

# **PRACTICING LAW IN A HOUSE OF MIRRORS**

## **Dilemmas Posed by Shifting Alliances and Latent Conflicts When Representing Multiple Parties**

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Hon. Walter D. Kelley  
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“Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living ... Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.” *Virginia Rules of Professional Conduct, Preamble: A Lawyer’s Responsibilities.*

## **HYPOTHETICALS**

### **1. Common Representation: Potential Conflicts and Future Conflicts.**

You represent an automobile manufacturer, Manufacturer. Plaintiff brought suit against Manufacturer, alleging that her vehicle suffers from manufacturing defects that substantially impair its use and market value. Alternatively, Plaintiff contends that the defects were the result of Dealer negligence. By counsel, Dealer demands that Manufacturer indemnify and defend Dealer.

(a) Can you defend Manufacturer and Dealer?

(b) Assume that Manufacturer agrees to indemnify and defend Dealer. As lead counsel, you immediately request a copy of Dealer’s service file, and while reviewing it, you discover a confidential memorandum strongly suggesting that the car’s defect’s were caused by the negligent acts of one Dealer’s mechanics. Can you continue representing Manufacturer and Dealer? If not, can you continue to represent just Manufacturer?

(c) To avoid complete disqualification, lawyers often ask there clients to waive future conflicts. For example, you regularly represent Manufacturer; therefore, to maintain goodwill with Manufacturer, in the engagement letter, you ask Dealer to consent to your continued representation of Manufacturer should a conflict arise disqualifying you from representing both. Is such a waiver enforceable against Dealer?

(d) Assume that upon realizing that you have discovered the confidential memorandum, Dealer forbids you from producing it for or disclosing it to Manufacturer. Are you required to keep the memorandum secret from Manufacturer?

**2. Aggregate Settlement.**

Plaintiff has brought an antitrust action against two phone companies, Hokie Telephone and Hoos Ringer. Hokie is a considerably larger corporation than Hoos. Accordingly, while Hokie and Hoos agree that they have not acted in an anticompetitive manner, Hokie is willing to allocate significant resources towards the litigation, whereas Hoos wants it to be resolved as quickly, and as cheaply, as possibly.

(a) Can you represent Hokie and Hoos in this matter?

(b) Assume that Hokie and Hoos executed a joint representation agreement waiving any conflict. A couple days later, Plaintiff calls you and makes a settlement offer that you believe is ideal for Hoos in that the amount demanded is minimal relative to the amount Hoos would have to spend defending the case through trial. Can you accept the offer on Hoos's and Hokie's behalf?

(c) If Hokie directs you to disregard Hoos' interest and reject the settlement, must you withdraw?

**3. Limited Arrangement.**

The State Corporation Commission (SCC) recently brought an action against several competing insurance companies. Ordinarily, these companies would not cooperate with each other in a lawsuit because of the risk that a competitor would obtain confidential, proprietary information; however, in this case, it appears that each company has a statute of limitations

defense that would not require disclosure of any confidential information. Accordingly, the defendants agree to work together, and they hire you to file the motion to dismiss. Your engagement letter includes a provision stating that no confidential information will be shared with you or exchanged between the defendants.

(a) Can you make this non-disclosure agreement with the defendants?

(b) Assume that each of the insurance companies consents in writing to the non-disclosure agreement and your representation. Assume also that the statute of limitations defense failed and it becomes impossible for you to adequately defend the companies without access to their confidential trade secrets. Can you continue to represent the companies pursuant to the non-disclosure agreement?

#### **4. Representing Association Versus Individual Constituents.**

The Virginia Energy Group is an association of three energy companies that do business in Virginia. The Group was formed to lobby the General Assembly on matters in which the individual members have like interests. The General Assembly recently proposed the enactment of several new environment-related requirements that are significantly more stringent than the current regulations. You represent the Group and arrange a conference call to discuss each member's take on the proposed regulations. Only two members were available for the conference call, and, not surprisingly, they both expressed great opposition to the new restrictions.

A couple days later, you finally reach the third member, Small Co. Energy. Small Co. tells you that it is not necessarily opposed to the new regulations because it can easily conform its operations to the proposed restrictions. Furthermore, Small Co. has hired an outside consultant to assess whether Small Co.'s ability to adapt to the restrictions will give it a

competitive advantage over the two other Group members. In the event that Small Co. determines that it will gain an advantage, Small Co. intends to break from the Group and lobby in favor of enacting the proposed regulations. Small Co. asks you to refrain from disclosing this information to the other two members until Small Co. finishes its research.

Do you have a duty to keep Small Co.'s plans confidential from the remaining members of the Group?

#### **5. Representing Association Versus Individual Constituents II.**

For more than ten years, you have represented Citizens Gas in numerous legal transactions and actions, and Gas has been extremely pleased with your performance. Hence, when Gas and several other utility groups agreed to form the Virginia Utility Association, Gas recommends that the Association hire you as lead counsel.

If you agree to represent the Association, can you continue to represent Gas individually?

#### **6. Representing Association Versus Individual Constituents III.**

Your firm represents Yoogole, a large internet services provider. Yoogole has launched an internal investigation into its relationship with a small competitor, and you have been assigned the task of interviewing key employees. During the interviews, you tell the employees that (1) you represent Yoogole, not the employee, (2) that you could represent the employee as long as there was not a conflict, and (3) that the interviews are subject to Yoogole's attorney-client privilege. Soon after you conduct the interviews, the Securities and Exchange Commission (SEC) announces that it is investigating Yoogole. A week later, Yoogole executes a "common interest agreement" with one of the employees, John Doe, in which Yoogole and Doe agree that they have a common interest regarding the SEC investigation, and they further agree to share information. Three weeks later, the SEC subpoenas written memoranda and other written

records pertaining to your interviews. Yoogle agrees to waive the privilege and produce the documents, but counsel for the employees, including Doe, moves to quash and asserts attorney-client privilege.

Do the employees have standing to assert attorney-client privilege over the interviews?

Does Doe?

**7. Nonconsentable Conflicts.**

Two years ago, you defended two construction companies, Acme Co. and Builders, Inc., in a breach of warranty suit brought by Short Regent Point Mall.

(a) Mall was successful in obtaining a judgment against Acme and Builders, but Builders refuses to pay its share. Can you represent Acme in a contribution action against Builders?

(b) Assume that you do not represent Acme in its contribution action against Builders. Instead, Acme seeks discovery of your notes from a meeting between Acme and Builders wherein the two co-defendants discussed how they would divide liability for the adverse judgment. The notes will confirm Acme's account of what percentage of the adverse judgment Builders agreed to pay. Can Builders block production of your notes by asserting the attorney-client privilege?

(c) Assume Acme wants to bring suit against Builders for reasons completely unrelated to the first suit. Acme was so impressed by your performance two years ago that it asks you to represent it in the suit against Builders. Can you represent Builders in its suit against Acme?

**8. Imputed Conflicts.**

Two of your firm's best clients are an electric utility and a telephone company. To date, no business conflict or actual legal conflict has interfered with your representation of both of them. A proceeding has been initiated at the State Corporation Commission to revise the Rules of Practice and Procedure. No particular conflicts between your two clients are apparent, but it is impossible to predict what issues might arise in the course of revising the Rules. Both clients are willing to waive conflicts at the outset, but each wants to be represented separately by the particular lawyer at the firm with whom they routinely deal. To accommodate the clients and avoid ethical obstacles, your firm considers erecting a "Chinese Wall"<sup>1</sup> to keep the two groups completely separated.

Is a Chinese Wall effective to cure a conflict of interest?

**9. Common Interest Privilege: Generally.**

You represent one respondent in a major utility rate case. Of the numerous other respondents, two have interests that appear to be closely aligned with your client's interests. Accordingly, you and the attorneys for the other two respondents meet to formulate a litigation strategy. As part of the coordination process, you share some of your client's confidential business information with the other attorneys. Applicant seeks discovery of the confidential information that you disclosed in the meeting. There is no written agreement between the three respondents.

(a) Is the information you shared with the other attorneys privileged?

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<sup>1</sup> "A 'Chinese Wall' is a screening mechanism employed by a law firm to avoid imputed disqualification. Professor Charles Wolfram, a leading ethics scholar, in his treatise *Modern Legal Ethics*, describes the term 'Chinese Wall' as meaning that the firm's screening device serves as an 'elaborate and extraordinary, yet effective and impregnable, barrier against transgression' as did the Great wall of China serve ancient emperors." McCauley, James M., Ethics Counsel for the Virginia State Bar, *Screening to Avoid Disqualification: Erecting "Chinese Walls,"* available at: <http://members.aol.com/jmccauesq/ethics/articles/ChineseWalls.htm>.

(b) Assume that your client does not mind disclosing the information, but the other respondents are worried that disclosing the information may adversely effect them. Can the other two respondents prohibit you from disclosing your client's confidential information?

**10. Common Interest Rule: Sharing An Expert Witness.**

You represent one respondent in a major utility rate case. Of the numerous other respondents, two have interests that appear to be closely aligned with your client's interests. To save money, the three respondents plan to share an expert witness. Close to the hearing date, one of the three settles with the applicant and withdraws from the case. The settling party now objects to the other two using the expert, because the expert was privy to confidential information about the settling party which might be revealed during the witness' cross examination.

Can the settling party prevent the your client from using the expert witness?

**11. Common Interest Rule: No Lawyer and No Formal Proceedings.**

Two different commercial developers were involved in negotiations with a utility over location of a proposed gas pipeline near their properties. During those negotiations, before any application was filed by the gas company and before either of the two developers had engaged counsel, the two developers worked closely to identify issues and develop a coordinated strategy. Before the application was filed, they decide they each need to engage separate counsel to protect their interests, but their lawyers continue to work closely together. After filing the application, the gas company sends a discovery request seeking production of all communications between the two parties, including communications between their counsel.

(a) Are the communications between the developers before the application was filed, and before counsel was engaged, privileged?

(b) Are the communications between the attorneys privileged?

**12. Common Interest Rule: Non-Parties and Separate Actions.**

Plaintiff has asserted a negligence claim against his office building's property manager, which you represent. Although implicated in the complaint, the landlord has not been made a party. Nevertheless, on several occasions, you and your client, and the landlord and its attorney, meet to share information and develop a litigation strategy. The landlord's information is helpful for your defense, and the common strategy should help the landlord in the event that it is made a party to the complaint. Plaintiff seeks discovery of your communications with the landlord.

(a) Are your communications with the landlord privileged?

(b) Assume instead that plaintiff brought two separate actions simultaneously, one against your client, and one against the landlord. If the property manager and the landlord, and their counsel, meet to coordinate their defenses, are these communications privileged?

## SUGGESTED ANSWERS

### 1. Common Representation: Potential Conflicts and Future Conflicts.

(a): Generally, RPC Rule 1.7(a) prohibits a lawyer from representing a client if such representation will be directly adverse to another client, or if there is significant risk that the representation will be materially limited by the lawyer's responsibilities to another client, third party, or the lawyer's personal interests (concurrent conflict). Here, because Plaintiff asserts alternative theories of liability, Manufacturer's interests conflict with Dealer's interests; that is, Manufacturer has an incentive to blame Dealer, and vice versa. However,

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate, and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.<sup>2</sup>

Thus, this concurrent conflict notwithstanding, you can still represent Dealer if both Dealer and Manufacturer consent in writing after consultation, and you reasonably believe that you can provide competent and diligent representation.<sup>3</sup> At this point, the conflict between Manufacturer and Dealer is inchoate, and the facts do not suggest that an actual conflict between them is particularly likely to evolve.<sup>4</sup> Accordingly, a lawyer might reasonably believe that he could provide competent and diligent representation to both parties.

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<sup>2</sup> VaRPC Rule 1.7, cmt. 4. *See also Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Bev. Co. of S.C., LP*, 433 F.3d 365, 372 (4th Cir. 2005) (holding that a reservation of rights letter does not create a *per se* conflict of interest); *In re A.H. Robins Co., Inc.*, 1986 Bankr. LEXIS 5053, \*3 (Bankr. E.D. Va. October 29, 1986) ("Although no actual conflict exists at the present time ... the near-certainty that such conflict will eventually unfold leads the Court to conclude that the only course of action is for [the firm] to disassociate itself as counsel ...").

<sup>3</sup> *See* Legal Ethics Opinion No. 1279 (permitting representation until potential conflict becomes a reality); Legal Ethics Opinion No. 1505 (same); Legal Ethics Opinion No. 1454 (same).

**(b):** A lawyer owes a duty of loyalty that requires her to communicate important information about a matter to the client.<sup>5</sup> When Dealer first requested indemnification and defense, the conflict between it and Manufacturer was potential, and a lawyer could reasonably provide competent and diligent representation to both clients notwithstanding the conflict;<sup>6</sup> however, in light of the memorandum suggesting Dealer negligence, a lawyer's ability to represent Dealer would be materially limited by the duty of loyalty and confidentiality she owed Manufacturer pursuant to Rule 1.4.<sup>7</sup> Therefore, in light of the memorandum, you could no longer represent both Manufacturer and Dealer.

After you cease representing both parties, Rule 1.9 governs whether you can continue representing just Manufacturer.<sup>8</sup> Under Rule 1.9(a), a lawyer who formerly represented a client in a matter cannot thereafter represent another party in the same or a substantially related matter in which that party's interests are materially adverse to the interests of the former client<sup>9</sup> unless both clients consent after consultation.<sup>10</sup> Although representing a client whose interests are

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<sup>4</sup> Compare *In re A.H. Robins*, 1986 Bankr. LEXIS 5053, at \*3 (present existence of claim against codefendant makes conflict near certain).

<sup>5</sup> "A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter." VaRPC Rule 1.4(c).

<sup>6</sup> See *supra*, n. 2 (potential versus actual conflicts).

<sup>7</sup> "[T]he lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit." VaRPC Rule 1.7, cmt. 7 (citing VaRPC Rule 1.4).

<sup>8</sup> "Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9." VaRPC Rule 1.7, cmt. 2.

<sup>9</sup> "If substantial relatedness exists between the matter in former representation and the matter in current representation adverse to the former client, there is a presumption that the attorney gained confidences and secrets in the former representation which could be used to the former client's disadvantage in the current representation. There is no presumption, however, if the matters are not substantially related." Legal Ethics Opinion No. 1652 (comparing *Rogers v. Pittston Co.*, 800 F.2d 350, 353-54 (W.D. Va. 1992), *aff'd without op.*, 996 F.2d 1212 (4th Cir. 1993) and *Pasquale v. Colasanto*, 14 Va. Cir. 54 (Alexandria 1988)).

adverse to a former client’s interests is not improper *per se*, disqualification may be warranted depending on “the relatedness of the two matters and the issue of whether the lawyer obtained secrets and confidences of the first client in the course of the representation.”<sup>11</sup> In this case, the matters are essentially the same, and you were privy to confidential information material to the dispute; therefore, you probably could not continue to represent Manufacturer.

**(c):** Future conflict waivers are contemplated under the Model Rules of Professional Conduct<sup>12</sup> and are not impermissible *per se* in Virginia.<sup>13</sup> However, “consent is not a contractual obligation,” and thus a former client may withdraw a future conflicts waiver even if consent was in writing.<sup>14</sup> Therefore, even if Dealer agreed to allow you to continue representing Manufacturer at the engagement stage, Dealer could subsequently withdraw its consent and move to have you disqualified.<sup>15</sup>

**(d):** This scenario illuminates the tension between a lawyer’s duty of loyalty under RPC Rule 1.4, and a lawyer’s duty to maintain a client’s secrets and confidences under Rule 1.6

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<sup>10</sup> Consent is effective only if there is “full disclosure of the circumstances, including the lawyer’s intended role in behalf of the new client.” VaRPC Rule 1.9, cmt. 12.

<sup>11</sup> Legal Ethics Opinion No. 1596.

<sup>12</sup> See American Bar Association Formal Op. 05-436 (recognizing expanded use of future conflict waivers under Model Rules).

<sup>13</sup> See Legal Ethics Opinion No. 1652 (approving by implication a future conflict waiver agreed to in writing by client’s ex-husband).

<sup>14</sup> *Id.* (permitting former client to withdraw written consent to attorney’s continued representation of ex-wife). See also *Commercial & Sav. Bank v. Brundige*, 5 Va. Cir. 33, 34 (Winchester 1981) (“The Court does not believe [VaRPC Rule 1.7] permits continued representation where the client later withdraws consent.”) (decided under DR 5-105(c), which has been replaced by Rule 1.7). Legal Ethics Opinion No. 1652 states that a former client may not withdraw consent under some circumstances, but the opinion lacks any indication of what those circumstances may be. Nevertheless, it should be noted that courts generally are wary of “the potential abuse of disqualification motions for tactical advantages.” *Richmond Redevelopment & Hou. Auth. v. Terrell*, 9 Va. Cir. 145 (Richmond 1987); *Personalized Mass Media Corp. v. Weather Channel*, 899 F. Supp. 239, 242 (E.D. Va. 1995) (citations omitted); *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 729 (E.D. Va. 1990); *In re Chantilly Constr. Corp.*, 39 B.R. 466, 468 (E.D. Va. 1984).

<sup>15</sup> “Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.” VaRPC Rule 1.7, cmt. 5.

when undertaking common representation. “As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.”<sup>16</sup> Hence, Dealer’s request that you not share the memorandum with Manufacturer creates an irreconcilable conflict. Furthermore, Virginia adheres to the rule that “[t]here can be no secrets between jointly represented parties,”<sup>17</sup> which suggests that Dealer could not prevent you from sharing the memorandum with Manufacturer.<sup>18</sup> However, the Virginia State Bar’s Standing Committee on Legal Ethics has suggested that, under these circumstances, a lawyer should not disclose a former client’s confidential information unless the former client consents, or a court orders disclosure.<sup>19</sup>

## **2. Aggregate Settlement.**

(a): Hokie and Hoos have different settlement goals, which creates a concurrent conflict.<sup>20</sup> As a result, you cannot represent them simultaneously unless (1) they each consent in writing after consultation, and (2) you reasonably believe that you can provide adequate representation despite the existing conflict.<sup>21</sup> In this case, Hokie’s and Hoos’ interests differ with respect to settlement strategy, but their interests with regard to the overall litigation are essentially the same. As a result, you should be able to adequately represent both parties.

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<sup>16</sup> VaRPC Rule 1.7, cmt. 7.

<sup>17</sup> *RML Corp. v. Assurance Co. of America*, 60 Va. Cir. 269, 276 (Norfolk 2002) (citing *Patel v. Allison*, 54 Va. Cir. 155, 156 (Va. Beach 2000)).

<sup>18</sup> *See Id.* (“[T]he attorney-client privilege does not preclude an attorney, who originally represented both parties in a prior matter, from disclosing information in a subsequent action between the parties.”) (quoting *Duncan v. Duncan*, 56 Va. Cir. 262 (Fairfax 2001)).

<sup>19</sup> Legal Ethics Opinion No. 1435.

<sup>20</sup> *See* VaRPC Rule 1.7(a).

<sup>21</sup> *See* VaRPC Rule 1.7(b)(1).

Nevertheless, because they have opposite opinions about the litigation strategy, a concurrent conflict likely exists, and you must obtain their consent in writing before assuming common representation.

**(b):** A lawyer cannot accept an aggregate settlement on behalf of multiple clients unless each client consents after consultation, including disclosure of the existence and nature of all the claims involved and of the participation of each person in the settlement.<sup>22</sup> In this case, although the offer may be in line with Hoos’s desired resolution, Hokie might think it can get a better deal if, for example, it pursues summary judgment for one of Plaintiff’s claims that Hokie believes lacks merit. Hence the requirement that each client consent to an aggregate settlement.

**(c):** Hokie’s instruction forces you to take sides between both clients, and as a result, you would have to withdraw.<sup>23</sup>

### **3. Limited Arrangement.**

**(a):** A lawyer may limit the objectives of representation if each client consents after consultation.<sup>24</sup> To this end, “[t]he terms upon which representation is undertaken may exclude specific objectives or means.”<sup>25</sup> Specifically, “the lawyer may conclude that failure to disclose one client’s trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the

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<sup>22</sup> VaRPC Rule 1.8(g).

<sup>23</sup> See Legal Ethics Opinion No. 616 (if co-clients’ interests with regard to settlement differ and cannot be reconciled, it is incumbent upon the attorney retained to withdraw from representation).

<sup>24</sup> See VaRPC Rule 1.2(b).

<sup>25</sup> VaRPC Rule 1.2, cmt. 4.

informed consent of both clients.”<sup>26</sup> Therefore, an agreement like the one described above is not prohibited *per se*.

**(b):** Although you can limit the objectives of representation, representation cannot be so limited as to prevent you from competently and diligently representing your clients.<sup>27</sup> Thus, because the non-disclosure agreement prevents you from adequately representing your clients, you cannot continue to represent them unless they terminate the agreement and properly waive any conflicts.

#### **4. Representing Association Versus Individual Constituents.**

**Answer:** A lawyer representing an organization does not represent the organization’s individual constituents;<sup>28</sup> therefore, it would appear that you are not under a duty to keep Small Co.’s plans secret from the other members.<sup>29</sup> However,

“When the organization’s interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.”<sup>30</sup>

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<sup>26</sup> VaRPC Rule 1.7, cmt. 7.

<sup>27</sup> “An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 ...” VaRPC Rule 1.2, cmt. 5.

<sup>28</sup> See VaRPC Rule 1.13(a) (“A employed or retained by an organization represents the organization acting through its duly authorized constituents.”).

<sup>29</sup> See *In re Grand Jury Subpoena*, 415 F.3d 333, 339-340 (4th Cir. 2005) (holding that no attorney-client privilege existed between employer’s lawyers and the employees).

<sup>30</sup> VaRPC Rule 1.13, cmt. 7.

Thus, when it became apparent to you that Small Co.’s interests were adverse to the Group’s, you were obligated to explain to Small Co. that you represent the Group, not the individual members.<sup>31</sup>

## **5. Representing Association Versus Individual Constituents II.**

**Answer:** A lawyer may represent an organization and one of its members simultaneously.<sup>32</sup> However, “the lawyer’s representation of both [the organization and the individual] is controlled by the confidentiality and conflicts provisions of these Rules”;<sup>33</sup> therefore, if dual representation presents a concurrent conflict, then you must obtain written consent from both the Association and Gas.<sup>34</sup> Furthermore, assuming both clients consent, you may still have to decline dual representation if you reasonably believe that the conflict will prevent you from providing competent and diligent representation to both clients.<sup>35</sup>

## **6. Representing Association Versus Individual Constituents III.**

**Answer:** This hypothetical mirrors the facts and issues presented in a recent opinion by the Fourth Circuit. In *In re Grand Jury Subpoena*, AOL launched an internal investigation, pursuant to which it conducted employee interviews similar to those described in the hypothetical, and the SEC subsequently investigated the relationship and, via the grand jury, subpoenaed the interview notes. Also, after the SEC’s investigation began, AOL and one of the employees

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<sup>31</sup> See *In re Grand Jury Subpoena*, 415 F.3d at 339. (noting that employer’s attorneys explained to the employees that the attorneys represented the employer, not the employees).

<sup>32</sup> See VaRPC Rule 1.13(e).

<sup>33</sup> VaRPC Rule 1.13, cmt. 9.

<sup>34</sup> See VaRPC Rule 1.13(e) (noting that attorney may simultaneously represent an organization and a member subject to the mandates of Rule 1.7).

<sup>35</sup> VaRPC Rule 1.7(b)(1).

executed a joint defense agreement.<sup>36</sup> The court refused to attach privilege to those interviews because no attorney-client relationship existed at that point; instead, the court held that the lawyers conducting the interviews represented AOL, not the employees.<sup>37</sup> Furthermore, the lone employee could not assert privilege because his joint defense agreement was entered into after the interviews were conducted, and prior to the agreement, no common interest existed.<sup>38</sup>

## **7. Nonconsentable Conflicts.**

(a): When dealing with a conflict of interests, representation is not proper just because a client consents: “[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly *ask* for such agreement or provide representation on the basis of the client’s consent.”<sup>39</sup> In Hypothetical No. 6, you would be forced to represent a client (Acme) whose interests are materially adverse to the interests of a former client (Builders) in a matter substantially related to the matter for which you represented the former client. Because your duty to Builders continues even after you cease representing it,<sup>40</sup> you cannot represent Acme absent consent from both the current and the former clients after consultation.<sup>41</sup> Given your intimate knowledge of Builder’s liability in this case, as well as your continued duties to Builder, arguably, a reasonable attorney would conclude that Builder should not consent to your representing Acme, which would create a nonconsentable conflict.

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<sup>36</sup> 415 F.3d 333, 335-337 (4th Cir. 2005).

<sup>37</sup> *Id.* at 339.

<sup>38</sup> *Id.* at 341.

<sup>39</sup> Rule 1.7, cmt. 5 (emphasis added).

<sup>40</sup> See VaRPC Rule 1.9(c)(1); *Better Gov’t Bureau v. McGraw*, 106 F.3d 582, 605 (4th Cir. 1997) (citation omitted).

<sup>41</sup> See VaRPC Rule 1.9(a).

**(b):** Although the majority rule is that when two clients are represented by the same lawyer in a matter, neither of them may assert the attorney-client privilege against the other in litigation between them regarding the subject of the dual representation,<sup>42</sup> the Virginia State Bar's Standing Committee on Legal Ethics has opined that the attorney should not disclose protected information unless the former clients consent, or unless the court orders her to disclose the information.<sup>43</sup> Thus, in an abundance of caution, you should wait for a court order compelling discovery of your notes before you produce them to Acme.

**(c):** A lawyer is prohibited from representing a party whose interests are materially adverse to a former client's;<sup>44</sup> however, this prohibition applies only to matters that are the same or substantially related to the matter for which the former client was represented.<sup>45</sup> In this case, Acme's suit against Builders is completely unrelated to the suit with the Mall; therefore, former client concerns are probably not implicated.<sup>46</sup> Nevertheless, your duty of confidentiality to Builder continues despite the fact that the client-lawyer relationship has ended, and this duty could materially limit your ability to adequately represent Acme in the present action.<sup>47</sup> Thus, even if both clients offer to consent in writing, the conflict may be nonconsentable, thereby barring your ability to represent either party.

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<sup>42</sup> *RML Corp. v. Assurance Co. of America*, 60 Va. Cir. 269, 276 (Norfolk 2002) (citing *Patel v. Allison*, 54 Va. Cir. 155, 156 (Va. Beach 2000)).

<sup>43</sup> Legal Ethics Opinion No. 1435.

<sup>44</sup> VaRPC Rule 1.9(a), cmt. 2.

<sup>45</sup> *Lewis v. Capital One Servs.*, 2004 U.S. Dist. LEXIS 26978 (E.D. Va. June 10, 2004). See also Legal Ethics Opinion No. 1652 ("Whether current representation adverse to a former client is "substantially related" to the former representation is a fact-specific inquiry requiring a case-by-case determination.").

<sup>46</sup> See Legal Ethics Opinion No. 1652 (matters not substantially related).

<sup>47</sup> See *Id.* (noting that confidential information learned about former client is relevant in new, unrelated matter, thereby barring continued representation of current client).

## 8. Imputed Conflicts.

**Answer:** For many years, law firms have employed Chinese Walls in hopes of avoiding disqualifying the entire firm because of one or more lawyer's conflict of interest.<sup>48</sup> Typically, a Chinese Wall requires that: (1) the disqualified lawyer does not participate in the matter; (2) the disqualified lawyer does not discuss the former representation with any member of the new firm; (3) the disqualified lawyer represents to court in sworn testimony or affidavit that he or she has not imparted any confidential information to other members of the firm; (4) the disqualified lawyer does not have any access to any files or documents relating to the matter; and (5) the disqualified lawyer does not share in any of the fees generated from the matter.<sup>49</sup> Although the Chinese Wall has been recognized as an effective screening device for avoiding imputed disqualification,<sup>50</sup> it has been received "with great skepticism" by Virginia courts.<sup>51</sup> Indeed, the Virginia State Bar Legal Ethics Opinions suggest that a Chinese Wall is effective only when dealing with a former government lawyers, i.e., a lawyer who switches from a government agency to a private law firm.<sup>52</sup> Accordingly, in the non-government lawyer

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<sup>48</sup> See e.g., *Greitzer & Locks v. Johns-Manville Corp.*, 1982 U.S. App. LEXIS 21211, \*4 (4th Cir. 1982); *Lux v. Commonwealth*, 24 Va. App. 561, 566 484 S.E.2d 145, 147 (Va. Ct. App. 1997).

<sup>49</sup> McCauley, James M., Ethics Counsel for the Virginia State Bar, *Screening to Avoid Disqualification: Erecting "Chinese Walls,"* available at: <http://members.aol.com/jmccauesq/ethics/articles/ChineseWalls.htm> (citing *Delaware River Port Auth. v. Home Ins. Co.*, Civ. Action No. 92-3384, 1994 WL 444710 (E.D. Pa. 1994)).

<sup>50</sup> See e.g., *Schliesse v. Stephens*, 717 F.2d 417 (7th Cir. 1983); *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222 (6th Cir. 1988); *Dworkin v. General Motors Corp.*, 905 F. Supp. 273 (E.D. Pa. 1995); *Hunter Douglas, Inc. v. Home Fashions, Inc.*, 811 F. Supp. 566 (D. Colo. 1992).

<sup>51</sup> *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 734 (E.D. Va. 1990) ("[T]his court has viewed with great skepticism the efficacy of a 'Chinese Wall' ...") (citing *In re Asbestos Cases*, 514 F. Supp. 914, 921 (E.D. Va. 1981). See also *In re A.H. Robins Co., Inc.*, 1986 Bankr. LEXIS 5053, \*3 (4th Cir. October 29, 1986) (noting that under the circumstances, an effective Chinese Wall would "be an ambitious undertaking, and a difficult, if not impossible, task to accomplish.").

<sup>52</sup> Compare Legal Ethics Opinion No. 1813 ("The use of the 'Chinese wall' approach to screen confidential information is not accepted, as the basis of the Rules of Professional Conduct is centered principally on the need to protect client confidences even after the lawyer-client relationship ceases.") with Legal Ethics Opinion No. 1334 ("The Committee has recently opined that the establishment of a "Chinese Wall" /screening device is an acceptable

scenario, a Chinese Wall may support a defense against disqualification, but the determinative factor will most likely be consent from both parties.<sup>53</sup>

Based on these authorities, whether the Chinese Wall would be effective under the facts of Hypothetical No. 7 depends on whether the clients consent, which they do, and whether the attorneys could provide adequate representation to the electric utility while maintaining their duties to the telephone company, and vice versa. Note that, if this splitting arrangement arose out of an action wherein the firm represented either of these clients, an irrebuttable presumption exists that confidential information was shared with every member of the firm;<sup>54</sup> therefore, all the members would be conflicted, and the Chinese Wall would be useless.

## **9. Common Interest Privilege: Generally.**

**(a):** “An attorney may not divulge a professional confidence made to him by his client. This privilege extends to communications among codefendants and their attorneys when

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means of averting a firm's vicarious disqualification based upon the taint of a former government lawyer's personal disqualification ...”). See also *In re Grand Jury*, 790 F. Supp. 109 (E.D. Va. 1992) (two attorneys jointly represented defendants under grand jury investigation in private practice, left law firm, and joined the United States Attorney's Office; no basis to disqualify the entire U.S. Attorney's office where the conflicted attorneys had recused themselves and the office had erected a “Chinese Wall.”); *Greitzer & Locks v. Johns-Manville Corp.*, 1982 U.S. App. LEXIS 21211, \*16-19 (4th Cir. 1982) (holding that Chinese Wall was at least partially effective, but emphasis on the former client's consent and inability to show actual prejudice); *Lux v. Commonwealth*, 24 Va. App. 561, 484 S.E.2d 145 (1997) (approving Chinese Wall in a Commonwealth's Attorney's office to overcome a conflict).

Quoting the Sixth Circuit, the Fourth Circuit provided the following explanation for relaxing ethical standards when dealing with a former government lawyer versus a private law firm:

The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaries government employee does not have the financial interest in the success of departmental representation that is inherent in private practice.

*In re Grand Jury*, 790 F. Supp. at 112 (quoted source omitted).

<sup>53</sup> See Legal Ethics Opinion No. 1712 (Chinese Wall ineffective absent consent); Legal Ethics Opinion No. 1459 (same).

<sup>54</sup> See e.g., Legal Ethics Opinion No. 1684; *supra*, n. 7.

engaged in consultation about their defense.”<sup>55</sup> Virginia has long recognized the common interest privilege,<sup>56</sup> and the rule has been adopted by the Fourth Circuit.<sup>57</sup> Based on the facts given, it appears that your client had a common interest with the other two respondents, and that you shared the information with the other respondents for the purpose of coordinating a litigation strategy; therefore, the rule applies, and the communications are privileged.

**(b):** The common interest privilege “belongs to each and all of the clients, and cannot be released without the consent of all of them.”<sup>58</sup> Accordingly, the other respondents may prevent your client from disclosing the information by refusing to waive the privilege.

#### **10. Common Interest Rule: Sharing An Expert Witness.**

**Answer:** The three respondents were sharing the expert as part of an effort to coordinate their defense in the rate case; therefore, pursuant to the common interest rule, the communications between them are privileged.<sup>59</sup> As a result, the settling party can assert the privilege and prohibit the remaining parties from actively disclosing its confidential information,<sup>60</sup> at least in theory; however, given the facts of Hypothetical No. 10, the common interest privilege is essentially meaningless. “[W]here a lawyer gives work product to an expert who considers it in forming opinions which he or she will be testifying to at trial, this

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<sup>55</sup> *Hicks v. Commonwealth*, 17 Va. App. 535, 537, 439 S.E.2d 414, 415 (Va. Ct. App. 1994) (citations omitted).

<sup>56</sup> *Chahoon v. Commonwealth*, 62 Va. 822, 836-842 (1871).

<sup>57</sup> See *In re Grand Jury Subpoena*, 415 F.3d 333, 341 (4th Cir. 2005) (“The joint defense privilege, an extension of the attorney-client privilege, protects communications between parties who share a common interest in litigation.”) (citations omitted); *Sheets v. Ins. Co. of N. America*, 2005 U.S. Dist. LEXIS 27060, \*5 (W.D. Va. November 8, 2005) (citation omitted).

<sup>58</sup> *Hicks*, 17 Va. App. at 537, 439 S.E.2d at 416.

<sup>59</sup> See *In re Grand Jury Subpoena*, 415 F.3d 333, 341 (4th Cir. 2005); *Chahoon v. Commonwealth*, 62 Va. 822, 836-842 (1871).

<sup>60</sup> *Hicks v. Commonwealth*, 17 Va. App. 535, 537, 439 S.E.2d 414, 416 (Va. Ct. App. 1994) (privilege belongs to each codefendant).

information is no longer privileged and must be disclosed.”<sup>61</sup> In Hypothetical No. 8, the expert appears to have been retained to testify; therefore, the settling party is helpless to prevent discovery of the confidential information that it shared with the expert, assuming that that information still factors into the expert’s opinion. Thus, the net result of the interplay between the common interest privilege and the Virginia and federal rules regarding expert discovery is that the settling party can prevent the remaining parties from voluntarily disseminating the information, but it cannot prevent them from disclosing it upon request. Note, however, that a different result would likely occur if the expert is retained for consulting purposes only. Absent “exceptional circumstances,” information disclosed to an expert for purposes of consulting the attorney on litigation strategy is non-discoverable attorney work product.<sup>62</sup>

## **11. Common Interest Rule: No Lawyer and No Formal Proceedings.**

(a): Pursuant to the common interest rule, communications and information shared between parties who share a common interest in litigation and their respective attorneys are privileged.<sup>63</sup> However, this rule applies only when the parties are represented by counsel.<sup>64</sup> This

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<sup>61</sup> *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 305 (W.D. Va. 1998). See also *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 284 (E.D. Va. 2001) (holding that materials provided to testifying expert are discoverable); *Re Wilson, etc. v. Rogers, et al.*, 53 Va. Cir. 280, 282 (Portsmouth 2000) (“By disclosing material to an expert to assist him in preparing expert opinion for trial, counsel opens the discovery door.”). This rule is based on Rule 4:1(b)(4) of the Rules of the Supreme Court of Virginia, as well as Rule 26(a)(2) of the Federal Rules of Civil Procedure, which permit discovery of facts known by expert witnesses.

<sup>62</sup> Rule 4:1(b)(4)(B). See also *Jones v. Ford Motor Co.*, 263 Va. 237, 258, 559 S.E.2d 592, 603 (2002) (refusing disclosure where expert consulted about trial strategy); *Re Wilson, supra*, 53 Va. Cir. at 282 (“[A]sking an expert to assist counsel in preparation for cross-examination of another expert moves into the area of legal theories which are protected by the rule.”).

<sup>63</sup> See e.g., *In re Grand Jury Subpoena*, 415 F.3d 333, 341 (4th Cir. 2005) (citations omitted); *Chahoon v. Commonwealth*, 62 Va. 822, 836-842 (1871).

<sup>64</sup> See *Hicks v. Commonwealth*, 17 Va. App. 535, 537, 439 S.E.2d 414, 415 (Va. Ct. App. 1994) (“This privilege extends to communications among codefendants and their attorneys when engaged in consultation about their defense.”) (emphasis added); *In re Grand Jury Subpoena*, 415 F.3d at 341 (“The purpose of the privilege is to allow

result is proper because the common interest rule is an extension of the attorney-client privilege,<sup>65</sup> and the attorney-client privilege “applies only to confidential disclosures by a client to an attorney ...”<sup>66</sup> As a result, the communications between the developers made prior to obtaining representation are not privileged.

(b): As noted, the common interest rule protects communications between parties who share a common interest in litigation and their respective attorneys.<sup>67</sup> For this privilege to apply, it is not necessary that formal adversarial proceedings be initiated; rather, it is sufficient that the communications were made in anticipation of litigation.<sup>68</sup> Accordingly, the communications between the developers and their respective attorneys, including those made prior to the application being filed, are privileged.

## 12. Common Interest Rule: Non-Parties and Separate Actions.

(a): Under the common interest rule, communications and information shared between parties who share a common interest in litigation are privileged.<sup>69</sup> The facts given indicate that the property manager and the landlord were coordinating a defense, which suggests the requisite

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persons with a common interest to ‘communicate *with their respective attorneys* and with each other to more effectively prosecute or defend their claims.’”) (emphasis added).

<sup>65</sup> *In re Grand Jury Subpoena*, 415 F.3d at 341.

<sup>66</sup> *Id.* at 338 (internal quotations omitted).

<sup>67</sup> *See supra*, nn. 54-57.

<sup>68</sup> *See In re Grand Jury Subpeona*, 415 F.3d at 341 (implicitly recognizing that privilege could have attached to communications made in preliminary, internal investigation if aimed at coordinating legal strategy); *Sheets v. Ins. Co. of N. America*, 2005 U.S. Dist. LEXIS 27060, \*2 (W.D. Va. November 8, 2005).

<sup>69</sup> *See e.g., In re Grand Jury Subpoena*, 415 F.3d 333, 341 (4th Cir. 2005) (citations omitted); *Chahoon v. Commonwealth*, 62 Va. 822, 836-842 (1871).

common interest existed. Furthermore, the privilege attaches despite the fact that the landlord is a non-party.<sup>70</sup>

(b): In *Hicks v. Commonwealth*, the Commonwealth brought two separate actions arising out of the same transaction, one case against the defendant, and one case against his accomplice.<sup>71</sup> The defendant then met with his accomplice's attorney because he was believed they were coordinating a joint defense strategy.<sup>72</sup> The Virginia Court of Appeals held that this meeting was privileged even though the defendant and the accomplice were not jointly indicted.<sup>73</sup> Based on the decision in *Hicks*, the common interest rule protects the communications between the property manager and the landlord even though they are parties to separate actions.

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<sup>70</sup> *Sheets v. Ins. Co. of N. America*, 2005 U.S. Dist. LEXIS 27060, \*5 (W.D. Va. November 8, 2005) (“A ‘common interest’ should not be construed so narrowly as to only encompass co-parties.”).

<sup>71</sup> 17 Va. App. 535, 536, 439 S.E.2d 414, 415 (Va. Ct. App. 1994).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 537, 439 S.E.2d at 416.