"The Rules of Professional Conduct Are Not Aspirational": Joint Representation of Corporations and Their Employees

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Two recent high profile matters involving Broadcom Corporation and Stanford Financial Group highlight the potential ethical pitfalls that confront attorneys who represent both corporations and individual officers or employees in government investigations or litigation. For antitrust lawyers retained to conduct internal investigations or to defend private or governmental lawsuits, these cases reaffirm the need to assess potential conflicts of interest and to obtain informed written consent before undertaking dual representation.

The benefits of designating one lawyer or law firm as counsel to both the company and one of its employees can be significant. Companies can save considerable expenses by avoiding payments to separate counsel. Dual representation can also facilitate a coordinated legal strategy between the company and individual, allowing for more efficient use of resources and time. Together these factors can facilitate favorable outcomes for both the company and individual, sooner, and at lower costs than a scenario in which the company and individual have separate counsel.

On the other hand, dual representation poses several potentially significant detriments for both the company and the individual, most importantly the potentially divergent interests between the company and the individual company employee. At the outset of the representation, insufficient information may be available to assess such potential risks. If conflicts of interest emerge, they may require terminating the lawyer's continued representation of either or both clients, increasing the costs and potentially derailing the anticipated coordinated position. The corporation itself and the individual employee may not fully appreciate the sometimes complex relationships inherent in sharing counsel, including the treatment of confidential information provided to the attorney. Finally, if joint representation ends poorly for the individual, he likely will look for someone to blame—and the company's in-house and outside lawyers may well end up in the crosshairs.

Many of these downsides, and especially the ethical risks that lawyers take in accepting retention in a joint representation, present themselves front-and-center in two recent cases that offer cautionary tales for both clients and lawyers. In *United States v. Nicholas*,[1] the U.S. District Court for the Central District of California held that a law firm that represented Broadcom and its chief financial officer in separate matters involving alleged manipulation of stock options acted unethically when it interviewed the executive as part of the internal investigation and subsequently

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[1] No. SACR 08-00139-CJC, 2009 WL 890633 (C.D. Cal. Apr. 1, 2009) (order suppressing privileged communications), *appeal docketed*, No. 09-50161 (9th Cir. Mar. 2, 2009). The government filed a notice of appeal on March 26, 2009, after the court issued a minute order on March 2 ruling that Ruehle's statements were privileged. The court issued its written opinion on April 1.

turned his statements over to the government during SEC and criminal investigations. Similar allegations of ethical misconduct underpin a pending malpractice complaint filed by the former Chief Investment Officer for Stanford Financial Group against the company, its general counsel, its outside law firm, and one of the partners at that law firm.

Given the conflicts and ethical pitfalls often associated with joint representation, antitrust lawyers must consider the implications of representing both a corporation and individual officers or employees. Starting with the specific ethics rules in the jurisdictions in which they practice, counsel need to focus on identifying potential conflicts of interest that might prevent them from properly discharging their duty of loyalty, the disclosures necessary to ensure informed consent to a joint representation, and how information received in the course of the joint representation will be handled vis-à-vis third parties, especially the government.[2]

Ethical Issues of Joint Representation

Joint representation of a corporation and individual employees raises complex ethical issues relating to counsel's duty of loyalty and maintenance of client confidences. All clients, regardless of their size or the duration of their relationship with a law firm, are entitled to the same duty of loyalty and zealous representation.[3] Similarly, both current and former clients have a right to expect their lawyers not to reveal confidential information provided in the course of the attorney-client relationship.[4] These obligations may come into conflict if counsel represents multiple parties, especially in the same matter.

The starting point in analyzing potential conflicts of interest is identifying the client, which in itself may be a complicated question in the corporate setting. ABA Model Rule 1.13(a) provides that, when retained by corporations and similar organizations, an attorney represents the organization only, "acting through its duly authorized constituents." Thus, individual officers, directors, and employees generally do not become clients of the corporation's attorney simply by reason of the attorney's work for the company, unless a specific, separate representation is undertaken.

In practice, however, counsel for companies often have previously represented the company's owners, executives, or officers in other matters, and unless a crystal-clear line is drawn showing that the representation ended, they may be deemed to still be clients of the attorney. Furthermore, in practice, counsel for companies tend to find that the company's employees believe the company lawyer represents them individually as well. For these reasons it is important for company counsel to ensure that the employee knows who the lawyer is, and is not, representing. This is often accomplished through providing a so-called *Upjohn* warning,[5] which, at the outset of an interview, emphasizes that: (1) the lawyer represents the company, not the individual employee; (2) information disclosed by the employee to the lawyer is privileged, but the privilege belongs to the company; and (3) the company may unilaterally decide to waive the privilege and disclose information discussed during the interview with third parties, including the government. These disclosures seek to satisfy a lawyer's ethical obligation under ABA Model Rule 1.13(f), which requires,

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[2] This article principally relies on the current (2008) version of the American Bar Association Model Rules of Professional Conduct (ABA Model Rule), http://www.abanet.org/cpr/mrpc/model_rules.html. While the ABA Model Rules serve as models for the ethics rules of most states, individual state rules can vary and should be reviewed for guidance in a particular case.

[3] ABA Model Rule 1.7.

[4] ABA Model Rule 1.6.

[5] The warning is derived from the Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), which held that communications by employees to counsel for the company are covered by the attorney-client privilege.

when dealing with an organization's employees, "a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[6]

In communicating with employees, company lawyers must also be sensitive to their ethical obligations respecting contacts with "unrepresented persons," including the requirement that the lawyer "shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[7]

The lawyer next needs to determine whether a conflict of interest would exist by undertaking to represent both the corporation and an individual employee. ABA Model Rule 1.7(a) prohibits an attorney from undertaking a representation that involves a "concurrent conflict of interest," and defines a concurrent conflict as any situation where "the representation of one client will be directly adverse to another client" or "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."

An exception to the rule allows joint representation despite concurrent conflicts, if the lawyer satisfies four conditions, as specified in ABA Model Rule 1.7(b):

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (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
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> (4) each affected client gives informed consent, confirmed in writing.

As to this fourth condition, while some states do not require that clients consent to conflicts of interest in writing,[8] other jurisdictions that follow ABA Model Rule 1.7(b) do, including California, New Jersey, and, effective April 1, 2009, New York.[9] Even in a jurisdiction in which a written consent is not mandatory, it is generally prudent to confirm client consent in writing because the burden will be on the attorney to establish that consent in fact was given. Consideration should be

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[6] In some cases, counsel may be ethically required to provide additional *Upjohn* disclaimers, for example, informing the employees that they may wish to obtain independent representation. *See* ABA Model Rule 1.13, cmt. 10 ("There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.").

[7] ABA Model Rule 4.3. The company lawyer faces two possibilities in dealing with employees: either the employee is not represented, which triggers ABA Model Rule 4.3, or the employee is represented, which means the attorney must act through the employee's counsel. *See* ABA Model Rule 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

[8] *See* ABA/BNA Lawyers' Manual on Professional Conduct 51:311 (2003).

[9] Cal. Rules of Prof'l Conduct R. 3-310(A) (2009) (defining informed written consent to mean "the client's or former client's written agreement to the representation following written disclosure"); N.J. Rules of Prof'l Conduct R. 1.7(b)(1) (2009) (requiring that "each affected client gives informed consent, confirmed in writing, after full disclosure and consultation"); N.Y. Rules of Prof'l Conduct R. 1.7(b)(4) (2009) (requiring written consent; replacing former N.Y. Code of Prof'l Responsibility DR 5-101 & 5-105(C) (2007), which did not refer to written consent).

given to providing written disclosures and securing, in the written consent, acknowledgment of the receipt of those disclosures.[10]

If the attorney has determined that there is no conflict, or that the conflict can be waived in accordance with ABA Model Rule 1.7, the attorney can accept retention by both clients. Once an attorney-client relationship is formed with either client, and regardless of the size or the specific nature of the representation, each client, both the company and the individual, is entitled to the same duty of loyalty; the least significant employee client, in other words, is entitled to the same protections as the largest corporate client of the firm.[11] This consideration becomes particularly relevant where counsel represents the employee in connection with the same matter as the corporate employer, and where the employer is paying for the representation—the employee client's interests cannot be sacrificed or subordinated for the good of the employer client.[12]

Once an attorney-client relationship is formed with either client, and regardless of the size or the specific nature of the representation, each client, both the company and the individual, is entitled to the same duty of loyalty . . .

Even when lawyers have adhered to these ethical rules for accepting joint representation, they must remain mindful of their continuing obligation to take appropriate action, including withdrawal of the representation, should unforeseen conflicts develop in the future.[13]

Broadcom

All these factors came into play in a recent district court ruling, *United States v. Nicholas*,[14] which arose from SEC inquiries into Broadcom's option practices and an ensuing criminal case against individual officers, including William Ruehle, Broadcom's former CFO. The district court found that Broadcom's outside law firm committed ethical violations by representing both Ruehle and Broadcom. Because the misconduct compromised both the rights of Ruehle and the integrity of the legal process, the court prohibited any use of Ruehle's statements by the government prosecutors and made an ethics referral to the California State Bar.[15]

Following a series of newspaper articles questioning its stock option practices, Broadcom retained an outside law firm to conduct an internal investigation. Shortly thereafter, shareholders commenced lawsuits against the company, its directors, and Ruehle personally as CFO. The retained law firm entered appearances in court for both the company and Ruehle.[16] Over the next several weeks, Ruehle had multiple contacts with Broadcom's general counsel, who confirmed that the law firm would represent Ruehle personally in the two actions.[17] During this period, the

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[10] *E.g.*, D.C. Rules of Prof'l Conduct R. 1.7, cmt. 28 (2007) ("It is ordinarily prudent for the lawyer to provide at least a written summary of the considerations disclosed and to request and receive a written informed consent, although the rule does not require that disclosure be in writing or in any other particular form in all cases. . . . [U]nder the District of Columbia substantive law, the lawyer bears the burden of proof that informed consent was secured.").

[11] This conflicts potential has caused some corporations to adopt policies that preclude their primary outside law firms from agreeing to represent individual directors, officers, or employees of the corporation.

[12] While ethics rules permit legal fees to be paid by third parties, such fee arrangements also can present ethical issues. The ABA Model Rules provide that fee arrangements must be approved by the client, after disclosure, and cannot compromise the lawyer's duty of loyalty or inhibit the lawyer's ability to exercise independent judgment on the client's behalf. ABA Model Rule 1.7, cmt. 13.

[13] ABA Model Rule 1.7, cmt. 29; ABA/BNA Lawyers' Manual on Professional Conduct 51:313 (2003) ("a lawyer generally must withdraw from representing all joint clients once an unconsented conflict arises between the clients").

[14] No. 08-00139-CJC, 2009 WL 890633 (C.D. Cal. Apr. 1, 2009) (order suppressing privileged communications), *appeal docketed*, No. 09-50161 (9th Cir. Mar. 2, 2009).

[15] *Id.* at *10.

[16] *Id.* at *2.

[17] *Id.* at *2–*3.

retained lawyers also interviewed Ruehle regarding Broadcom's stock option granting practices and obtained other information from him to prepare a joint defense of the shareholder actions.[18]

When the SEC launched an investigation, however, the outside law firm, acting on behalf of Broadcom, disclosed key statements from Ruehle's interviews, initially to the company's outside auditors, and later to the SEC and the United States Attorney's Office.[19] Ruehle later learned that the government intended to use these disclosures in a criminal prosecution against him. He promptly objected and asserted that his conversations with the firm were privileged communications.[20] The government maintained Ruehle's statements were not protected by the attorney-client privilege because he had been given an *Upjohn* warning by the company's lawyers.[21]

After conducting an evidentiary hearing, the court found that Ruehle's statements to the outside lawyers were protected attorney-client communications and that the firm had breached its duty of loyalty to Ruehle by disclosing those communications to the SEC without his consent.[22] The issues of adequate disclosure and informed consent to joint representation proved essential to the trial court's ruling. The court rejected the government's reliance on *Upjohn*, expressing "serious doubts" about whether Ruehle ever actually received such a warning.[23] Even assuming he did, however, the court concluded that the warning was "woefully inadequate" because the outside lawyers never told Ruehle that his statements could be shared with third parties, including the government.[24] Finally, the court found that whether an *Upjohn* warning was given was "irrelevant" because such a warning is given to a non-client, not someone with whom a lawyer has an existing attorney-client relationship. Since the firm was already representing Ruehle in the shareholder litigation, "[a]n oral warning, as opposed to a written waiver of the clear conflict presented by [the firm's] representation of both Broadcom and Mr. Ruehle, is simply not sufficient to suspend or dissolve an existing attorney-client relationship and to waive the privilege."[25]

Having determined that Ruehle's statements were privileged, the court found that the firm's actions breached its ethical duties to him in three ways. First, the firm had failed to obtain Ruehle's informed written consent to the joint representation, as required under Rule 3-310 of the California Rules of Professional Conduct.[26] Second, the firm breached its duty of loyalty by interrogating Ruehle on behalf of Broadcom without first obtaining his "free and intelligent consent."[27] Third, by

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[18] *Id.* at *3, *5. The court found that the law firm had provided Ruehle individually, not merely as part of the entire board of directors, with progress reports and its defense strategy and asked him to review and obtain specific information that would help to facilitate the defense. *Id.* at *2–*3, *5.

[19] *Id.* at *3.

[20] Id. at *4.

[21] *Id.* at *6. *See also* Government's Memorandum of Law Concerning the Attorney-Client Privilege at 1 (Feb. 20, 2009).

[22] *Nicholas*, 2009 WL 890633, at *4–*7. According to the court, sustaining a claim of privilege requires the moving party to establish three elements: (1) "the existence of an attorney-client relationship," which "depends on the reasonable expectations of the client"; (2) that the communication in question "was made in order to obtain legal advice"; and (3) the communication was "intended to remain confidential." *Id.* at *4. The court found "no serious question" that each of these elements was satisfied. *Id.* at *5.

[23] *Id.* at *6 (citing Ruehle's testimony and the lack of contemporaneous notes from the firm lawyers).

[24] *Id.*

[25] *Id.*

[26] While the firm had properly obtained such consent in connection with an unrelated representation years earlier, it failed to do so respecting the stock options matter. *Id.* at *2.

[27] *Id.* at *8 (quoting Gilbert v. Nat'l Corp. for Hous. P'ships, 84 Cal. Rptr. 2d 204, 212 (Ct. App. 1999)).

disclosing Ruehle's privileged communications to Broadcom's outside auditors and the government without his consent, the firm violated the duty to preserve client confidences.[28]

The court held that the firm's misconduct required it to suppress all evidence reflecting Ruehle's statements to his counsel regarding Broadcom's stock option practices. Further, noting that "[t]he Rules of Professional Conduct are not aspirational,"[29] the court referred the entire firm to the California State Bar for discipline, asserting that the firm's misconduct "compromised the rights of Mr. Ruehle, the integrity of the legal profession, and the fair administration of justice."[30]

The government is appealing the court's suppression order.[31]

Stanford

Similar ethical issues are raised in a pending lawsuit by Laura Pendergest-Holt, the former Chief Investment Officer for companies controlled by Robert Allen Stanford. Following her arrest in February 2009 for obstruction of justice for providing allegedly false testimony during an SEC fraud investigation of Stanford and three of his companies, Holt filed a complaint against Stanford's outside lawyer and his law firm for legal malpractice and breach of fiduciary duty.[32] Holt alleges in her complaint that the outside lawyer and his firm never advised her that (a) they represented the company only; (b) she needed to retain separate counsel prior to providing testimony to the SEC; (c) she had a Fifth Amendment right against self-incrimination; (d) she could choose not to speak to the SEC; (e) there were potential criminal penalties associated with providing sworn testimony to the SEC; (f) that the company's interests were adverse to hers; and (g) that there was no attorney-client privilege for communications between her and the other defendants.[33]

Holt claims she has been wrongfully accused of a crime as a "direct and proximate result of Defendants' wrongful conduct and malpractice."[34] She has sought damages in excess of $20 million, punitive damages, and disgorgement.[35] Her lawsuit remains pending.[36]

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[28] *Id.* at *10.

[29] *Id.*

[30] *Id.*

[31] The government's opening brief on appeal maintains that the district court's privilege ruling was erroneous for three reasons: (1) the court applied the wrong standard to determine whether Ruehle, a corporate officer, had a personal claim of attorney-client privilege over his statements to the law firm; (2) even assuming an attorney-client relationship existed between Ruehle and the law firm, Broadcom had the unilateral right to waive the privilege for all communications except those relating to Ruehle's personal liability; and (3) Ruehle understood his statements would be shared with the company's auditor, and thus had no expectation that the statements would remain confidential. Government's Opening Brief at 18–20, United States v. Ruehle, No. 09-50161 (9th Cir. May 27, 2009).

[32] Plaintiff's Original Petition, Pendergest-Holt v. Stanford Group Co., No. 2009-22392, 2009 WL 1030825 (Tex. Dist. Ct. Apr. 9, 2009).

[33] *Id.* at 5–6.

[34] *Id.* at 2.

[35] *Id.* at 6.

[36] Unlike the *Broadcom* case involving Ruehle, there is a dispute whether the law firm ever represented Holt in a personal capacity. Holt's claim appears to revolve around the firm's actions (or omissions) in connection with its representation of her in her role as an officer of the company. To support her allegations of the law firm lawyer's misconduct, Holt identified what she characterized as "contradictory answers," *id.* at 6, given by him during her sworn testimony before the SEC respecting whom the lawyer represented. On the one hand, Holt stated that the lawyer told the SEC lawyers present that he "represent[ed] the company Stanford Financial Group and affiliated companies." On the other hand, she alleged that the lawyer later contradicted that statement in response to a question from one of the SEC lawyers: "Q: Just so we're clear. As I understand your statement, you do not as far as you're concerned, represent the witness here today? A: ***I represent her*** insofar as she is an Officer or director of one of the Stanford affiliated companies." *Id.* The complaint does not mention the very next exchange. "Q: Ms. Holt, are you ready to proceed? A: Yes. Q: Okay. Would you like to have personal representation of counsel before proceeding. A: No." Sworn Testimony of Laura Pendergest-Holt at 7, *In re* Stanford Group Co., No. FW-02973-A (SEC Feb. 10, 2009) (emphasis added).

Application to Antitrust Representation

Although both the Broadcom and Stanford cases arose in the securities law context, the issues they present regarding the pitfalls of dual representation are readily transferable to criminal and civil antitrust matters. Consider the common example of retention to investigate suspected cartel activity. In some cases, the company lawyer will be able to assess early on that there is not likely to be direct adversity between the company and an employee—for example, when dealing with a custodian of records or an employee who obviously had no contacts with competitors during the period under scrutiny. In other cases, the company lawyer may have indirect evidence of diverging interests, for example, a newspaper article identifying the employee as a participant in a price-fixing conspiracy. In still other cases, the company lawyers may be simply unable to assess the question of direct adversity due to a lack of information and until after they have had an opportunity to conduct interviews, review documents, or speak to government attorneys.

Throughout these early stages, there are ethical issues that must be considered before interacting with the employees. When is it necessary to give an *Upjohn* warning? Always? At what stage of the discussion? Assuming you do provide an *Upjohn* warning, should you obtain written acknowledgement from the individual that the cautions were provided? Will any of these steps unduly chill the ability to get timely information?

If employees are prepared to be represented by the company's lawyer, either at their own request or, more likely, the company lawyer's urging, when and how do you explore whether the employees need independent counsel (even to decide if the employees need independent counsel)? Do you advise them to consult their own separate counsel to ensure informed consent? Do you retain "shadow" counsel for them in an effort to minimize adverse consequences in the event a conflict arises in the future?

As previously noted, there are numerous arguments why joint representation may be desirable: reduced costs, coordinated strategy, and greater control, among others. If you do undertake a joint representation, what do you say to a company employee when you set out to prepare that employee for a government interview? Does the advice differ if that employee is your client? Do you recommend that the individual employee retain separate counsel for purposes of that interview? How would the analysis change if you learn that the employee engaged in conduct that might give rise to personal liability for price fixing? If the company has not obtained conditional leniency, the corporation and the individual may have divergent interests for example, because the company may find it beneficial to provide the government with incriminating information about the individual pursuant to a plea agreement.[37]

What if you have obtained conditional leniency, thus protecting the company and its employees from criminal exposure for violating the Sherman Act?[38] How does this affect the company's and the individual's interests—are they aligned or still potentially adverse? What about the prospect of legal exposure for the individual based on violations of state antitrust laws?

While comparatively less frequent, ethical issues involving multiple representation also arise in civil antitrust matters. A company that has been sued based merely on a newspaper story may need to conduct an internal investigation to assess the merits of the plaintiffs' claims. Additionally,

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[37] Scott D. Hammond, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech Before the ABA Antitrust Section 2006 Spring Meeting (Mar. 29, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/215514.htm.

[38] Antitrust Division, Dep't of Justice, Model Corporate Conditional Leniency Letter at (a), (d) (2008), *available at* http://www.usdoj.gov/atr/public/criminal/239524.htm (footnote omitted).

defendants who settle with plaintiffs typically agree as part of the settlement to cooperate with plaintiffs' requests for company documents, information, and testimony so plaintiffs can proceed against the non-settling defendants. Can outside counsel for the company, which is contractually obligated to cooperate with plaintiffs, represent an employee personally in connection with plaintiffs' request to depose that individual in the ongoing civil case? What if the individual simply wants to put the matter behind him and take no part in the civil action? Is there any adversity between the company and the individual?

Even in the merger context, joint representation may pose potential conflicts issues. During merger reviews, the federal antitrust agencies sometimes issue civil investigative demands (CIDs) to third parties for the purpose of gathering additional information. With increasing frequency, such CIDs are targeted to consultants who have been retained by the merging parties such as an investment firm that issued a synergies analysis. Can outside counsel for one of the merging parties also represent the consultant for purposes of responding to a government CID asking the consultant to produce documents and provide testimony?

Finally, in virtually all cases, there is at least the potential that individual employees may face employment discipline or sanctions up to and including dismissal from the company, for their failures to abide by the company's code of ethics. If such potential exposure exists, is outside counsel for the company conflicted from representing an individual employee when the underlying conduct, if proven, would violate the company's code of ethics? If such potential conflicts are not foreseeable at the outset of the representation, can the lawyer withdraw from representing the individual once an actual conflict arises? What disclosures and waivers are necessary or effective to permit such representation?[39]

Best Practices

The potential conflicts issues associated with dual representation should always be top-of-mind for in-house counsel and their outside lawyers before taking on joint representation of the company and its employees. In determining whether joint representation is possible in a particular case, the lawyer should ask:

- Is it possible zealously to represent both the corporation and employee? Questions that should be considered include: Would a disinterested lawyer, given the facts at hand, conclude that multiple representation is in the interest of both the corporation client and the individual client? Will new information or changed circumstances render continuation of multiple representation impermissible?
- If one or the other proposed client believes joint representation could be advantageous, is it possible to obtain the informed consent of all clients after full disclosure of the advantages and risks of multiple representation? Is it necessary to use translators or engage independent counsel to advise the individual in order to ensure that the individual employee fully understands the implications of giving consent?
- If counsel undertakes the joint representation, what steps should be taken at the outset to structure the representation so as to minimize potential adverse consequences if an actual conflict between the clients arises? Can the lawyer seek a prospective waiver from both clients permitting continued representation of the corporate client and termination of the rela-

[39] These potential conflict issues are, of course, heightened to the extent the lawyer represents multiple individuals in the same investigation or matter.

tionship with the employee client? Should co-counsel or "shadow" counsel be maintained in order to minimize possible disruption if withdrawal is ever required?[40]

- How should the disclosures of the potential risks of joint representation and the parties' consent be memorialized? If written disclosures and consent are not possible, there should be, at a minimum, some witness to any oral discussions, and a contemporaneous record created.
- In particular circumstances, multiple representation will require discussions of how attorney-client confidences will be treated—for example, will they be shared with other commonly represented parties? What steps will be taken to obtain consent of both clients before any client confidences are revealed outside the jointly represented parties?

Other than avoiding all joint representations, the keys to avoiding ethical pitfalls are properly assessing the potential for conflicts and then assuring adequate disclosure to, and informed consent by, each affected client or potential client.

Other than avoiding all joint representations, the keys to avoiding ethical pitfalls are properly assessing the potential for conflicts and then assuring adequate disclosure to, and informed consent by, each affected client or potential client. An attorney can represent multiple parties only with the consent of each client after "full disclosure of the advantages and risks involved in multiple representation,"[41] which means the provision of information "reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict."[42] This may require "disclosure of any and all defenses and arguments that a client will forgo because of the joint representation, together with the lawyer's fair and reasoned evaluation of such defenses and arguments, and the possible consequences to the client of failing to raise them."[43]

Such evaluations clearly involve very fact-intensive analysis, so it is not possible to catalog all the issues that should be discussed in making this decision in a particular context. A lawyer should make the fullest disclosure possible to ensure informed client decision making, including how the attorney will address client confidences received in the course of the representation. Because of differences as to how the issue of confidences involving joint clients may be treated in a particular jurisdiction,[44] it is prudent at the outset of the representation for the lawyer to enter

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[40] *See, e.g.*, N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2004-2 (2004) at 6 ("[A]n attorney contemplating multiple representation can, and often should, consider whether the attorney-client relationship can be structured to minimize potential drawbacks to multiple representation. Such structuring may include obtaining prospective waivers of conflict, contractually limiting representation to minimize the possibility of conflicts, having a written understanding with regard to confidential information learned during the representations, and providing for co-counsel or shadow counsel."). Although this opinion applies the New York Disciplinary Rules of the Code of Professional Responsibility, which were superseded effective April 2009 by the New York Rules of Professional Conduct, the reasoning contained therein remains sound.

[41] N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2004-2 (2004) at 2.

[42] *Id.* at 5 (citing N.Y. Code of Prof'l Responsibility EC 5-16 (2007)).

[43] *Id.* at 5 (citing N.Y. County Lawyers' Ass'n Prof'l Ethics Op. 707 (1995)). *See also* D.C. RULES OF PROF'L CONDUCT R. 1.7, cmt. 7 (2007) ("The underlying premise [of Rule 1.7(b)] is that disclosure and informed consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide wholehearted and zealous representation of a client or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests."); D.C. Prof'l Ethics Op. 269 (1997) (obligations of company lawyer to clarify role in internal investigations); D.C. Prof'l Ethics Op. 296 (2000) (joint representation and confidentiality of information).

[44] *See* Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 670 (N.Y. 1996) ("Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other . . . ."). *But see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-450 (2008) (in joint representation, lawyer must protect the confidential information of each co-client).

into an agreement with all potential clients that confidential information provided to the lawyer by any of them will be disclosed to the others.[45]

Conclusion

Given the current economic climate and the accompanying pressures it places on companies to control legal costs, dual representation can offer attractive economic options as well as strategic benefits that allow the company and the individual more efficiently to mount a defense against third parties.

Despite these economies and efficiencies, however, dual representation raises a host of thorny ethical issues. Lawyers who fail to follow the relevant ethics rules with respect to joint representation—assessing potential conflicts of interest, obtaining and documenting a client's informed consent, and preserving client confidences—do so at their peril. ●

[45] *See* ABA Model Rule 1.7, cmt. 31 ("The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.").