Representing Media Clients and Their Employees in Newsgathering Cases: Traps for the Unwary

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As large libel verdicts continue to be overturned,[1] plaintiffs' lawyers are suing individual reporters and their employers on novel and more expansive tort theories for newsgathering conduct.[2] The role of prepublication and prebroadcast counsel, whether inside or outside, appears to be expanding as well. Counsel must now know not only the nuances of libel and privacy law but also the compendium of federal and state laws concerning wiretapping, eavesdropping, trespass, hidden cameras, intrusion, ride-alongs, and searches.[3] Potential newsgathering liability may create more complicated relationships between media lawyers and their clients. As civil and criminal liability for newsgathering conduct becomes less theoretical and more commonplace, prepublication counsel must be more aware of and sensitive to the possibility of conflicts of interest between reporters and their employers.[4] These potential conflicts are still being handled on an ad hoc or, even more frequently, on a post hoc basis—if they are spotted at all.

In rendering advice, can counsel presume to represent the company only? How does counsel acknowledge, establish, and perhaps limit who is the client? What guidelines should counsel use to detect potential adversity between the reporter and the company? Does the reporter's individual exposure to potential criminal liability change counsel's calculus in determining potential adversity? When and how should counsel disclose the possibility of adversity? When and under what circumstances should counsel obtain a prospective waiver of conflicts of interest? These questions present complex problems in the abstract, and even more complex problems in the sometimes sensitive, tripartite relationship among lawyers, reporters, and media companies—problems made even more complicated by real world deadlines and financial constraints. We hope to provide some guidance for anticipating and addressing at least some of these issues.

Traditionally, when defamation was the major legal concern facing newspapers, broadcasters, and other media, these clients would consult their lawyers only at the time of prepublication review, generally when the news story had been researched, written, and was ready for publication. This discrete consultation would focus on a single liability risk, the danger of false and defamatory statements in the story, and would be based on a review of factual information that was the result of the reporter's investigation. The reporter and the editor, with rare exceptions, already had agreed on the final written product of their labors, and they simply needed attorney review to assess and limit the risk of defamation.

Traditional prepublication review is designed to avoid civil liability. Where respondeat superior is the usual rule, the reporter, the editor, and the publisher generally share a common set of interests and goals. If the reporter is found liable, the company will usually be liable, and vice versa. Indeed, after *Garrison v. Louisiana*[5] largely eliminated the relic of criminal libel, newsroom lawyers have not concerned themselves with criminal law. With few and very noteworthy exceptions, such as the rare confidential source battle that was litigated to the jailhouse and beyond, a reporter was extremely unlikely to face criminal sanctions as a result of any particular article.[6]

The advent of newsgathering liability presents a very different set of risks for media lawyers. First, legal consultations are no longer simply the discrete discussion between lawyer and client after the story has been researched and written. Instead, they may precede the reporter's investigation and continue while the investigation is ongoing.

Second, because of the so-called crime-fraud exception to the attorney-client privilege,[7] the lawyer's advice may later become evidence used against the client.[8]

Third, and perhaps most significant, assisting media clients in avoiding these liabilities creates additional issues for media lawyers, aggravated by the potential application of criminal law principles to newsgathering advice and counsel.

What Are These Issues?

Identifying the Client

A lawyer must always consider who is the client in these circumstances. For example, does the individual employee become in effect another client of the company's lawyer? Certainly, editors or reporters may well argue that they acted and relied on the attorney's advice on newsgathering risks—and that fact may be significant. According to the *Restatement (Third) of the Law Governing Lawyers*, "[w]hether the lawyer is to represent the organization, a person or entity associated with it, or more than one such persons or entities is a question of fact to be determined based on reasonable expectations in the circumstances" and thus "a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer."[9] A corporate officer may invoke the attorney-client privilege individually if the evidence shows the officer is consulting the lawyer in an individual capacity.[10] One court has held that an employee can claim the privilege individually only if the substance of the consultation did not concern the employee's official duties or the company's general affairs.[11]

Some federal courts have adopted a five-part test for determining when individual corporate employees can claim that the corporation's lawyer also represented them:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities.

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> Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.[12]

Obtaining Informed Consent

If there is to be a joint representation, the lawyer must obtain informed consent from both clients. In *Felix v. Balkin*,[13] the court disqualified attorneys for both the defendant-employer and the plaintiff-employee for failure to discover conflicts of interest arising from joint representation in a sexual harassment suit. A number of employees sued Saks Fifth Avenue and various supervisors for the alleged sexual harassment committed by one particular supervisor. One of the supervisors who was being jointly represented with Saks then filed her own sexual harassment suit against Saks and the particular supervisor. Thus, an employee-plaintiff in one suit was suing her employer with whom she was a co-defendant in another suit brought by another employee on similar facts.

The *Felix* court analyzed the ethics of dual representation of employer and employee, holding that, in these circumstances, joint representation compromised the attorney's duty of loyalty to both clients. The court noted that, when undertaking joint representation, attorneys incur a two-part duty of disclosure to the clients: from investigation of the "essential facts," attorneys must (1) determine in their "professional opinion that interests are, in fact, common and not adverse, and [(2)] explain fully to each client the implications of the common representation."[14] The goal is the client's informed decision to proceed with the joint representation. Where such explanation does not make it "obvious that the lawyer can adequately represent the interests of each client," or where a client refuses to consent to joint representation after such an explanation, the attorney must withdraw.[15]

These duties are heightened, the court noted, when the joint representation is of employer and employee, "for without full understanding of all facts and circumstances, the lawyer cannot know, and cannot form a reliable opinion, that the inherent inequality of status, or particular individual interests, may not override a common interest."[16] The attorney representing the defendant-employer and employee failed to discharge these duties faithfully because he had had only a cursory conversation with the employee about conflicts, did not question her about any potential conflicts, and did not explain the consequences of dual representation and conflicts of interest. Even though the court admitted the employee had breached her duty of candor to her defense attorney, the court nonetheless disqualified the attorney's entire firm from all of the pending lawsuits.

Recognizing Potential Consequences

If there is a joint representation, the attorney owes duties to both clients and may be prevented from representing either if a conflict arises. As *Felix* illustrates, the company lawyer who advises both the company and its employees faces an increased risk of disqualification, even if the company and the individual employee do not bring claims against one another. Although most courts have refused to disqualify the employer's attorney because an attorney-client relationship existed between the attorney and the employee as an agent of the employer (rather than as an individual), the decisions have not been uniform.[17] For example, in *Montgomery Academy v. Kohn*,[18] an attorney was disqualified from representing a school in its suit to recover from its former director for an investment made in a Ponzi scheme, after the director had provided the attorney with confidential information regarding her investment of the academy's funds in the scheme. The court determined that, at the time of the disclosure, there was an implied attorney-client relationship between the attorney and the employee.

In a recent Ninth Circuit case, *United States v. Henke*,[19] the court went even further, holding that an attorney for a criminal defendant was disqualified from representation because he could not use confidential statements made by another witness, a former defendant who had been represented by a different law firm. The existence of a joint defense agreement, the court ruled, meant that the attorney had had an implied attorney-client relationship with the adverse witness and precluded any cross-examination.

Even when the dual representation ceases and the individual employee has retained separate counsel, the company's attorney may be prevented from taking any adverse position involving the individual employee and may even be prevented from cross-examinination. The conflicts rules preclude representation where the attorney seeks testimony from either a current client or a former client, where the new matter is substantially related to the subject of the former client representation. Courts have held that lawyers could not continue in a case if they would be required to cross-examine a former client on matters substantially related to work they had done for the witness.[20]

Safeguarding the Attorney-Client Privilege

Another danger posed by creeping dual representation is the risk that one party to the representation can unilaterally waive the attorney-client privilege for the others.[21] The cases, however, are divided over whether a joint client may unilaterally waive the attorney-client privilege. Can one holder of the privilege, by disclosure of confidential communications, waive the privilege for all holders? According to *Western Fuels Association, Inc. v. Burlington Northern Railroad Co*., the answer is "yes."[22] Answering "no" is *In re Grand Jury Subpoenas 89–3 and 89–4, John Doe 89–129*.[23] In a November 2001 decision also named *In re Grand Jury Subpoena*,[24] the First Circuit rejected claims of privilege by individual employees who sought to prevent company counsel from producing written communications with them during a joint representation. The company had negotiated a plea agreement allowing a waiver of privilege, and the court upheld the unilateral waiver.

Finally, with the risk of joint representation and criminal liability looming, the civil practitioner who seeks to represent both the corporation and an individual employee may also face an increased exposure to malpractice claims by failing to consider the potentially conflicting criminal law concerns of both clients. Where the possibility of criminal liability is involved, joint representation of corporations and employees presents a formidable labyrinth of potential conflicts. Individual employees, for example, enjoy Fifth Amendment rights, which, by the Constitution's terms, extend to a person; corporations do not.[25]

Thus, allowing an individual client to produce documents or to testify at a

Eliminating the Problem Before It Starts

Below is an example of a proposed form of engagement letter to address issues in the newsgathering litigation context:

Dear Media Company *(A)* and Journalist/Reporter *(B)*:

We have been requested to represent you in the lawsuit filed by _____, which named both of you as defendants. With your approval, we will accept that joint representation. Common representation of multiple defendants is advantageous in a case such as this because it facilitates a consistent and unified defense.

However, common representation of multiple defendants sometimes poses the possibility of a conflict of interest. At this point, based on all of the information available, there do not appear to be any conflicts of interest between *A* and *B* that would preclude joint representation. Nor does it appear likely that any such conflict will arise in the future. If at any time either of you perceive there is a conflict of interest in our representation of both of you, we request that you bring that to our attention immediately. Similarly, we are obligated to tell you if we ever perceive such a conflict. Once again, based on our analysis of the legal issues involved in these cases and based on everything we know as of now, we do not see any likelihood of any such conflict occurring in the future. In the unlikely event that a conflict arises in the future, we would withdraw from our representation of *B*, who would then be separately represented by a different law firm. In that event, both of you agree that we may continue to represent *A* in this case and in other cases after withdrawing from joint representation.

Each of you should be aware that communications between each defendant and us may be shared with the other defendants. Communications with one defendant will be considered communications with all defendants.

In addition, as we have discussed, you are aware that our firm represents many other companies and individuals. This can create situations where work for one client on a matter might preclude us from assisting other clients on unrelated matters. It is possible that during the time that we are representing you, some of our present or future clients will have disputes or transactions with you. In order to avoid the potential for this kind of restriction on our practice, you agree that we may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not substantially related to matters in which we have represented you, even if the interests of such clients in those other matters are directly adverse to yours. We do not intend, however, for you to waive your right to have our firm maintain confidences or secrets that you transmit to our firm, and we agree not to disclose them to any third party without your consent. We would, of course, take appropriate steps to ensure that such information is kept confidential by us.

If our representation of you and this letter meets with your approval, please sign a copy of this letter and return the signed copy to me.

We look forward to working with you.

Very truly yours,

Agreed: Media Company *(A)*, Journalist/Reporter *(B)*

Caveat: Based on all of the facts and circumstances known at the time, counsel should carefully consider whether this form of engagement letter should be modified appropriately and executed in advance of newsgathering litigation. The enforceability of these consents, and their appropriate form, may vary from state to state.

deposition, which may be helpful to the corporate client defending the lawsuit in question, may constitute a waiver of the individual's constitutional rights. Examples of such waivers can be found, for example, in *Environmental Defense Fund, Inc. v. Lamphier*,[26] in which the court held that the operator of an industrial waste disposal business had waived his Fifth Amendment privilege as to letters he had introduced into evidence in a civil action and thus could be required to testify about their contents.

Conversely, advising employees about their Fifth Amendment rights could also subject the corporation and its lawyer to criminal liability. In certain circumstances, corruptly endeavoring to convince a witness to assert the Fifth Amendment privilege (so as to discourage the witness from testifying) can be an obstruction of justice, so special care needs to be exercised in this area.[27]

How Can You Avoid These Problems?
After identifying potential conflicts, how does counsel mitigate these problems and protect the attorney-client relationship? Some have suggested the potential for obtaining advance waivers of those potential conflicts, i.e., a prospective general waiver of conflicts that may arise.

A review of the *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct* suggests that, while there is no express prohibition against advance waivers, there is no specific support for them either. However, the following authorities have supported the validity of advance waivers:

ABA Formal Opinion 93–372
An ABA ethics committee opinion outlines four specific conditions that should be met for enforceable advance waivers, including that (1) the waiver should be in a written document that expressly reflects the client's agreement; (2) the waiver cannot be presumed to waive objection to disclosure or use of confidential client information; (3) the waiver must communicate information reasonably sufficient to permit the client to appreciate the significance of the matter in question; and (4) the waiver does not negate the requirement that a lawyer make an independent judgment as to whether a new representation will adversely affect the firm's representation of the original client. The opinion of the

ABA Committee on Ethics and Professional Responsibility goes on to state:

> Informed consent by the client is as necessary for effectiveness of a prospective waiver as for a contemporaneous waiver, but in the nature of things the consent is much less likely to be fully informed. Given the importance that the Model Rules place on the ability of the client to appreciate the significance of the waiver that is being sought, it would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicting clients would survive scrutiny. Even that information might not be enough if the nature of the likely matter and its potential effect on the client were not also appreciated by the client at the time the prospective waiver was sought.
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> . . . .
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> The closer the lawyer who seeks a prospective waiver can get to circumstances where not only the actual adverse client but also the actual potential future dispute are identified, the more likely it will be that a prospective waiver is consistent with the requirement of the Model Rules that consent be attended by a consultation that communicates "information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Model Rules Terminology. The goal should be for the client to be able to recognize the legal implications and possible effects of the future representation at the time the waiver is signed. That this involves predictions about the future where prognostication can be difficult only highlights the substantial burden that those seeking enforceable prospective waivers must meet.[28]

Similarly, the *Restatement (Third) of the Law Governing Lawyers* points out that client consent to conflicts that might arise in the future is subject to special scrutiny and that an open-ended consent to all future conflicts requires client sophistication and an opportunity to receive independent legal advice about the consent. Section 122 (comment d) notes that "the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial."[29]

Another scholarly publication, *The Law of Lawyering*, recognizes the reality that large law firms have been and are using advance waivers. That secondary authority points out that consents to prospective conflicts of interest in advance are fast becoming a "staple of practice" in large law firms with long and diverse client lists.[30] The authors also point out that a firm undertaking this practice should include statements in its engagement agreements disclosing that the firm can reasonably be expected to represent a potential new client's competitors, but that the firm will loyally serve all clients despite these possible conflicts of interest and will "take the client's agreement to go forward as informed consent."[31]

ABA Model Rule 1.7

In February 2002, the ABA House of Delegates approved, among other things, a new comment to Rule 1.7 of the *Model Rules of Professional Conduct* that recognizes the validity of advance consents when the lawyer has made an adequate disclosure of the risks, and the client reasonably understands them. In judging the validity of advance consent, factors to be weighed include the client's experience as a user of legal services, the involvement of "consent counsel," specificity in describing future conflict risks, and limitation of consent to matters unrelated to the original representation.[32]

District of Columbia

In addition to scholarly commentary, ethics opinions by various bar groups in several states offer varying degrees of support for advance waivers.[33] A recent opinion issued by the Legal Ethics Committee of the District of Columbia Bar is especially instructive.[34] This ethics opinion squarely faces the validity of advance consents and contains one of the best available discussions of the legal authorities and the essential arguments on this subject. The opinion begins by flatly stating that advance waivers of conflicts of interest are *not* prohibited by the Model Rules but that they must comply with the "overarching requirement of informed consent."[35]

This means that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid. An advance waiver given by a client having independent counsel (in-house or outside) available to review such actions presumptively is valid, however, even if general in character. Regardless of whether reviewed by independent counsel, an advance waiver of conflicts will not be valid where the two matters are substantially related to one another.[36]

The opinion makes a number of interesting observations, including that the committee knew of no D.C. Court of Appeals decision on advance waivers, that the D.C. Rules are silent on the subject, and that the committee itself had previously expressed doubt about enforceability of such waivers (although it had never addressed the issue directly).[37] It also explains that permitting advance consents under restricted conditions can be advantageous to some clients because otherwise certain lawyers and law firms might not be available to represent them due to concern about disqualification and/or censure.

The opinion is also important because it attempts to clarify the "specificity" dilemma, which has always been subjective, by determining that an advance consent generally will be valid if the nature of the consent is sufficiently specific, or if the client is advised by independent counsel. In the latter case, the consent should be presumed valid, according to the opinion, even if quite general. Advance consents may include litigation, but not matters "substantially related" to a matter in which the firm has represented the consenting client. It remains to be seen whether other bodies will adopt this bright-line test for validity.

Case Law on Advance Waivers

Only a few cases address the validity of advance waivers. In *Elliott v. McFarland Unified School District*,[38] the California Court of Appeal upheld the trial court's denial of a request to recuse School Legal Services (SLS), which provided legal services to school districts and other public education entities under a "joint powers agreement." SLS initially represented both Kern and McFarland in a mandamus proceeding. Later, SLS called to the attention of McFarland a disparity in the legal positions of Kern and McFarland and argued that it could continue to represent Kern, but not McFarland, due to the resulting conflict.[39] McFarland later argued that the trial court erred in denying its recusal motion because SLS's representation of Kern against McFarland in the *Elliot* proceeding amounted to representation of conflicting interests without informed written consent.[40] The court noted, however, that although the record revealed no written consent by Kern and McFarland, the joint powers agreement between the parties stated that

> [i]n the event that two or more parties hereto are unable to resolve a legal issue between or among them without legal proceedings, the party or parties in contra-position to that of legal counsel employed as set forth herein on the legal issue involved shall secure its/their separate legal counsel at its/their own expense.[41]

The court then concluded that this provision of the joint powers agreement constituted McFarland's advance written consent to SLS's continued representation of Kern.

In *Interstate Properties v. Pyramid Co. of Utica*,[42] the court also denied a motion to disqualify a law firm where the firm had obtained a letter of advance consent. The law firm of Finley, Kumble was representing Interstate when it filed an opposition to Pyramid-Utica's application for a permit to develop a mall. The permit was denied, and subsequently Interstate and Pyramid-Utica formed a joint venture to develop a single shopping center. Impressed with Finley's abilities in opposing the prior permit, Pyramid-Utica agreed that the joint venture should hire Finley to represent it in a new application. The permit was approved, and Pyramid-Utica then went on to hire Finley in additional matters.[43]

Interstate later sued Pyramid-Utica, contending that it had violated the terms of the joint venture agreement. The defendants then moved to disqualify the Finley firm from representing Interstate in the litigation. The court denied the motion, finding that the "linchpin" of Finley's exoneration was found in Pyramid's express permission in the engagement letter for Finley to continue to act as general counsel for Interstate in any and all pending and future matters, including any adversary proceedings that might later arise between Interstate and Pyramid.[44] The court also noted that the letter went on to acknowledge that there had been no confidential or privileged communications between Finley and Pyramid that would inhibit representation of Interstate in litigation concerning the joint venture agreement. Finally, the court noted that the letter specifically cautioned Pyramid that in "reviewing and executing this agreement [the waiver letter], that the same be carefully examined by separate counsel of their own choosing, and that you acknowledge that you have not relied upon any advice provided by Finley, Kumble but instead have acted solely in reliance upon the advice of independent counsel."[45]

In *Fisons Corp. v. Atochem North America, Inc.*,[46] the federal district court upheld an advance waiver even though the law firm's engagement later resulted in concurrent representation of two clients whose interests were adverse. There, the law firm of Dechert Price & Rhoads had been primary counsel for Pennwalt Corporation[47] for more than thirty years. The plaintiff, Fisons, eventually purchased Pennwalt Corporation, and also inherited certain trademark disputes that were outstanding against Pennwalt. Fisons asked Pennwalt if it would allow Dechert Price to continue its representation, now on behalf of Fisons, in certain of those trademark disputes. Dechert Price, however, was unwilling to represent Fisons if that representation would jeopardize its ability to represent Pennwalt in any future litigation between Pennwalt and Fisons.[48] Fisons agreed in writing that it had consented to Dechert Price's continued representation of Pennwalt, even in possible future litigation adverse to Fisons. Fisons later moved to disqualify Dechert Price from acting as Pennwalt's counsel in an action adverse to Fisons on the grounds that the firm was representing Fisons in the trademark action.[49]

The court first noted that Dechert Price, by concurrently representing Fisons and Pennwalt, was engaged in a conflict of interest prohibited by the *Model Rules of Professional Conduct*.[50] Nevertheless, the court found that Dechert Price had obtained Fisons's informed consent to the conflict, and that Fisons had agreed to the dual representation at issue.[51] The court stated:

> Fisons was made aware of the possible adverse effects of dual representation when Dechert Price told Fisons that it would undertake to represent Fisons provided that Dechert Price be allowed to continue its representation of [Pennwalt]. Such disclosure is adequate in view of the fact that Fisons is a knowledgeable and sophisticated client. Indeed, Fisons' consent was provided by an officer of the corporation who was also an attorney.[52]

Thus, the court emphasized the disclosure that was made, the knowledge and sophistication of the client, and the fact that the consenting client's interests were represented by an attorney.

Fisons argued that the disclosure was inadequate because it had not been informed that the conflict of interest could arise in a suit charging Pennwalt management with fraud. The court rejected that argument, stating that the disciplinary rules do not require that the nature of the litigation that gives rise to the conflict be known prior to giving consent. Instead, the rules require that the law firm provide full disclosure of the possible effect of multiple representation on the exercise of the attorney's professional judgment on behalf of each.[53] Accordingly, the court concluded that Dechert Price had established Fisons's informed consent to the dual representation.[54]

There is also an unpublished decision, *Kennecott Copper Corp. v. Curtis-Wright Corp.*,[55] in which the court approved Skadden Arps's advance waiver in a retainer agreement with a new "one-shot" client. The court found such waiver sufficient to neutralize a conflict that arose three years later.

Technically not a waiver case, *City of Cleveland v. Cleveland Electric Illuminating Co.*[56] is a time-honored opinion based on federal and Ohio law that sets forth some helpful principles. The court pointed out that the rules regarding conflicts-based disqualification had been developed when law firms were smaller and performed discrete "matters" for clients, a situation that by that time was already changing.[57] The opinion points out that Squire, Sanders & Dempsey had represented CEI in an "open, continuous and notorious" manner against the city for years, and that the city was aware of the potential conflict all along, but nevertheless had engaged Squire, Sanders in a number of matters over the years, none of which, except a single bond deal, had a "substantial relationship" to the case at hand. The court decided that the city was equitably estopped from disqualifying Squire, Sanders and noted that the bond counsel role did not reflect a true adversarial position, as often would be the case.[58] On that basis, the court concluded that the city had waived its right to object to the firm's representation and denied the motion to disqualify.[59]

At least one decision, *Worldspan v. Sabre Group*,[60] is not favorable to advance waivers, at least when the consent was not informed because of the ambiguity of the engagement letter and the time lapse between consent and the conflict at issue. A large Atlanta firm, Alston & Byrd, obtained from Worldspan a waiver of future conflicts in unrelated matters. The consent had been obtained as part of the firm's standard engagement letter in 1992. Six years later, Worldspan sued Sabre, alleging theft of trade secrets, fraud, and antitrust violations. When Alston & Byrd appeared for Sabre, Worldspan moved to disqualify. The federal district judge declined to find that Worldspan had given its informed con-

sent, and pointed out that "contract principles" do not supersede the rules of professional responsibility. The court went on to find that the consent was not informed because the letter was ambiguous, in that it did not refer to the specific potentially adverse parties, to the circumstances under which adverse representation would be undertaken, or to other information that the court considered relevant. Part of the court's rationale was that a general advance consent covering all unrelated matters is insufficient to waive adversity in litigation unless it expressly refers to "litigation." More important, the court seemed greatly troubled by the fact that the consent was six years old. Although this decision has cast some doubt on the enforceability of advance waivers, it is unique in its outcome.

Conclusion

In 1999, after the U.S. Supreme Court decided *Wilson v. Layne*,[61] a media lawyer commented to his colleagues about the ruling: "I've spent years learning to be a First Amendment lawyer. Now the Court's telling me I've got to be a Fourth Amendment lawyer as well?"

The remark, though somewhat flippant, is right on the mark. Increasing risks of newsgathering liability have forced media counsel to become more savvy and knowledgeable about new areas of the law, to become involved in reviewing and advising about client projects earlier and earlier in the story process, and to navigate through the shoals of joint representation and conflicts of interest well before any libel or privacy claim, or even a potential claim, has arisen. The danger of criminal liability, and loss of the attorney-client privilege because of the crime fraud rule, aggravates these concerns. Careful review of the applicable ethical rules, however, coupled with appropriate disclaimers and consents where necessary, should permit lawyers to undertake their traditional duties of assisting media clients in performing their vital First Amendment functions.

Endnotes

1. *See, e.g.*, Cobb v. Time, Inc., 278 F.3d 629 (6th Cir. 2002) (reversing $10.7 million judgment and rendering judgment for defendants because no actual malice); MMAR Group, Inc. v. Dow Jones & Co., 187 F.R.D. 282 (S.D. Tex. 1999) (granting new trial and vacating $222 million judgment); Turner v. KTRK Television, Inc., 38 S.W.3d 103 (Tex. 2000) (vacating $3.25 million judgment and rendering judgment for defendants because no actual malice).

2. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514 (2001) (wiretapping); Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (wiretapping); Wilson v. Layne, 526 U.S. 603 (1999) (ride-alongs); Food Lion v. Am. Broadcasting Cos., 194 F.3d 505 (4th Cir. 1999) (undercover investigation); Sanders v. Am. Broadcasting Cos., 978 P.2d 67 (Cal. 1999) (hidden camera); Shulman v. Group W Prod., Inc., 955 P.2d 469 (Cal. 1998) (recording of accident victim).

3. *See generally* 2002 LDRC BULLETIN NO. 2, CRIMINAL PROSECUTIONS OF THE PRESS: THE ESPIONAGE ACT, NEWSGATHERING POST–*BARTNICKI*, CRIMINAL LIBEL, RESTRICTING JUROR INTERVIEWS (2002), at http://www.ldrc.com/Press_Releases/bull2002-2.html.

4. *See* LDRC, *supra* note 3, at 63–78.

5. 379 U.S. 64 (1964); *but see* LDRC, *supra* note 3, at 79–106. For a more recent example of criminal libel prosecution, see State v. Carson, Powers, and Observor Publ's, Inc., Case No. 01 CR 301 A, B, & C (Dist. Ct. Wyandotte County, Kan. July 19, 2002); Reporters Committee for Freedom of the Press, *Jury finds editor, publisher and newspaper guilty of criminal libel, available at* http://www.rcfp.org/news/2002/0719kansas.html (last visited July 29, 2002); Felicity Barranger, *A Criminal Defamation Verdict Roils Politics in Kansas City, Kan.*, N.Y. TIMES, July 29, 2002, at C7.

6. *But see* Daniel Scardino, *Vanessa Leggett Serves Maximum Jail Time, First Amendment-Based Report's Privilege Under Siege*, 19 COMM. LAW. 4, at 1 (2002).

7. *See In re* Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term 1991, 33 F.3d 342 (4th Cir. 1994).

8. In the *Food Lion* case, for example, the attorneys for Food Lion successfully argued that the trial court should reject claims of privilege and allow discovery of ABC's in-house legal advice and other privileged communications. This misguided decision illustrates the court's lack of understanding of the prebroadcast lawyer's role and the societal value of undercover investigations.

9. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14, cmt. f (2001).

10. *In re* Grand Jury Proceedings, 434 F. Supp. 648, 650 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978).

11. *In re* Grand Jury Investigation No. 83–30557, 575 F. Supp. 777, 780 (N.D. Ga. 1983).

12. *In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986).

13. 49 F. Supp. 2d 260 (S.D.N.Y. 1999).

14. *Id.* at 270.

15. *Id.*

16. Id. at 271. The court disqualified the plaintiffs' law firm as well for deceptive conduct.

17. *See* Cole v. Ruidoso Mun. Sch., 43 F.3d 1373 (10th Cir. 1994) (refusing disqualification of school district's attorney in principal's sex discrimination and Equal Pay Act claim based on fact that prior consultation with district attorney involved carrying out duties as principal); Polovy v. Duncan, 702 N.Y.S.2d 61 (N.Y. App. Div. 2000) (prior relationship between former executive director of not-for-profit corporation and lawyer who negotiated director's leave and resignation on behalf of corporation would not have led a reasonable person to conclude that the lawyer was her "personal attorney" such that lawyer's conduct during negotiations created a conflict of interest; there was no retainer agreement between the director and the lawyer with respect to any prior matter in which the lawyer may have assisted the director, and such assistance apparently was in furtherance of the corporation's interests); Talvy v. Am. Red Cross in Greater N.Y., 618 N.Y.S.2d 25 (N.Y. App. Div. 1994) (former personnel director of defendant not entitled to disqualify defendant's lawyer involved in prior cases for defendant; even though personnel director was involved in prior litigation discussions and confidential communications, he had no reason to believe his communications with lawyer would be kept from his employer).

18. 50 F. Supp. 2d 344 (D.N.J. 1999).

19. 222 F.3d 633 (9th Cir. 2000).

20. United States v. Esposito, 816 F.2d 674 (4th Cir. 1987); United States v. O'Malley, 786 F.2d 786 (7th Cir. 1986); Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984); United States v. James, 708 F.2d 40 (2d Cir. 1983); United States v. Shepard, 675 F.2d 977 (8th Cir. 1982); Selby v. Revlon Consumer Prods. Corp., 6 F. Supp. 2d 577 (N.D. Tex. 1997); Pyle v. Meritor Sav. Bank, Nos. CIV. A. 92-7361, 92-7362, 1994 U.S. Dist. LEXIS 5408 (E.D. Pa. Apr. 25, 1994); Bobkoski v. Bd. of Educ., No. 90 C 5737, 1991 U.S. Dist. LEXIS 5020 (N.D. Ill. Apr. 11, 1991); United States v. Cheshire, 707 F. Supp. 235 (M.D. La. 1989).

21. There may be an incentive for corporations to waive their attorney-client privilege, produce the results of internal investigations, and disclose an employee's admissions. Since the Holder Memorandum in 1999, the Department of Justice has taken the position that a "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors" in determining whether to charge the corporation. Such cooperation can be a two-edged sword. According to news accounts, Arthur Andersen LLP attempted cooperation with the Department of Justice, when its Enron-re-

lated shredding came to light, and agreed to waive its corporate attorney-client privilege. In doing so, it produced the internal memorandum from its in-house counsel that eventually persuaded a Houston jury to convict the accounting firm of obstruction of justice.

22. 102 F.R.D. 201 (D. Wyo. 1984).

23. 902 F.2d 244, 248 (4th Cir. 1990) (joint defense privilege cannot be waived without the consent of all parties).

24. 274 F.3d 563 (1st Cir. 2001).

25. *See* United States v. White, 322 U.S. 694 (1944) (unincorporated labor union); Hale v. Henkel, 201 U.S. 43 (1906) (corporations); *In re* Grand Jury Subpoena, 973 F.2d 45 (1st Cir. 1992) (nominee trust); *In re* Two Grand Jury Subpoenae Duces Tecum Dated Aug. 21, 1985, 793 F.2d 69 (2d Cir. 1986) (nonincorporated law firm); Heinold Hog Market, Inc. v. McCoy, 700 F.2d 611 (10th Cir. 1983) (bill-paying service that was not a sole proprietorship); *see also In re* Special Investigation No. 281, 473 A.2d 1 (Md. 1984) (holding dentist had no Fifth Amendment right in patient records that he turned over to his professional association, even though records were generated while dentist was in private practice).

26. 714 F.2d 331 (4th Cir. 1983).

27. *See* United States v. Capo, 791 F.2d 1054 (2d Cir. 1986); United States v. Cioffi, 493 F.2d 1111, 1119 (2d Cir. 1974).

28. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Opinion 93-372, Waivers of Future Conflicts of Interest (1993) (emphasis added).

29. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122, cmt. d (2000).

30. GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 10.9 (3d ed. 2001).

31. *Id.*

32. MODEL RULES OF PROF'L CONDUCT R. 1.7, n.9 § 22 (2002).

33. For a complete listing of state ethics opinions, the Defense Research Institute has published a comprehensive list (with hyperlinks to individual opinions) at www.dri.org/dri/about/stateguidetoethicsopinionshidden.cfm.

34. D.C. Bar Ass'n Legal Ethics Comm. Op. 309 (2001) (advance waivers of conflicts of interest), *available at* http://www.ethicsandlawyering.com/Issues/files/opin309.pdf.

35. *Id*. at 1.

36. *Id*.

37. *Id*. at 4–5.

38. 211 Cal. Rptr. 802 (Cal. Ct. App. 1985).

39. *Id.* at 804.

40. *Id.* at 805.

41. *Id.*

42. 547 F. Supp. 178 (S.D.N.Y. 1982).

43. *Id.* at 179–80.

44. *Id.*

45. *Id.*

46. No. 90-Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284 (S.D.N.Y. Nov. 14, 1990).

47. In 1989, Pennwalt Corporation was purchased and renamed by Atochem North America. For ease of reference, however, the corporation is referred to as Pennwalt throughout the discussion. The name change of the corporation had no impact on the advance waiver that was given.

48. 1990 U.S. Dist. LEXIS 15284, at *2.

49. *Id.* at *3.

50. *Id.* at *13.

51. *Id.* at **13–15.

52. *Id.* at **15–16.

53. *Id.* at *16.

54. *Id.* at *17.

55. No. 78–1295 LFM (S.D.N.Y. 1978).

56. 440 F. Supp. 193 (N.D. Ohio 1976).

57. *Id.* at 196.

58. *Id.* at 201–04.

59. *Id.* at 205; *see also* Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981) (approving an advance consent given orally to an identified potential conflict that later materialized); Zadar Corp. v. Kwan, 37 Cal. Rptr. 2d 754, 756 (Cal. Ct. App. 1995) (finding that a written consent to representation of another specific client of the firm, that stated "notwithstanding any adversity that may develop," amounted to consent to an adverse position in litigation).

60. 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

61. 526 U.S. 603 (1999) (ride-alongs).