the moving party and opposing counsel actually had a prior attorney client relationship; 2) the interests of opposing counsel's present client are adverse to the movant; and 3) the matters involved in the present underlying lawsuit are substantially related to the matters for which the opposing counsel previously represented the moving party."[137] The lynchpin of a
motion to disqualify is the "Substantial Relationship Test" which evolved from Cannon 4 of the Model Code of Professional Responsibility. The Restatement (Third) of the Law Governing Lawyers describes the substantial relationship test as follows:

A subsequent matter is substantially related to an earlier matter . . . if there is a substantial risk that the subsequent representation will involve the use of confidential information of the former client obtained in the course of the representation . . . Substantial risk exists where it is reasonable to conclude that it would materially advance the client’s position in the subsequent matter to use confidential information obtained in the prior representation.

The presence of a "substantial relationship" between the matters involved in the prior representation and those of the litigation at issue do not necessarily require disqualification. "When a former client moves to disqualify an attorney currently representing an adverse client, the substantial relationship test is inapposite if the former client had no reasonable expectation that the confidences disclosed to the attorney during his representation of the former client would not also be shared with the attorney's present adverse client. This rule applies in situations where a partnership, joint venture or other cooperative effort breaks up, or where two former co-parties to a litigation sue each other."

Motions for disqualification adversely affect a client in many ways. They delay the proceedings while the motion is addressed and result in additional fees and costs being incurred, but most importantly, "disqualification may impose a serious impact on a party's right to an attorney of his choice[; therefore,] it should only be imposed when continued representation may pose a significant risk of taint upon the trial. Generally speaking, motions to disqualify are viewed with disfavor and the party seeking disqualification must meet a high standard of proof before disqualification will be granted."

Courts recognize that motions for disqualification are often interposed for tactical reasons and therefore subject such motions to a highly factual inquiry. In evaluating
motions to disqualify based on conflict of interest, the general rule is that "[d]oubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification." 143

D. Reversal of Adjudicated Result or Voiding of Transactions Tainted by Conflict

Any result obtained in a litigated matter that proceeds in the face of an unresolved conflict of interest may be subject to reversal. The principle underlying reversal of the outcome of a case due to a conflict of interest was stated in United States v. Throckmorton, where the U.S. Supreme Court held that "[w]here an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side -- these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained ..." 144 The principle is most often applied in criminal cases, but is applied in civil matters as well. 145 As it relates to transactional matters, a danger exists that any transaction tainted by conflict may later be voided. 146

VIII. Other Potential Impacts of an Ethical Breach on an Attorney

The impact of an ethical breach on an attorney can be wide reaching. Depending on the circumstances, professional misconduct may result in the imposition of disciplinary action against the attorney by a state bar association and/or a finding of liability in civil proceedings. While Model Rule 8.4 defines the "professional misconduct" that subjects an attorney to disciplinary action, the statutes and common law of each state govern whether an attorney is subject to civil (or criminal) liability in connection with the representation. 147

A. Disciplinary Action Related to Professional Misconduct

The Model Rules cast a wide net in defining "professional misconduct". An attorney need not actually violate a Rule to engage in professional misconduct -- it is enough that an attorney attempted to violate one of the Rules, knowingly assisted or induced another to violate
a Rule, or that the attorney did any of the foregoing by acting through another (e.g., by requesting or instructing an agent to take action on behalf of the attorney). \(^{148}\) In this regard, Model Rule 8.4 provides:

> It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. \(^{149}\)

Allegations of professional misconduct are appropriately handled through the grievance committee of the relevant state bar association, not the courts. \(^{150}\) A finding of professional misconduct may subject an attorney to suspension or disbarment in the state where the finding is made, as well as other licensing states through reciprocal enforcement proceedings. Attorneys engaging in multi-party representations, including those involving parties to a Joint Venture, must be vigilant of the level of complexity required to comply with their professional obligations. "There are innumerable reported decisions of lawyer disciplinary proceedings arising from improvident multiple representations. Suspension generally is appropriate when a lawyer knows of a conflict of interest, does not fully disclose its possible effects, and either injures or jeopardizes a client." \(^{151}\)
B. Potential Civil Liability

The Model Rules of Professional Conduct were "not designed to be a basis for civil liability."\textsuperscript{152} Despite this acknowledgment and the further pronouncements of the American Bar Association, that the "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached", the Rules have been used for just that purpose -- to support a cause of action by equating a violation of the standards of professional conduct with a breach of duty.\textsuperscript{153} Violations of the standards of professional conduct have been used to support tort actions for breach of fiduciary duty and professional malpractice.\textsuperscript{154} “When a conflict of interest has caused injury to a client, the remedy of legal malpractice is available.”\textsuperscript{155} A claim for legal malpractice "based on a conflict of interest . . . must demonstrate that a conflict existed and the [the plaintiff] was damaged thereby."\textsuperscript{156}

In addition to tort actions seeking an award of "damages" in connection with an alleged ethical violation, a former client may file a civil action seeking recoupment of all legal fees paid to the attorney (or firm) over the course of the representation if the representation involved a conflict of interest.\textsuperscript{157} In this regard, the Restatement (Third) of the Law Governing Lawyers § 37, Partial or Complete Forfeiture of a Lawyer's Compensation, notes that “[a] lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.”\textsuperscript{158} Unlike tort actions, a “forfeiture” action of this nature does not require proof of damage resulting from the alleged ethical violation. It is further noted
that in some states, once a conflict has been established, an attorney cannot receive a fee from either party with opposing interests.\(^{159}\)

**IX. Conclusion**

Properly prepared, executed, and managed joint ventures provide excellent opportunities for participants; however, the complex relationships between the parties and their counsel require heightened levels of scrutiny with respect to conflicts of interest and the disclosures to be made with respect thereto. By properly advising clients, confirming the scope of representation, utilizing appropriate waivers, and entering into joint defense/prosecution agreements, attorneys share in the benefits of joint venturing while avoiding costly mistakes that might otherwise result in negative, long-term professional implications.

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3. *Id.*
7. *Id.*
9 John R. Prairie, *SBA Overhaul of 8(a) Rules Provides Additional Flexibility for Joint Ventures, But May Increase Risk For Large Contractors Partnering with 8(a) Firms*, 46 The Procurement Lawyer 24 (Summer 2011).


12 The Model Rules refer to these individuals as "constituents" when referring to a corporation and as "other constituents" when referring to such persons within the context of an organizational client that is not a corporation. See *Model Rules of Prof'l Conduct R. 1.9*, cmt. 1; see also *Model Rules of Prof'l Conduct R. 1.13*, cmt. 1.

13 See *Model Rules of Prof'l Conduct R. 1.7*, cmt. 5 ("The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c)").

14 See *Model Rules of Prof'l Conduct R. 1.7*, cmt. 30.

15 *Id.*

16 *Restatement (Third) of the Law Governing Lawyers § 76 (2000)* (recognizing the common interest doctrine, and stating that “[i]f two or more clients with a common interest in a litigated or nonlitigated matter agree to exchange information concerning the matter,” and their communication of such information “otherwise qualifies as privileged,” then the communication “is privileged as against third persons”).


27 Id.

28 Id.

29 Id.

30 MODEL RULES OF PROF'L CONDUCT R. 1.13(a)("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents"); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §121 (2000), cmt. d ("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.").

31 Kristen Salvatore DePalma & Emily V. Burton, Engaging with the Realities of the Corporate Family, 12 Del. L. Rev. 133, 153 (2011).

32 See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 33 ("[E]ach client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client.").


34 George S. Mahaffey, Jr., All for One and One for All? Legal Malpractice Arising from Joint Defense Consortiums and Agreements, the Final Frontier in Professional Responsibility, 35 ARIZ. ST. L. J. 21, 30 (2003).

35 Dent, Lawyers and Trust in Business Alliances, supra n. 5.


37 King & Patterson, supra n. 20.

38 Id.

40  **RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (2000); see also** King & Patterson, *supra* n. 20, at 10.

41  King & Patterson, *supra*, n. 20, at 11.

42  *Id.*


44  **MODEL RULES OF PROF'L CONDUCT R. 1.13(a)("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents"); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §121 (2000), cmt. d ("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.").**

45  The Model Rules refer to these individuals as "constituents" when referring to a corporation and as "other constituents" when referring to such persons within the context of an organizational client that is not a corporation. *See MODEL RULES OF PROF'L CONDUCT R. 1.9, cmt. 1; see also MODEL RULES OF PROF'L CONDUCT R. 1.13, cmt. 1.*

46  *See MODEL RULES OF PROF'L CONDUCT R. 1.13, cmt. 2 (While communications with the employees or other constituents of an organization may be "covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer."); but see Steinfeld v. Marks, 1997 U.S. Dist. LEXIS 13569, *11-13  (S.D.N.Y. 1997) (facts sufficient to withstand motion to dismiss established in suit brought against attorney for small joint venture by one of two constituents with equal ownership alleging the representation included such party due to his capacity as co-joint venturer) (citing Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) ("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. This is especially true in this case because both ... Rosman and Shapiro treated Filomat as if it were a partnership rather than a corporation."); Franco v. English, 210 A.D.2d 630, 634, 620 N.Y.S.2d 156, 160 (1994) (holding that the limited partnership's attorney had a fiduciary relationship with the individual partners); see also Pucci v. Santi, 711 F. Supp. 916, 927 (N.D. Ill. 1989) (holding that a limited partnership's attorney also represents the limited partners); Roberts v. Heim, 123 F.R.D. 614, 624-25 (N.D. Cal. 1988) (holding that the attorneys for the promoter/general partners also represent the limited partners); Rice v. Strunk, 670 N.E.2d 1280, 1286-88 (Ind. 1996) (holding that a partnership's attorney represents the individual partners only when the partners participate equally in the management of the partnership or when specific circumstances give rise to an attorney-client relationship between the partnership's attorney and the individual partner, such as "when there is evidence of reliance by the individual partner on the lawyer as the partner's separate counsel or of the partner's expectation of personal representation."); Johnson v. Superior Court, 38 Cal. App. 4th 463, 476-77, 45 Cal. Rptr. 2d 312, 320 (1995)
(holding that the "mere representation of a partnership does not per se constitute representation of the individual partners," and that in determining whether the partnership's attorney also represents an individual partner, a court should consider: (1) the size of the partnership; (2) the nature and scope of the attorney's representation; (3) the contacts between the attorney and the individual partner; (4) the attorney's access to financial information relating to the individual partner's interests; and (5) whether the totality of the circumstances implies an agreement by the attorney to refrain from accepting representations adverse to the individual partner's personal interests); Wortham & Van Liew v. Superior Court, 188 Cal. App. 3d 927, 932, 233 Cal. Rptr. 725, 728 (1987) ("In the context of the representation of a partnership, the attorney for the partnership represents all the partners as to matters of partnership business."); Margulies v. Upchurch, 696 P.2d 1195, 1200-01 (Utah 1985) (holding that although a limited partnership's attorney does not "automatically become[] counsel for limited partners," the attorney may become counsel for the limited partners when the limited partners reasonably believe that the attorney is also their attorney).

47 See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 34 ("A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary."); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §121 (2000), cmt. (d); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995), supra n. 21, at 2 (lawyer for corporate client does not thereby represent corporate affiliates of that client except in limited situations or by express agreement of lawyer; "[t]he fact of corporate affiliation, without more, does not make all of a corporate client's affiliates into clients as well").

48 See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 33 ("[E]ach client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client.").

49 See MODEL RULES OF PROF'L CONDUCT R. 1.9(c).

50 See MODEL RULES OF PROF'L CONDUCT R. 1.13, cmt. 2.

51 See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 5 ("The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c). ")

52 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 131 (2000), cmt. e, citing In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 123-125 (3d Cir. 1986)(communication by officer to corporate counsel concerning matters within role and functions of officer could not be claimed as privileged against corporation).

53 See MODEL RULES OF PROF'L CONDUCT R. 1.13, cmt. 2.

54 Id.
MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 5.

See MODEL RULES OF PROF'L CONDUCT R. 1.7(a).

See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 28.

Id.

Id.

MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 5.

See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 28.

Id.

Id.

MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) addresses concurrent conflict of interest issues involving direct adversity between the interests of current clients while subsection (2) addresses circumstances of indirect adversity.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995), supra n. 21, at 3 (internal quotations and citations omitted).

See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 8.

MODEL RULES OF PROF'L CONDUCT R. 1.7.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, §132 (2000), cmt. i, Ill. 8 (“With the informed consent of each client as provided in §122, a lawyer might undertake representation of another client as an accommodation to the lawyer’s regular client, typically for a limited purpose in order to avoid duplication of services and consequent higher fees. If adverse interests later develop between the clients, even if the adversity related to the matter involved in the common representation, circumstances might warrant the inference that the ‘accommodation’ client understood and impliedly consented to the lawyer’s continuing to represent the regular client in the matter. Circumstances most likely to evidence such an understanding are that the lawyer has represented the regular client for a long period of time before undertaking representation of the other client, that the representation was to be of limited scope and duration, and that the lawyer was not expected to keep confidential from the regular client any information provided to the lawyer by the other client.”

See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 32.

See Steinfeld, supra n. 46, at 15-16 (facts alleged were sufficient to withstand a motion to dismiss as to plaintiff co-joint venturer's claim against former attorney for representing interests materially adverse to plaintiff where attorney representing joint venture had drafted an assignment between its partners specifying the manner of division of licensing royalties
and, without the knowledge or consent of plaintiff, had subsequently negotiated a licensing agreement between the joint venture and a third party providing for payment of all royalties to plaintiff's joint venture partner).

70 See Model Rules of Prof'l Conduct R. 1.8(g); see also Model Rules of Prof'l Conduct R. 1.8, cmt. 13 ("The rule stated in this paragraph is a corollary of both [Model Rules 1.7 and 1.2(a)] and provides that, before any settlement offer . . . is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement . . . is accepted.").

71 See Model Rules of Prof'l Conduct R. 1.4.

72 See Model Rules of Prof'l Conduct R. 1.7, cmt. 31; see also Model Rules of Prof'l Conduct R. 1.4.

73 See Model Rules of Prof'l Conduct R. 1.4(a)(5).

74 See Model Rules of Prof'l Conduct R. 1.13, cmt. 6.

75 Model Rules of Prof'l Conduct R. 1.13, cmt. 3.

76 See Model Rules of Prof'l Conduct R. 1.13, cmt. 5 ("The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.").

77 Model Rules of Prof'l Conduct R. 1.13(b).

78 See Model Rules of Prof'l Conduct R. 1.0(f).

79 See Model Rules of Prof'l Conduct R. 1.13, cmt. 3; see also Model Rules of Prof'l Conduct R. 1.0(f).

80 See Model Rules of Prof'l Conduct R. 1.13, cmt. 4 ("In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. . . . [i]f the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent.").

81 See Model Rules of Prof'l Conduct R. 1.13, cmt. 6 ("The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other
Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. Paragraph (c) of this Rule // It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

82 See id.

83 Kempner v. Oppenheimer & Co., 662 F. Supp. 1271, 1277 (S.D.N.Y. 1987) (each client was aware of the other's relationship to the firm and therefore had no reason to believe information imparted by one party would be withheld from the other).

84 Id.

85 See Model Rules of Prof'l Conduct R. 1.9.

86 See Model Rules of Prof'l Conduct R. 1.9, cmt. 1 ("After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule . . . a lawyer who has represented multiple clients in a matter [cannot] represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent."); see also Restatement (Third) of the Law Governing Lawyers, §132 (2000).

87 See Model Rules of Prof'l Conduct R. 1.7, cmt. 4; see also Model Rules of Prof'l Conduct R. 1.9.

88 See Model Rules of Prof'l Conduct R. 1.9 (a)("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing") (emphasis added); Model Rules of Prof'l Conduct R. 1.9 (b) ("A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing") (emphasis added); Restatement
(THIRD) OF THE LAW GOVERNING LAWYERS, §132 (2000) ("Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in §122, a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse") (emphasis added).

89 Laborers Local 1298 Annuity Fund v. Grass (In re Rite Aid Corp. Sec. Litig.), 139 F. Supp. 2d 649, 659-660 (E.D. Pa. 2001), overruled in part on other grounds, by In re Rite Aid Corp. Sec. Litig., 396 F.3d 294 (3d Cir. 2005)(court inferred consent of the former client to the firm's continued representation of its existing client following the termination of the joint representation where the engagement letter clearly delineated the relationship between the firm's representation of each client and stated that, in the event of a conflict, the representation of the former client would cease while that of its existing client would continue); see also Ass'n of the Bar of the City of New York Comm. on Prof'l & Judicial Ethics, Formal Op. 2004-02 (2004), p. 2 (noting an attorney considering undertaking a multiple representation should consider structuring the representation to minimize adverse consequences in the event of a conflict, including seeking a prospective waiver permitting the continued representation of the existing corporate client where a conflict arises with the other client).

90 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (2000), cmt. i, Ill. 8; see also Laborers Local 1298, supra n. 89 (court held an attorney's former client to have been an "accommodation client" where the attorney was engaged through another client and all communications occurred through the primary client and inferred that the accommodation client had consented to the firm's continued representation following the termination of its representation of same due potential conflicts of interest).


93 Id.

94 Id. citing Interstate Properties v. Pyramid Co., 547 F. Supp. 178 (S.D.N.Y. 1982)(former client bound by express consent for its former law firm to represent its present co-venturer, which former client understood was firm’s long-standing and more substantial client, after co-venturers had falling out and suit was filed between them).

95 See MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2).

96 See MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(3); see also MODEL RULES OF PROF’L CONDUCT R. 1.7, cmt. 23.

97 See MODEL RULES OF PROF’L CONDUCT R. 1.7, cmt. 23.

98 See MODEL RULES OF PROF’L CONDUCT R. 1.8, cmt. 13.
99 See id.

100 See Model Rules of Prof'l Conduct R. 4.1, cmt. 1.

101 Model Rules of Prof'l Conduct R. 4.1, cmt. 2 ("This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances... Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation").


103 DePalma & Burton, supra n. 31, at 153.


105 See e.g. North Penn Hospital v. Hughes Foulkrod Constr. Co., 1981 Pa. Dist. & Cnty. Dec. LEXIS 184, 9-11 (Pa. Ct. Com. Pl. 1981) (General, pre-dispute consent by former client to law firm's continued representation of remaining client in dual representation in the event a dispute later arose between the parties was insufficient to meet the requirements of Rule 5-105(C) of the Code of Professional Responsibility and was therefore not an effective consent to continued representation of one client in a matter adverse to another. The consent obtained failed to provide a detailed account of how the company's interests might be adversely affected by the law firm's representation of the other party to the transaction and failed to disclose the possible effects of the dual representation on the exercise of the firm's independent professional judgment on behalf of each client, thereby making such consent too general. Further, the consent had been obtained two years prior to the drafting and execution of agreement in dispute, making it too remote to meet the requirements of the Code).

106 See Model Rules of Prof'l Conduct R. 1.7, cmt. 22.


108 See generally Model Rules of Prof'l Conduct R. 1.7(b).

109 See Model Rules of Prof'l Conduct R. 1.7, cmt. 20.

110 See Model Rules of Prof'l Conduct R. 1.7, cmt. 18.

111 Model Rules of Prof'l Conduct R. 1.7, cmt. 22.

112 See Model Rules of Prof'l Conduct R. 1.2(a).
See Model Rules of Prof’l Conduct R. 1.8, cmt. 13 ("[T]he rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer . . . is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement . . . is accepted").

Id.

Model Rules of Prof’l Conduct R. 1.7, cmt. 16.

See Model Rules of Prof’l Conduct R. 1.7, cmt. 19.

See Model Rules of Prof’l Conduct R. 1.7, cmt. 29; see generally King & Patterson, supra n. 20, at 12.

See Model Rules of Prof’l Conduct R. 1.16(a)(3).

See Model Rules of Prof’l Conduct R. 1.7, cmt. 33 ("Each client in the common representation has the right to discharge the lawyer as stated in Rule 1.16.").

See Model Rules of Prof’l Conduct R. 1.16(c).

Model Rules of Prof’l Conduct R. 1.16: Declining or Terminating Representation
(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the rules of professional conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.
(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.
(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

122 See Model Rules of Prof'l Conduct R. 1.16(c).
123 See Model Rules of Prof'l Conduct R. 1.16(d).
124 See Model Rules of Prof'l Conduct R. 1.7, cmt. 4.
125 See Model Rules of Prof'l Conduct R. 1.7, cmt. 5 ("[u]nforeseeable developments, such as changes in corporate and other organizational affiliations . . . might create conflicts in the midst of a representation . . . Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients.").
126 See Model Rules of Prof'l Conduct R. 1.7, cmt. 4; see also Model Rules of Prof'l Conduct R. 1.9.
128 Restatement (Third) of the Law Governing Lawyers § 121 (2000), cmt. f, Ill. 11.
129 Id.
130 In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 88 (5th Cir. 1976) ("As a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification."); see also Evans v. Artek Systems Corp., 715 F.2d 788, 791 (2d Cir. 1983).
131 Model Rules of Prof'l Conduct R. 1.9; Bieter Co. v. Blomquist, 132 F.R.D. 220, 222 (D. Minn. 1990), rev'd on other grounds, 987 F.2d 1319 (8th Cir. 1993).
134 Masiello v. Perini Corporation, 394 Mass. 842, 848 (1985) [citations omitted]; see also Kemper, supra n. 83 (The purpose of this prophylactic rule is 'to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.' (citing Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 570 (2d Cir. 1973)); Shabbir v. Pak. Int'l Airlines, 443 F. Supp. 2d 299, 305-306 (E.D.N.Y. 2005) ('a risk exists when the attorney is in a position to use privileged information acquired in the representation of a client against that client in another matter, or when there is a significant risk that the conflict will affect the attorney's ability to represent his or her client with vigor').

135 Model Rules of Prof'L Conduct R. 1.9; Bieter Co. v. Blomquist, supra, n. 131.

136 Pacheco Ross, supra n. 133.

137 Bieter, supra n. 131; see also United States v. Stiger, 413 F.3d 1185, 1196 (10th Cir. 2005); Kempner, supra n. 83 ('an attorney may be disqualified . . . if he has accepted employment adverse to the interests of a former client on a matter substantially related to the prior litigation'); Pacheco Ross, supra n. 133, at n. 4.

138 Pacheco Ross, supra n. 133 ('The only notable difference between [Model Rule 1.9's standard and the test . . . applied in this district is that the latter requires a demonstration that the attorney had access to confidential information. However, the Second Circuit has held that once a substantial relationship is established, the court need not inquire whether the attorney in fact received confidential information, because the receipt of such information will be presumed. Thus, as applied, the two tests are nearly identical. The fulcrum under both standards is whether a substantial relationship exists between the prior and subsequent representations . . . ') (citations and punctuation omitted); see also Exterior Systems v. Noble Composites, 175 F. Supp. 2d 1112 (N.D. Ind. 2001)(substantial relationship test is a federal common law standard for attorney disqualification); LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 255-256 (7th Cir. 1983) (discussing three part inquiry under the substantial relationship test).


140 United States Football League v. Nat'l Football League, 605 F. Supp. 1448, 1453 n. 7 (S.D.N.Y. 1985) (internal quotations and citations omitted); see also American Special Risk Ins. Co. v. Delta Am. Re Ins. Co., 634 F. Supp. 112, 121 (S.D.N.Y. 1987) (citing Allegaert v. Perot, 565 F.2d 246, 250-51 (2d Cir. 1977)); Kempner, supra n. 83; Christensen v. U.S. District Court for the Central District of California, 844 F.2d 694 (9th Cir. 1988); National Souvenir Center, Inc. v. Historic Figures, Inc., 728 F.2d 503 (D.C. Cir. 1984). But see Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979) (court held that "the need to safeguard the attorney-client relationship is not diminished by the fact that the prior representation was joint with the attorney's present client").
Pacheco Ross, supra n. 133 (citing Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 748 (2d Cir. 1981) and Evans, supra n. 130; see also United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980) (disqualification is appropriate "...only when [the court] determines, on the facts of the particular case, that [it] is an appropriate means of enforcing the applicable disciplinary rule"); Kempner, supra n. 83, at 1280 ("unless an attorney's conduct tends to taint the underlying trial . . . courts should be quite hesitant to disqualify an attorney. Given the availability of both federal and state comprehensive disciplinary machinery, there is usually no need to deal with all other kinds of ethical violations in the very litigation in which they surface"). (citations omitted).

Exterior Systems, supra n. 138 (citing Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982) ("Disqualification motions 'should be viewed with extreme caution for they can be misused as techniques of harassment'.").

Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978).


See Model Rules of Prof'L Conduct R. 8.4, cmt. 2 ("Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. . . . Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category . . .").

See Model Rules of Prof'L Conduct R. 8.4, cmt. 1 ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf.").

Model Rules of Prof'L Conduct R. 8.4.

Kempner, supra n. 83, at 1279-1280 (the courts are not the proper forum for grievances concerning the conduct of counsel, allegations of professional misconduct are appropriately addressed by the grievance committee of the bar association through which the attorney is licensed).

King & Patterson, supra n. 20, at 13.
See Model Rules of Prof’l Conduct, Preamble & Scope, cmt. 20.

Id.

See e.g., Steinfeld, supra n. 46 (claim for legal malpractice based on representation involving a conflict of interest).

Restatement (Third) of the Law Governing Lawyers § 121 (2000), cmt. f, Ill. 11.

Steinfeld, supra n. 46, at *10 (citations omitted); see also David J. Meiselman, Attorney Malpractice: Law and Procedure § 19:4 at 2914 (1980).


Id.

See id. citing, e.g. Silbiger v. Prudence Bonds Corp., 180 F.2d 917 (2d Cir. 1950, cert. denied, 340 U.S. 813, 71 S.Ct. 40, 95 L.Ed. 597 (1950) ("Certainly by the beginning of the Seventeenth Century it had become a commonplace that an attorney must not represent opposed interests, and the usual consequence has been that he is debarred from receiving any fee from either, no matter how successful his labors."); Crawford & Lewis v. Boatmen's Trust Co., 1 S.W.3d 417 (Ark. 1999).