

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS**

1. FORMAL OPINION 2004-02

**REPRESENTING CORPORATIONS AND THEIR CONSTITUENTS IN THE CONTEXT
OF GOVERNMENTAL INVESTIGATIONS**

Topic: Multiple Representations; Corporations and Corporate Constituents

Digest: Multiple representations of a corporation and one or more of its constituents are ethically complex, and are particularly so in the context of governmental investigations. If the interests of the corporation and its constituent actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such a multiple representation, provided the representation satisfies the requirements of DR 5-105(C) of the New York Code of Professional Responsibility: (i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent; and (ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise. In determining whether these requirements are satisfied, counsel for the corporation must ensure that he or she has sufficient information to apply DR 5-105(C)'s disinterested lawyer test in light of the particular facts and circumstances at hand, and that in obtaining the information necessary to do so, he or she does not prejudice the interests of the current client, the corporation. Even if the lawyer concludes that the requirements of DR 5-105(C) are met at the outset of a multiple representation, the lawyer must be mindful of any changes in circumstances over the course of the representation to ensure that the disinterested lawyer test continues to be met at all times. Finally, the lawyer should consider structuring his or her relationships with both clients by adopting measures to minimize the adverse effects of an actual conflict, should one develop. These may include prospective waivers that would permit the attorney to continue representing the corporation in the event that the attorney must withdraw from the multiple representation, contractual limitations on the scope of the representation, explicit agreements as to the scope of the attorney-client privilege and the permissible use of any privileged information obtained in the course of the representations, and/or the use of co-counsel or shadow counsel to assist in the representation of the constituent client.

Code: DR 2-110; DR 4-101; DR 5-105; DR 5-107; DR 5-108; DR 5-109; DR 7-104

Question

Under what circumstances may a lawyer simultaneously represent a corporation and one or more of its officers, directors, employees or other constituents in the context of a governmental investigation? What disclosures must the lawyer make to her current and prospective clients and what consents must she obtain prior to undertaking such a

representation? How may the lawyer structure her relationship with her clients so as to minimize adverse consequences if conflicts between their interests arise?

Opinion

In an era in which each day's edition of The Wall Street Journal brings fresh reports of companies under investigation, it has become increasingly common for lawyers to be asked to undertake simultaneous representation of a corporation and one or more of its officers, directors, employees or other constituents (sometimes collectively referred to as "constituents") in the context of a governmental investigation. In addition, in an era in which corporations are under increasing pressure to demonstrate that they are "good corporate citizens" by cooperating fully with governmental investigations, it has become increasingly likely that simultaneous representation of a corporation and its constituents may involve the representation of differing interests.

At the same time, there is relatively little guidance available to attorneys on the ethical issues implicated by a request for simultaneous representation of a corporation and an officer or employee of that corporation in the context of a governmental investigation. We have found no ethics opinions addressing the topic.¹ In addition, reported case law on multiple representation – which tends to be limited to issues such as when conflicts will require the disqualification of counsel or the reversal of a conviction – is of only limited assistance.²

As a result, we believe it would be helpful and timely to outline the ethical issues implicated by multiple representation of a corporate client and one or more officers, directors, employees or other constituents in the context of a governmental investigation. In particular, this Opinion focuses on: (1) the circumstances under which a lawyer for the corporation may ethically undertake simultaneous representation of one or more employees of the corporation; (2) the disclosures that must be made and the consents that must be obtained in order to render such multiple representation ethically permissible; and (3) the steps that can or should be considered to minimize potential harm to the corporate and employee clients if conflicts between their interests arise.³ Although this Opinion deals specifically with multiple representations in the context of governmental investigations, we believe that most, if not all, of the concepts discussed in this opinion would apply to any multiple representation of a corporation and one or more of its constituents.

While there is no per se bar to simultaneous representation of corporate and employee clients in the context of governmental investigations, the Code of Professional Responsibility imposes three important restrictions on the permissibility of such representations. First, the lawyer must be able to conclude that a disinterested lawyer would, given the facts at hand, regard multiple representation as in the interest of both the corporate client and the employee client. Second, the lawyer must obtain the consent of both clients after full disclosure of the advantages and risks involved in multiple representation. Third, the lawyer must be alert to changes in circumstances

that would render continuation of multiple representation impermissible.

In addition, the lawyer contemplating multiple representation should consider whether steps might be taken to structure his relationship with each client so as to minimize adverse consequences in the event that a conflict between them arises. For example, it may be appropriate or even necessary for the lawyer to seek a prospective waiver from his clients permitting him to continue his representation of the corporate client in the event that a conflict arises between the corporate client and the employee client. Additionally, or alternatively, the lawyer may conclude that the disinterested lawyer test is more clearly satisfied if he jointly represents one or both clients with co-counsel or shadow counsel.

The Standard Articulated in DR 5-105

DR 5-105 articulates the ethical standard governing the permissibility of representing multiple clients in a matter. Subject only to the exception contained in DR 5-105(C), the provisions of DR 5-105(A) and (B) prohibit undertaking or continuing in multiple representation “if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected” or “if it would be likely to involve the lawyer in representing differing interests.”

As defined by the Code, differing interests “include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest.” 22 N.Y.C.R.R. § 1200.1(a); see also NYSBA Comm. on Prof'l Ethics Op. 674 (n.d.). Accordingly, a finding of “adverse” or “differing” interests does not require “actual detriment” or any actual conflict; rather, a broad prophylactic rule is appropriate because it “not only preserves the client’s expectation of loyalty but also promotes public confidence in the integrity of the bar.” Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 131, 674 N.E.2d 663, 667 (1996) (discussing, on motion to disqualify, similar standard under DR 5-108 regarding conflicts with former clients).

Under DR 5-105, a lawyer may undertake or continue multiple representation of clients with potentially differing interests only if:

a disinterested lawyer would believe that the lawyer can competently represent the interests of each [client] and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

DR 5-105(C).

The Disinterested Lawyer Test

Thus, under DR 5-105, the first determination that must be made before undertaking simultaneous representation of a corporate client and an employee client is that a disinterested lawyer would believe that a single lawyer could competently represent the

interests of each client. In addition, since DR 5-105 also speaks to continuing a multiple representation, it requires the attorney to remain alert to potential conflicts and to reassess, as circumstances change, whether the disinterested lawyer test is still satisfied.

A “disinterested lawyer” is an objective, hypothetical lawyer “whose only aim would be to give the client the best advice possible about whether the client should consent to a conflict” or potential conflict. Simon’s New York Code of Prof’l Responsibility Ann. 554-55 (2003). If the lawyer believes that such a disinterested lawyer “would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for” consent to multiple representation. EC 5-16.

In some instances, it will be obvious that the disinterested lawyer test cannot be satisfied with respect to the simultaneous representation of a corporate client and an employee client. For example, if the government is investigating securities law violations relating to the filing of false or misleading financial statements, a disinterested lawyer could not reasonably conclude that a single lawyer could competently represent both the corporation and an employee who has admitted wrongdoing in connection with the financial statements under investigation.

In such a scenario, the corporation would have a strong interest in avoiding or limiting criminal or civil liability by, among other things, cooperating fully with the government and providing any information sought by the government regarding the preparation of the financial statements.⁴ The individual employee would, by contrast, have to consider a variety of factors before deciding whether it was in his interest to cooperate with the government, and he would need counsel able and willing to negotiate the best possible resolution of the matter for him.

In other scenarios, it would be clear that the disinterested lawyer test is easily satisfied. For example, in our same hypothetical investigation of securities law violations, an employee in the corporation’s maintenance department who merely overheard comments regarding the need to alter the corporation’s financial statements would have no reason for concern about personal liability. Such an employee would have no need for counsel to negotiate independently with the government on his behalf, and a disinterested lawyer would easily conclude that a single lawyer could competently represent the interests of both the corporation and the maintenance worker.

Many situations, however, are likely to be far less clear than the two scenarios described above. What if, for example, instead of working in the corporation’s maintenance department, the employee was the head of one of the corporation’s accounting divisions, albeit not the one involved in the financial statements under investigation? What if the employee worked in the accounting division under investigation, and had some, but not full, discretion to decide how to account for the transactions giving rise to the investigation? What if the employee had no decision-making authority, but nonetheless participated in booking the transactions? What if the

employee is the corporation's CEO, who is not an accountant but who certified the accuracy of the corporation's financial statements?

In all such scenarios, the question of whether multiple representation would pass the disinterested lawyer test is much closer and likely would turn on the specific knowledge possessed by the employee, the specific laws or regulations implicated by the conduct, and the perceived scope of the government's investigation. As a result, in all such scenarios, the lawyer must take particular care to ensure that he has a sufficiently detailed grasp of the relevant facts to be able to make the assessment required by DR 5-105(C).

Obtaining the Facts Needed to Apply the Disinterested Lawyer Test

The need for facts sufficient to apply the disinterested lawyer test raises the issue of what, if any, precautions a lawyer must take in his fact-gathering to avoid potential harm to his existing or prospective clients. In the typical case, an attorney's first encounter with a corporate employee will occur in the context of an interview in which the attorney is representing only the corporation and is engaged in fact-gathering on behalf of the corporation. In such interviews, it is typical for the attorney to advise the employee that: (1) the attorney represents the corporation, not the employee; (2) any information imparted to the attorney is privileged, but the privilege is held by the corporation, not the employee; and (3) it will be up to the corporation to decide whether to waive the privilege and share any information imparted by the employee with third parties.

In all cases where the interests of the constituent and the interests of the corporation may differ, attorneys are affirmatively required to give at least part of the advice described above. The Code requires an attorney to advise a corporation's employees that she is "the lawyer for the organization and not for any of the constituents" in any situation in which "it appears that the organization's interests may differ from those of the constituents." DR 5-109(A). Given the ease with which the "differing interests" test is satisfied, we believe an attorney should usually advise a corporate employee that she represents the corporation rather than the employee. Furthermore, given the increased solicitude that courts and other authorities have shown for the reasonable expectations of a party in determining whether an attorney-client relationship has been formed,⁵ an attorney also acts at the peril of his corporate client if the attorney fails to make clear whom she does and does not represent.

If, in an initial interview, a corporate employee asks the corporation's attorney whether he should consult with counsel, it is typical for the attorney to reiterate that he represents the corporation and therefore cannot advise the employee. Here, too, the Committee regards that practice as a prudent precaution. While DR 7-104(a)(2) allows an attorney to advise an unrepresented party to secure counsel,⁶ the attorney also must bear in mind that as corporate counsel, "he owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity." EC 5-18. Because affirmatively advising a corporate employee to

secure counsel may work against the interests of the corporation, we believe it is appropriate for corporate counsel to be reluctant to render that advice – at least in the absence of the consent of his client to do so.⁷

If a constituent requests, prior to an initial interview by corporate counsel, to be represented by corporate counsel, it is typical for corporate counsel to decline at that point to undertake multiple representation. The Committee regards that practice as a prudent precaution. While it is, in theory, possible that corporate counsel will already have facts sufficient to enable her to apply the disinterested lawyer test prior to an initial interview with the employee, it seems likely that in most instances she will not have sufficient facts. Thus, we regard it as likely to be an exceptional case in which corporate counsel could properly agree to represent one of the corporation's employees prior to an initial interview of that employee.

If an employee who has already been interviewed subsequently requests representation by corporate counsel – a request that typically is triggered by a request from the government to interview or take testimony from the employee – the corporate attorney will then need to determine whether he has sufficient facts to enable him to apply the disinterested lawyer test. If he does not, he must then determine how best to obtain those additional facts.

In this regard, the corporate attorney should take care to avoid proceeding in a manner that could work against the interests of his existing client, the corporation. Thus, for example, if the corporate attorney were simply to agree to meet again with the corporate employee for the purpose of determining whether he could represent the employee, without first discussing whether the attorney may not be free to share with the corporation any additional information that was imparted, then the attorney may not in fact be able to share that information with the corporation, see, e.g., *United States v. Dennis*, 843 F.2d 652, 656-57 (2d Cir. 1988) (statements made by prospective client are privileged even if attorney ultimately declines the engagement), and might even in some cases be unable to continue to represent the corporation. See Restatement (Third) of the Law Governing Lawyers § 15 (2000) (addressing a lawyer's duty to protect information relating to the representation of a prospective client and how to protect against adverse consequences to an existing client). As a consequence, to protect the interests of the existing client, the corporation, it is important that the lawyer make clear to the employee that information shared in the interview will be disclosed to the corporation and that the corporation will control the decision as to whether to disclose such information further.

Consent After Full Disclosure

If the attorney concludes that the disinterested lawyer test has been satisfied, the lawyer may undertake multiple representation only with the consent of each client after “full disclosure of the implications of the simultaneous representation and the advantages and risks involved.” DR 5-105(C).

“ Full disclosure” 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” EC 5-16; cf. *People v. Gomberg*, 38 N.Y.2d 307, 314, 342 N.E.2d 550, 554 (1975) (“Attorneys are under an ethical obligation to disclose to their clients, at the earliest possible time, any conflicting interests that might cloud their representation.”).

Full disclosure also includes “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.” NYCLA Ethics Op. 707 (1995).

This Opinion cannot, and does not attempt to, catalogue all possible advantages and risks attendant to simultaneous representation of a corporation and one or more of its employees. Instead, the Opinion attempts to provide general guidance in this area by noting some of the more common advantages and risks, with the caveat that in each case in which multiple representation is contemplated, the attorney must give careful, fact-specific consideration to the potential risks and advantages of the representation so that there can be full disclosure to the clients within the meaning of DR 5-105(C).

Risks and Advantages from the Corporate Client’s Perspective

In the case of a corporate client, the most common (and most readily apparent) advantage to multiple representation is avoiding the expense of separate counsel. Other common advantages include providing employees with the benefit of counsel who has a detailed and broad knowledge of the relevant facts and avoiding the suggestion that there is any division of interest between the corporation and its employees.⁸

With respect to the risks posed to a corporate client from multiple representation, the most serious potential risk will tend to be the possibility that a conflict will arise that will disable corporate counsel from continuing as corporate counsel. If a matter is time sensitive, or if corporate counsel has invested considerable time in the representation, the prejudice to the corporation from such a development could be quite significant.

In this regard, corporate counsel should ensure that the corporation understands that if the interests of the corporation and the employee become materially adverse, corporate counsel will not be able to continue in the matter on behalf of the corporation unless the employee consents to counsel doing so. See DR 5-108(A) (prohibiting, absent consent after full disclosure, representation that is materially adverse to a former client in the same or a substantially related matter). In addition, if there is any reasonable possibility of a divergence of interests, we believe that corporate counsel should seriously consider advising the corporation to obtain a prospective waiver sufficient to satisfy DR 5-108(A) as a condition of consenting to multiple representation. Indeed, in some cases, the absence of such a waiver might well cause the multiple representation to fail the disinterested lawyer test.

Other common disadvantages, from the corporation’s perspective, to multiple

representation include potential loss of credibility with the investigating agency, complication of corporate counsel's ability to report facts to the corporation, and complication of the corporation's ability to report facts to the government.

With respect to the first of those possible disadvantages, it may well be the case that a government attorney will regard with greater suspicion the testimony of a corporate employee that is favorable to the corporation if the employee is represented by counsel for the corporation. Indeed, a government attorney may even affirmatively object to the multiple representation. In such cases, it is not uncommon for the corporation or its counsel to decide against multiple representation even if it is believed to be permissible.

Multiple representation may also complicate corporate counsel's ability to report to the corporation because, absent consent, she may not be able to pass on the confidences or secrets of his employee client. See DR 4-101(B)(3); DR 4-101(C)(1) (confidences and secrets of a client cannot be disclosed or used for the advantage of a third party without consent of the client after full disclosure); *Greene v. Greene*, 47 N.Y.2d 447, 453, 391 N.E.2d 1355, 1358 (1979) (prohibition against disclosure of client confidences covers any confidential communication made by the client in the course of the lawyer's representation and continues even after the dissolution of the attorney-client relationship).⁹ While such a factor is likely to be less significant in cases in which the prospective employee client has already been extensively debriefed, it nonetheless remains a potential complicating factor that ordinarily should be disclosed prior to seeking consent for multiple representation.

Similarly, corporate counsel should ordinarily consider and discuss with the corporation the possibility that multiple representation could complicate the corporation's ability to cooperate with, and report facts to, the government. As noted above, the current state of the law, and the current state of mind of law enforcement officials, operate to place considerable pressure on corporations to be willing to self-report, to waive the attorney-client privilege and effectively to serve as an investigative arm of the government with respect to the conduct of their employees. Allowing corporate counsel to simultaneously represent a corporate employee may put the corporation or its counsel in the undesirable position of having information that is of interest to the government but that cannot be shared with the government because the employee client has declined to waive his attorney-client privilege.¹⁰

Risks and Advantages from the Employee's Perspective

From the employee's perspective, many of the common advantages of multiple representation tend to be similar to the advantages that exist from a corporate client's perspective. Those advantages typically include obtaining counsel who has a detailed and broad knowledge of the relevant facts and avoiding the suggestion that there is any division of interest between the corporation and the employee.¹¹

The principal risks posed to the employee client from multiple representation typically tend to be that corporate counsel's larger constituency may render it difficult for him

(despite his best intentions) to be as vigilant in his protection of the individual client's interests, or that a divergence of interests will require the attorney to withdraw from representation of the employee client. Any such risks should be discussed with the prospective employee client prior to obtaining his consent to multiple representation. In addition, where the need to withdraw would be likely to work a significant disadvantage to the employee client (because, for example, the matter is time sensitive or especially complex), consideration should be given to the advisability of having co-counsel or shadow counsel.¹²

Structuring the Representation to Minimize Potential Adverse Consequences

As the foregoing discussion indicates, an 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.

Prospective Waivers

There is, as a general matter, no ethical bar to seeking a waiver of future conflicts. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 372 (1993); NYCLA Ethics Op. 724 (1998). In order to best ensure the likelihood that such waivers will be effective, however, it is advisable to put them in writing, see ABA Formal Op. 372, and they should otherwise meet all the requirements for contemporaneous waivers. See *id.*; NYCLA Ethics Op. 724; see also, e.g., *Woolley v. Sweeney*, No. 3:01-CV-1331-BF, 2003 U.S. Dist. LEXIS 8110, at *22 (N.D. Tex. May 13, 2003) (rejecting client's prospective waiver of conflicts where client "has never had the benefit of full disclosure"). The nature of these requirements depends on the specific conflicts to be waived, which, in turn, depend on the interests of the various clients. NYCLA Ethics Op. 724 (stating that "adequacy of disclosure and consent will depend . . . upon the circumstances of each individual case") (citation omitted).

In seeking to obtain a prospective waiver from clients, it frequently will be difficult for an attorney to make "full disclosure" to the same extent as in connection with a concurrent waiver. This is because it may not be clear to the attorney at the outset of the representation just what conflicts might later arise. To satisfy his obligation of full disclosure, then, the lawyer seeking a prospective waiver should at least advise the client "of the types of possible future adverse representations that the lawyer envisions, as well as the types of matters that may present such conflicts. The lawyer also should disclose the measures that will be taken to protect the client or prospective client should a conflict arise." NYCLA Ethics Op. 724. "[I]t would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicted clients would survive scrutiny." ABA Formal Op. 372. In other words, the more specific the lawyer can be, the more likely the waiver is to be upheld. *Id.*

In the context of governmental investigations, prospective waivers may be useful in dealing with a number of the potential conflicts discussed above. Most commonly, prospective waivers may be sought in such cases from an employee client regarding the ability of corporate counsel to continue representing the corporate client in the event an actual or potential conflict develops. In addition, if there is any realistic likelihood that the governmental investigation might lead to litigation, consideration should be given to obtaining a waiver of the employee client's right to object to being cross-examined by his former attorney. Such a waiver will satisfy the specificity requirement for advance waivers because the constituent client will understand the nature of the future representation in which the lawyer would cease to represent the individual and continue to represent the entity.¹³

It bears noting that even if the prospective waivers do comport with the requirements for contemporaneous waivers as of the time they are made, the lawyer must still revisit the issues at the time the actual or potential conflicts arise. ABA Formal Op. 372 (stating that securing "second" waiver from client at time that actual conflict develops "in many cases . . . will be ethically required"); NYCLA Ethics Op. 724 (stating that "[n]otwithstanding" prospective waiver, "the lawyer must reassess the propriety of the adverse concurrent representation . . . when the conflict actually arises"). If the actual or potential conflicts turn out to be "materially different" from those the clients waived, the lawyer will not be permitted to rely on the prospective waivers, and will have to obtain new, contemporaneous waivers. NYCLA Ethics Op. 724. Likewise, courts will not necessarily accept the validity of prospective waivers, and may have to satisfy themselves that such waivers continue to be appropriate in light of the circumstances that actually develop. Cf. *United States v. Alex*, 788 F. Supp. 359, 363 (N.D. Ill. 1992) (rejecting waiver of conflicts by former clients as "by no means binding on this court," and recognizing "obligation to independently review the former clients' consents to waive their former counsel's conflict of interest"). Thus, in seeking such prospective waivers, the lawyer should be as specific as possible, in order to ensure that the lawyer has adequately disclosed the risks, and to maximize the likelihood that a reviewing court will conclude that the waiver was knowledgeably made.¹⁴

Contractual Limits on Representation

A lawyer may likewise ethically limit by contract his representation of a client, provided that the representation still comports with the requirements of the N.Y. Code of Professional Responsibility. NYSBA Comm. on Prof'l Ethics Op. 604 (1989). In effect, this means that the representation may not be so limited as to be inadequate. Ass'n of the Bar of the City on New York Comm. on Prof'l & Judicial Ethics [hereinafter "ABCNY"] Formal Op. 2001-3 (2001). Stated otherwise, the representation "must be sufficient . . . to render practical service to the client," and must not "materially impair the client's rights." NYSBA Ethics Op. 604. Such a limitation on representation is, however, subject to many of the same requirements as valid waivers: there must be full disclosure of the terms of the engagement and the client must consent. ABCNY Formal Op. 2001-3. In addition, such a representation should not be proposed if "a client could not reasonably conclude that the proposed arrangement serves its interests." *Id.*

Finally, any such representation “must cover a discreet matter or a discreet stage of a matter and not terminate before the completion of that stage.” NYSBA Ethics Op. 604.

Accordingly, it may be possible for a lawyer to limit his representation of an employee of the corporation to a discreet stage of an investigation in which a conflict with the corporation is unlikely to arise. For example, the lawyer may attempt to limit his representation of the employee to the investigatory stage of the case, thereby eliminating any risk that he would still represent the employee at the time of trial, should he then need to cross-examine the employee. Alternatively, depending on the facts of the particular case, the lawyer may be able to limit the scope of his representation of the employee even more narrowly, perhaps to just a single interview or a handful of interviews with the government about a narrowly circumscribed topic.

Understandings with Respect to Privileged and Confidential Information

Once it is decided that the lawyer will represent the corporation and the constituent, it is important to have a clear understanding with both clients as to (1) whether and what kind of confidential information will be shared; (2) who will control the privilege with respect to such information; (3) how the attorney-client privilege will operate in the event a dispute arises between the clients concerning the matter; and (4) whether the lawyer will continue to represent the corporation even if a conflict develops between the corporation and the constituent. While the New York Code does not require that such understandings be in writing, we strongly recommend that they be in writing.

Co-Counsel or Shadow Counsel

Another potential middle ground that may be appropriate in some cases is the use of co-counsel or shadow counsel – that is, separate counsel who serves as additional counsel for the corporate employee and thus is available to offer independent advice to the employee and, if necessary, to take over as sole counsel for the employee. While the use of such counsel diminishes one of the advantages of multiple representation – namely, cost-savings – it can also significantly diminish the potential risks of multiple representation. If the co-counsel’s existence is disclosed to the government (as it is in some cases), it can allay any concern on the part of the government that the corporate employee is not receiving independent legal advice. In addition, if the matter is a complex or time-sensitive one, having co-counsel who is kept reasonably well apprised of facts and developments could help prevent prejudice to the employee if it is subsequently determined that corporate counsel cannot continue to represent the employee.

Conclusion

Multiple representations are ethically complex, and the high-stakes nature of a typical governmental investigation only adds to the complexities. Before undertaking simultaneous representation of a corporation and one or more of its employees in the context of a governmental investigation, an attorney must carefully consider whether a disinterested lawyer would conclude that he can competently represent the interests of

each client. The attorney must also take care to ensure that she has sufficient information to apply the disinterested lawyer test, and must give careful, fact-specific consideration to the risks and advantages to multiple representation and discuss those factors fully with each client before seeking their consent to multiple representation. In addition, throughout the representation, the attorney must remain alert to changing circumstances that may render continuation of multiple representation impermissible or inadvisable, and the attorney must discuss any such circumstances with his clients. Finally, the attorney should give consideration to whether there are ways in which the multiple representation can be structured so as to minimize adverse consequences to her clients should a conflict between them arise.

Endnotes.

1. Although we have found one ethics opinion in New York relating to multiple representation in a corporate context, that opinion is limited to the relatively narrow issue of an attorney's duties when perjury is committed by a corporate officer and the attorney represents both the officer and the corporation. NYSBA Comm. On Prof'l Ethics, Op. 674 (1995).
2. The issues that might arise at trial are distinct from those implicated at the investigative stage of a matter. In addition, whether counsel should be disqualified and whether counsel should have accepted or continued in multiple representation are separate questions. Thus, while decisions rendered in the context of litigated actions provide some assistance, they do not define the universe of issues relevant to deciding whether it is ethically permissible to undertake multiple representation of a corporate client and one or more employee clients in the context of a government investigation.
3. The guidelines established in this Opinion apply to situations where a lawyer represents or may represent an organization and also one of its constituents, regardless of whether the constituent is an officer, director, or employee, and we use those terms interchangeably throughout the Opinion. However, as with all circumstances in which disclosure and consent is or may be required, the degree of sophistication of the constituent will play a role in how detailed the discussions of those issues need to be.
4. In recent years, both the Department of Justice and the Securities and Exchange Commission, among other law enforcement agencies, have repeatedly cited the willingness of a corporation to cooperate with governmental investigations (which cooperation is sometimes requested to include waiver of the attorney-client privilege) as an important factor in determining whether to hold a corporation civilly or criminally liable for the actions of its officers or employees. See, e.g., United States Attorneys Manual, Criminal Resource Manual 161 (January 20, 2003 memorandum of Deputy Attorney General Larry D. Thompson announcing a revised set of principles governing

federal prosecution of business organizations) (“The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”); SEC Release No. 34-44969, 2001 WL 1301408 (October 23, 2001) (Report on the Relationship of Cooperation to Agency Enforcement Decisions) (describing the nature and extent of a company’s cooperation with the SEC as important factors to be taken into account in determining whether an enforcement action will be brought against the company).

5. See, e.g., Restatement (Third) of the Law Governing Lawyers § 14 & cmts. e-f (conditioning attorney-client relationship on client’s intent and lawyer’s failure to “manifest lack of consent,” and stating that failure of corporate counsel to clarify whom he represents “in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer”); Nancy J. Moore, Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee, 39 S. Tex. L. Rev. 497, 506 (1998) (noting the inability of many corporate employees to understand the distinction between the lawyer’s role as corporate counsel and his role as counsel for the employee in his individual capacity); see also *Rosman v. Shapiro*, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (implying attorney-client relationship between corporate counsel and corporate officer where attorney represented close corporation and officer “reasonably believed that [attorney] was representing him”). But see *Talvy v. Am. Red Cross*, 205 A.D.2d 143, 149-50, 618 N.Y.S.2d 25, 29-30 (1st Dep’t 1994) (“Unless parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for a corporation represents the corporation, not its employees.”), *aff’d mem.*, 87 N.Y.2d 826, 661 N.E.2d 159 (1995).

6. DR 7-104(a)(2) states that “[d]uring the course of the representation of a client a lawyer shall not give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client.” However, since the employee will not typically be named in any related action actually being litigated before a tribunal while the governmental investigation is still pending, the employee, properly speaking, may not be a “party” within the meaning of this provision.

7. As noted above, DR 5-109(A) prescribes what corporate counsel must instruct a corporate constituent in cases where the interests of the corporation and the constituent “differ.” Where the interests of the entity and the interests of the constituent are actually adverse, however, the New York Code provides no additional guidance and requires nothing more. It nevertheless may be advisable to consider that in situations of actually adverse interests, the ABA Model Rules provide specific guidance not also provided by the New York Code. Comment 10 to ABA M.R. 1.13 states: “There are times when the organization’s interest may be or become adverse to those of [the constituent]. In such circumstances the lawyer should advise any constituent . . . that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the

organization cannot provide legal representation for the constituent individual, and that discussion between the lawyer for the organization and the individual may not be privileged.” Of course, there are many situations in which the entity’s and the constituent’s interests will or might “differ” within the meaning of the New York Code yet such warnings and separate representation will not be necessary.

8. Less sophisticated corporate clients might also mistakenly believe that multiple representation carries the benefit of ensuring that their employees are represented by attorneys whose first loyalty is to the corporation. In such cases, it is incumbent upon corporate counsel to make clear to the corporation that he will owe a full and equal duty of loyalty to the employee clients, and that, if she is unable to discharge that duty, she will not be able to continue representing the employee clients.

9 . Although there is an exception to the obligations of DR 4-101 “where an attorney acts for two or more clients jointly,” the scope of this exception is not entirely clear. Some authorities suggest that it is limited “only to the evidentiary privilege and applies only in subsequent litigation between the clients.” NYSBA Comm. on Prof’l Ethics Op. 555 (1984). These sources stress that before confidences may be shared between jointly represented clients, “the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality.” *Id.* Courts, however, have appeared more willing to infer such consent from the nature of the relationships in a multiple representation. See *Tekni-Plex*, 89 N.Y.2d at 137, 674 N.E.2d at 670 (“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”); accord *Talvy*, 205 A.D.2d at 149-50, 618 N.Y.S.2d at 29-30. Given these differing approaches, the Committee believes that it will always be advisable, prior to sharing the confidences of one client with another, for the lawyer to obtain the client’s consent, after full disclosure. See DR 4-101(C)(1). This can be done in an engagement letter that sets out the understandings and agreements between the corporate client and the employee client with regard to the sharing and control of confidential information.

10. For an example of one such potential complication, see *infra* note 13.

11. Cost savings will not ordinarily be among the potential advantages to the employee client because the cost of separate counsel would in many, if not most, cases be borne by the corporation. Payment of such costs by the corporation is plainly allowed so long as there is full disclosure and the client consents. See DR 5-107.

12. To determine whether to withdraw from employment in the context of a multiple representation, a lawyer should refer to, *inter alia*, DR 2-110 and EC 5-15.

13. In seeking the prospective waivers and advance permission to reveal confidential information (see discussion *infra* at 13), counsel should also bear in mind any specific reporting requirements to which the corporate client may be subject. For example,

certain corporations, such as banks and broker-dealer firms, are subject to federal laws that require them to report suspicious financial transactions by filing suspicious activity reports (“SARs”). See, e.g., 12 C.F.R. pt. 21. If counsel for such a corporation undertakes the simultaneous representation of a corporate employee, counsel may obtain, in the course of representing that employee, otherwise privileged information regarding suspicious transactions that, as an agent of the corporation, counsel may be obligated to disclose to the corporation and that the corporation, in turn, may be obligated to report to the government. As such, counsel for corporations with reporting requirements should consider seeking prospective waivers and advance permission to disclose information from any potential employee client that would permit the filings of such reports. While DR 4-101(C)(2) permits an attorney to reveal client “[c]onfidences or secrets when . . . required by law . . .,” the precise scope of this provision is unclear. It is thus uncertain whether the attorney, absent consent from the employee client, could report to the government information acquired in the course of representing that employee. Moreover, given that some of the reporting laws prohibit the filer of a SAR from informing any party that is involved in the underlying transaction, see, e.g., 31 U.S.C. 5318(g)(2)(A)(i), a prospective waiver prior to undertaking the representation may be the only opportunity for counsel to obtain the employee client’s consent.

14. In evaluating the validity of prospective waivers, reviewing courts try to ascertain whether the client was reasonably informed about the future matter. See Restatement (Third) of the Law Governing Lawyers § 122 (2000) (defining “informed consent” to a prospective (as well as current) waiver as “requiring that the client or former client have reasonably adequate information about the material risks of such representation”). ABA Formal Op. 372 (“the particular future conflict of interest as to which the waiver is invoked [must have been] reasonably contemplated at the time the waiver was given”); NYCLA Ethics Op. 724 (an advance waiver is valid if “the subsequent conflicts should have been reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought”). Where the attorney specifically identifies the party or parties with whom the client’s interests potentially could differ and explains how that divergence could occur, courts have tended to uphold prospective waivers. See *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981) (quoting *In re Boivin*, 533 P.2d 171, 174 (Or. 1975); accord *Fisons Corp. v. Atochem N.A., Inc.*, No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284, at *15 (S.D.N.Y. Nov. 14, 1990); see also *Interstate Props. v. Pyramid Co.*, 547 F. Supp. 178, 181-82 (S.D.N.Y. 1982). In the scenarios being considered in this opinion, the party with whom the client’s interests might differ normally will be reasonably clear. Cf. *W.R. Grace & Co. v. Goodyear Tire & Rubber Co.*, No. 1:99-CV-305, 1999 U.S. Dist. LEXIS 22554, at *12-*16 (W.D. Mich. 1999) (upholding prospective waiver executed by members of defense group that prohibited members from objecting “to the continued representation by Common Counsel of all or any of the other members [of the group] in connection with any legal services arising out of” the subject of the agreement). Moreover, even in litigation, courts have upheld prospective waivers involving representation of a corporation and its constituents. See *In re Rite Aid Corp. Sec. Litig.*, 139 F.Supp.2d 649 (E.D. Pa. 2001) (permitting a lawyer who represented the corporation and several of its executives to

withdraw from representing one of the executives and continue to represent the corporation after a conflict developed, based upon a written engagement letter containing an advance waiver); see also *Zador Corp. v. Kwan*, 37 Cal. Rptr. 2d 754 (Cal. Ct. App. 6th Dist. 1995) (upholding an advance waiver permitting a lawyer who represented a corporation and an individual to continue representing the corporation after a conflict developed between the corporation and individual).

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