EYES WIDE SHUT: HOW IGNORANCE OF THE COMMON INTEREST DOCTRINE CAN COMPROMISE INFORMED CONSENT

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I. INTRODUCTION

Oscar Wilde said, "I can resist anything except temptation."[1] Many clients may agree. They may be tempted to jump into a common interest arrangement with strange bedfellows to gain the advantages that information-sharing provides. Attorneys, nonetheless, must make sure that when they jump, their clients do so with both eyes open.

The potential that the common interest doctrine may provide a client with advantages in current litigation renders it a very attractive tool from a client's perspective. The common interest doctrine is an evidentiary mechanism permitting independent clients with a common legal interest to share attorney-client privileged information with each other without waiving that privilege.[2] Through informal aggregation of common interests, an attorney representing one client assumes certain obligations to other members of a common interest group, which members are represented by their own attorneys, to advance the interests of her own client. The attorney achieves this by implementing a strategy advancing the legal interests common to the group.[3] Such aggregation may result in faster, more efficient litigation because at least two parties are sharing resources and information, obtaining results at a faster rate

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1. OSCAR WILDE, LADY WINDERMERE'S FAN 6 (Methuen 1985).

2. *See, e.g., In re* Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89–129, 902 F.2d 244, 249 (4th Cir. 1990) (quoting United States v. Schwimmer, 892 F.2d 237, 243–44 (2d Cir. 1989)); Sedlacek v. Morgan Whitney Trading Group, Inc., 795 F. Supp. 329, 331 (C.D. Cal. 1992) (quoting *In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d at 249); Schachar v. Am. Acad. of Ophthalmology, Inc., 106 F.R.D. 187, 191–92 (N.D. Ill. 1985); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1175 (D.S.C. 1975); James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 632 (1997). See *infra* Part II.A for a detailed discussion of the common interest doctrine.

3. *See, e.g., In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d at 249 (quoting *Schwimmer*, 892 F.2d at 243); *Sedlacek*, 795 F. Supp. at 331 (quoting *In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d at 249); *Schachar*, 106 F.R.D. at 191–92; *Duplan Corp.*, 397 F. Supp. at 1175; Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437, 440–41 (Fla. Dist. Ct. App. 1987).

and for a lower cost.[4] It may also lead to the discovery of otherwise undiscoverable information useful to the client.[5]

In addition to its potential advantages, informal aggregation under the common interest doctrine also creates pseudo-attorney-client relationships between the attorney for one client and the other members of the common interest group—the "pseudo-clients"—the boundaries of which are not clearly defined.[6] These pseudo-attorney-client relationships obligate the attorney to consider the interests of pseudo-clients in addition to those of the original client.[7] Should the interests of the client and the pseudo-client conflict in the future, the attorney may be required to withdraw from representing the client, thus depriving the client of his choice of counsel.[8]

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4. Arnold Rochvarg, *Joint Defense Agreements and Disqualification of Co-Defendant's Counsel*, 22 AM. J. TRIAL ADVOC. 311, 312 (1998). *See also, Schachar*, 106 F.R.D. at 191–92; Joan K. Archer, *Joint Defense/Common Interest Privilege in Kansas*, J. KAN. B. ASS'N, Feb. 2006, at 20, 20 ("The privilege has been embraced because it provides great value to the adversarial system. As one court explained, a joint defense provides defendants 'a pooling of resources, a healthy exchange of vital information, a united front against a common litigious foe, and the marshaling of legal talent and advice.'") (quoting Lugosh v. Congel, 219 F.R.D. 220, 236 n.10 (N.D.N.Y. 2003)); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386–88 (2000); Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989, 1000 (1995) (quoting *ATLA Guide to Litigation Groups*, TRIAL, July 1991, at S1, S2).

5. See *infra* note 25 for further explanation.

6. Courts in various jurisdictions disagree in defining the boundaries of the relationship between an attorney and a pseudo-client. *Compare* Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) (recognizing that implied attorney-client relationship may exist between attorney and pseudo-client); City of Kalamazoo v. Michigan Disposal Serv. Corp., 125 F. Supp. 2d 219, 232 (W.D. Mich. 2000), *aff'd* 151 F. Supp. 2d 913 (W.D. Mich. 2001) (finding direct attorney-client relationship between attorney and pseudo-client); Essex Chem. Corp. v. Hartford Accident & Indem. Co., 993 F. Supp. 241, 252–53 (D.N.J. 1998) (recognizing that an implied attorney-client relationship may exist between attorney and pseudo-client); Ageloff v. Noranda, Inc., 936 F. Supp. 72, 75–76 (D.R.I. 1996) (same); GTE N., Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1581 (N.D. Ill. 1996) (finding implied attorney-client relationship between attorney and pseudo-client); *with* Turner v. Firestone Tire & Rubber Co., 896 F. Supp. 651, 654 (E.D. Tex. 1995) (recognizing that fiduciary relationship may exist between attorney and pseudo-client); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (1995) (determining that no attorney-client relationship exists between attorney and pseudo-client, although fiduciary relationship may exist). See *infra* Part II.B for a detailed discussion of the relationship created between an attorney and a pseudo-client and the boundaries thereof.

7. *E.g., Abraham Constr.*, 559 F.2d at 253 (finding that attorney may owe to pseudo-client all duties owed by attorney to client or some other fiduciary duty); *Kalamazoo*, 125 F. Supp. 2d at 245 (finding that attorney owes to pseudo-client all duties owed by attorney to client); *GTE N.*, 914 F. Supp. at 1581 (same); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (noting that attorney may owe pseudo-client fiduciary duties). See *infra* Part II.B for a detailed discussion of the obligations an attorney owes to a pseudo-client.

8. See *infra* Part III.B for a discussion of the possibility of attorney withdrawal and the effects thereof on the client's choice of counsel.

Consider, for example, the following scenario: Acme Development Company and Beta Land Trust are real estate development companies in the City of Xylon. Both Acme and Beta have significant undeveloped land holdings within Xylon, which they plan to develop in the future. Xylon has seized several acres of undeveloped land held by Acme, Beta, and others, under its eminent domain powers. Acme and Beta believe that their land was seized as part of a larger unconstitutional effort on the part of Xylon to create a commercial development that would generate greater taxes for the city than the undeveloped land currently garners. Both Acme, through Attorney Arnot, and Beta, through Attorney Bellows, have initiated separate claims against Xylon challenging the takings. Attorneys Arnot and Bellows seek to cooperate with each other by entering into a common interest agreement to more efficiently develop their clients' separate actions against Xylon.

At this point in the hypothetical, there are only two attorney-client relationships: the first, between Attorney Arnot and Acme, and the second, between Attorney Bellows and Beta. Before entering into any concerted effort against Xylon, Attorneys Arnot and Bellows owe only their respective clients the duties of diligence, confidentiality, and loyalty.[9] Attorney Arnot owes no duty to Beta as a client and Attorney Bellows owes no duty to Acme as a client.[10]

To further the interests of their respective clients through pooled information, resources, and strategies, Attorneys Arnot and Bellows enter into a common interest arrangement on behalf of their clients to bring the independent claims of Acme and Beta against Xylon. To enable such an arrangement, Attorneys Arnot and Bellows obtain the written consent of their respective clients to breach their duties of confidentiality. The parties exchange information originally privileged under the evidentiary attorney-client privilege and the ethical rule of confidentiality for the purpose of enhancing the individual claims of their respective clients while increasing the efficiency and decreasing the cost of the litigation.

At this point in the hypothetical, Beta may perceive the existence of an attorney-client relationship with Attorney Arnot and

9. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2003) (diligence); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003) (confidentiality of information); MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003) (conflict of interest: current clients).

10. Of course, Attorney Arnot owes Beta all the duties to which a third party is entitled under the Model Rules of Professional Conduct, and likewise for Attorney Bellows and Acme. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1 (2003) (addressing attorney's duty to remain truthful in statements to third parties); MODEL RULES OF PROF'L CONDUCT R. 4.2 (2003) (prohibiting attorney from directly contacting third party attorney knows to be represented by counsel); MODEL RULES OF PROF'L CONDUCT R. 4.3 (2003) (obligating attorney to correct any apparent misunderstanding of third party regarding attorney's role).

Acme may perceive the existence of an attorney-client relationship with Attorney Bellows. Under current law, it is unclear whether such attorney-client relationships do, in fact, exist.[11] It is clear, however, that Attorney Arnot will owe some duty to Beta after exchanging confidential information under a common interest arrangement, but there is no consensus across jurisdictions regarding the scope of such a duty.[12]

Several commentators have attempted to define the duties owed by an attorney to another member of a common interest group.[13] Such discussions, however, overlook the effect that these new obligations on an attorney may have on her relationship with the original client. Specifically, the potential conflict between the attorney's duties to the client and her obligations to the pseudo-client in later dealings may require the attorney to withdraw as the client's representative if she is unable to fulfill her duties to both the client and the pseudo-client.[14] The likelihood of such a disqualifying future conflict is fact specific, as are the consequences of such a risk. To many clients, the disqualification of the attorney that they have come to trust and who has come to learn the intricacies of the client's business may be a dire consequence of informal aggregation.[15] To any client, an attorney's disqualification at a critical point in a legal matter may prove disastrous.[16]

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11. *See* cases cited *supra* note 6. Part II.B, *infra*, contains a detailed discussion of the existence of an attorney-client relationship between an attorney and a pseudo-client.

12. *See, e.g.*, *Abraham Constr.*, 559 F.2d at 253 (finding that attorney may owe to pseudo-client all duties owed by attorney to client or some other fiduciary duty); *Kalamazoo*, 125 F. Supp. 2d at 245 (finding that attorney owes to pseudo-client all duties owed by attorney to client); *GTE N.*, 914 F. Supp. at 1581 (same); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (1995) (noting that attorney may owe pseudo-client fiduciary duties).

13. *E.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (rejecting theory that joint representation creates attorney-client relationship with pseudo-client, but recognizing that fiduciary and contractual duties may still exist); Mark P. Fitzsimmons & Theresa Allyn Queen, *Love Among Porcupines: Maintaining Healthy Relationships with Co-Counsel in the Prickly Context of Complex Toxic Tort Litigation through Joint Defense and Joint Counsel Relationships*, SL080 ALI-ABA 143, 165–70 (Jan. 26–27, 2006) (identifying theories that joint defense agreement creates attorney-client relationship, imposes duty of confidentiality, or imposes no duty); Bruce C. King & Carol J. Patterson, *Representation of Multiple Parties in the Construction Arena: Ethical Issues*, CONSTR. LAW, Fall 2005, at 5, 10–11 (proposing that joint multiple party representations impose only duty of confidentiality on parties); Rochvarg, *supra* note 4, at 344–45 (rejecting theory that joint representation creates attorney-client relationship and proposing that such representation creates independent duty to pseudo-client).

14. See *infra* Part III.B for a detailed discussion of potential attorney withdrawal or disqualification posed by a common interest arrangement.

15. See *infra* notes 136–37 and accompanying text for a detailed discussion of potential limitations on a client's choice of counsel.

16. See *infra* notes 138–40 and accompanying text for a discussion of the consequences of attorney disqualification related to the timing of such disqualification.

This Article addresses the novel ethical problems presented by the common interest doctrine that implicate an attorney's duties of diligence, confidentiality, and loyalty to his or her client. These adverse effects of informal aggregation are not always fully considered before engaging a client in a common interest arrangement, but they should be. In Part II, this Article first explains the potential advantages that the common interest doctrine presents as an evidentiary tool, but then recognizes that exercise of the doctrine creates an undefined duty on the part of the attorney to the party with whom a client exchanges confidential information. Specifically, Part II.B warns that the common interest doctrine creates some duty—ethical or fiduciary—owed by an attorney to a third party. Part III.A explains the effect that this undefined obligation to other members of the common interest agreement may have on an attorney's ability to provide her original client with the representational rights to which he is entitled. In Part III.B, the Article further explains that the relationship created between an attorney and the other members of the common interest group may so interfere with the attorney's ability to represent her client as to require her to withdraw as counsel to the original client. Finally, Part IV of this Article proposes that a broader discussion of the risks of the common interest doctrine, as well as an individualized cost-benefit analysis, would serve to adequately inform a client of the risks associated with the common interest doctrine.

II. AN ATTORNEY OWES AN UNDEFINED DUTY TO THE PSEUDO-CLIENT UNDER THE COMMON INTEREST DOCTRINE

A. The Common Interest Doctrine Offers Many Attractive Advantages to Clients

Sharing information pursuant to the common interest doctrine may appear very attractive to Acme and Beta from the above hypothetical. Information-sharing provides clients with many advantages in litigation including cost-savings, greater access to information, and litigation strategies enhanced through collaboration. The evidentiary mechanism by which Acme and Beta could exchange privileged information is the common interest doctrine.[17]

17. Few jurisdictions have yet considered or recognized the concept of the common interest doctrine. The courts in the following jurisdictions have not yet considered whether to apply the common interest doctrine to protect attorney-client privileged communications disclosed among plaintiffs or non-parties sharing a common legal interest: Alabama, Alaska,

The common interest doctrine is an exception to the general rule that the evidentiary attorney-client privilege is waived when attorney-client privileged information is disclosed to third parties.[18] The doctrine protects attorney-client privileged information disclosed in a confidential manner to third parties sharing a common legal interest for the purpose of obtaining legal advice.[19] The doctrine typically applies whenever two parties share privileged information to further a common legal interest, even if the parties' interests are otherwise adverse.[20]

The purpose of the common interest doctrine is the same as that of the underlying attorney-client privilege: to encourage open and full communication between an attorney and his or her client, re-

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Arkansas, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, the United States Court of Appeals for the First Circuit, the United States Court of Appeals for the Fifth Circuit, and the United States Court of Appeals for the Eleventh Circuit. A number of states included in this list maintain attorney-client privilege statutes that arguably protect communications shared among plaintiffs or non-parties, as well as among co-defendants. *See, e.g.*, ALA. R. EVID. 502(b)(3), ALASKA R. EVID. 503(b)(3); ARK. R. EVID. 502(b)(3); IDAHO R. EVID. 502(b)(3); KY. R. EVID. 503(b)(3); LA. R. EVID. 506(B)(3); ME. R. EVID. 502(b)(3); MISS. R. EVID. 502(b)(3); NEB. REV. STAT. § 27-503(2)(c) (2006); NEV. REV. STAT. § 49.095(3) (2002 & Supp. 2004); N.H. R. EVID. 502(b)(3); N.M. R. EVID. 11-503(B)(3); N.D. R. EVID. 502(b)(3); OKLA. STAT. ANN. tit. 12, § 2502(B)(3) (West 1992); OR. R. EVID. 503(2)(c); S.D. CODIFIED LAWS § 19-13-3(3) (Michie 1995); UTAH R. EVID. 504(b); VT. R. EVID. 502(b)(3); WIS. STAT. ANN. § 905.03(2) (West 2000). Those states are included in the above list, however, because the courts within those states have not yet applied the respective statutes to protect communications shared among plaintiffs or non-parties. Thus, the boundaries and consequences of the common interest doctrine remain largely undefined. *See generally* Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 65–68 (2005).

18. *E.g.*, In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89–129, 902 F.2d 244, 249 (4th Cir. 1990) (quoting United States v. Schwimmer, 892 F.2d 237, 243–44 (2d Cir. 1989)); Sedlacek v. Morgan Whitney Trading Group, Inc., 795 F. Supp. 329, 331 (C.D. Cal. 1992) (quoting *In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d at 249); Schachar v. Am. Acad. of Ophthalmology, Inc., 106 F.R.D. 187, 191–92 (N.D. Ill. 1985); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1175 (D.S.C. 1975); Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., 870 N.E.2d 1105, 1109 (Mass. 2007); Fischer, *supra* note 2, at 632.

19. *E.g.*, *In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d at 249 (quoting *Schwimmer*, 892 F.2d at 243–44); *Sedlacek*, 795 F. Supp. at 331 (quoting *In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d at 249); *Schachar*, 106 F.R.D. at 191–92; *Duplan*, 397 F. Supp. at 1175; *Hanover*, 870 N.E.2d at 1109 (quoting Schaffzin, *supra* note 17, at 86); Fischer, *supra* note 2, at 632.

20. Intex Recreation Corp. v. Team Worldwide Corp., 471 F. Supp. 2d 11, 16 (D.D.C. 2007); *In re* Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 416 (N.D. Ill. 2006); Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437, 442 (Fla. Dist. Ct. App. 1987). It is this adversity which sets the stage for future conflicts which may force counsel to withdraw. *See, e.g.*, United States v. Moscony, 697 F. Supp. 888, 894 (E.D. Pa. 1988); Paul R. Rice, *Joint Clients/Participants in Joint or Common Defense*, 1 ACPRIV-FED § 4:33 (2007). See *infra* Part III.B for a detailed discussion of potential withdrawal by counsel.

sulting in the most efficient and effective legal advice possible.[21] By ensuring that a client's communications to his or her attorney will remain privileged, the client should feel more comfortable revealing all relevant information to his or her attorney.[22] The attorney's ability to render the best legal advice is enhanced when he or she has greater access to the big picture.[23]

Additionally, such aggregation may result in faster, more efficient litigation. By pooling resources and information, all parties involved may obtain results at a faster rate and for a lower cost.[24] Shared information may also lead to the discovery of otherwise undiscoverable information useful to a party.[25] At the very least, the end product of informal aggregation is more efficient litigation.

The hypothetical explained above provides a useful example of the benefits of the common interest doctrine. Attorney Arnot represents Acme in its claim against the City of Xylon for its exercise of eminent domain powers to seize undeveloped land owned by Acme. Attorney Bellows represents Beta in a similar, but separate, cause of action against Xylon. Attorneys Arnot and Bellows determine that they could more efficiently and effectively represent their respective clients if they could share attorney-client privileged information with each other. Absent the common interest doctrine, such an exchange would waive the attorney-client privilege that Acme and Beta previously held.[26] Under the common interest

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21. *See, e.g., In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d at 249; *Visual Scene*, 508 So. 2d at 440–41; Susan K. Rushing, Note, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 TEX. L. REV. 1273, 1274 (1990) ("The joint-defense privilege fulfills the social goal of encouraging interparty communications by preserving their confidentiality. When several clients retain separate counsel, the litigation often requires cooperation among the clients and their respective counsel if the clients are going to receive effective legal representation." (footnotes omitted)).

22. *See Duplan*, 397 F. Supp. at 1175 (stating that the common interest doctrine is intended to bring about client's objective freedom of mind in seeking out legal advice).

23. *See* Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.").

24. Fitzsimmons & Queen, *supra* note 13, at 146; Rochvarg, *supra* note 4, at 312.

25. *See* Lowenthal & Erichson, *supra* note 4, at 998–99. Of course, no client entering a common interest arrangement can accurately assess the significance of these advantages until he has entered such an arrangement and received information from another member of the common interest group. Information shared under the common interest doctrine must always be first protected by the attorney-client privilege. *See, e.g., In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d at 249; Minebea Co. v. Pabst, 228 F.R.D. 13, 15 (D.D.C. 2005). Thus, an outside party cannot review such privileged material to determine its usefulness until after he or she has accepted the terms of the common interest arrangement.

26. *See, e.g.*, Genentech, Inc. v. U.S. Int'l Trade Comm'n, 122 F.3d 1409, 1415 (Fed. Cir. 1997); United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981); *In re* Megan-Racine Assocs., 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995); Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1047 (D. Del. 1985); *In re* LTV Sec. Litig., 89 F.R.D. 595, 604 (N.D. Tex. 1981);

doctrine, however, Attorneys Arnot and Bellows can engage in such information-sharing while maintaining the protection of the underlying attorney-client privilege.[27]

In sharing such information, the parties can reduce the costs of their respective claims and enhance their legal strategies. If Beta shares with Acme the amount of taxes that it currently pays on its land, for example, Acme need not conduct its own research to find such useful information. The parties may also save by investing jointly in the services of a single expert to value the land seized by the City of Xylon and to calculate the projected taxes on the same land once it is developed. Moreover, Acme and Beta may bolster their legal strategies concerning the motives of Xylon in seeking to develop a parcel of land much larger than the individual plots held by Acme and Beta by openly discussing their separate legal claims. The common interest doctrine, thus, offers both Acme and Beta several potential advantages in their current claims against Xylon.

B. Defining an Attorney's Duty to Third Parties Under the Common Interest Doctrine

Once an attorney enters into a common interest arrangement on behalf of her client, she necessarily undertakes to provide some service to the other members of the common interest arrangement—the "pseudo-clients"—even though they are represented by separate counsel. It is unclear precisely what such obligations entail, as the law on this issue is split over whether the attorney has entered into a second attorney-client relationship with the pseudo-client or whether the attorney has simply assumed some fiduciary obligation to the pseudo-client.[28] There is consensus, however, that an attorney owes some duty to a pseudo-client.[29]

In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975).

27. See *supra* notes 18–20 and accompanying text for further explanation of how the common interest doctrine maintains the attorney-client privilege even after such privileged information is shared with third parties who comprise a common interest group.

28. *See supra* note 6.

29. *E.g.*, Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) (finding that attorney may owe to pseudo-client all duties owed by attorney to client or some other fiduciary duty); City of Kalamazoo v. Michigan Disposal Serv. Corp., 125 F. Supp. 2d 219, 245 (W.D. Mich. 2000), *aff'd* 151 F. Supp. 2d 913 (W.D. Mich. 2001) (finding that attorney owes to pseudo-client all duties owed by attorney to client); GTE N., Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1581 (N.D. Ill. 1996) (same); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (1995) (noting that attorney may owe pseudo-client fiduciary duties).

In attempting to resolve disputes between attorneys and pseudo-clients, various courts have questioned whether the pseudo-client is a client under the law governing lawyers or whether the pseudo-client is a third party.[30] Those courts that have determined that the attorney has created an attorney-client relationship with the pseudo-client have required the attorney to extend to the pseudo-client all the same ethical obligations owed to any other client.[31] Courts that have held that no attorney-client relationship exists have gone on to determine that the attorney may nonetheless owe some fiduciary duty to the pseudo-client.[32] Regardless of the theory these courts applied, the determination was clear—an attorney may unknowingly assume some obligation to a pseudo-client by entering into a common interest arrangement for the benefit of her original client.[33]

1. Does the Pseudo-Client Become a Client?

One theory concerning the relationship between an attorney and a pseudo-client holds that a pseudo-client becomes an attorney's client where confidential information is exchanged pursuant to a common interest arrangement.[34] This differs substantially from the general rule that an attorney's ethical duties to a client commence after the client requests the lawyer's representation and the lawyer agrees to such representation.[35] A determination that an attorney has entered into an attorney-client relationship with a pseudo-client

30. *See, e.g.*, *supra* note 6.

31. *E.g.*, *Kalamazoo*, 125 F. Supp. 2d at 245; *GTE N.*, 914 F. Supp. at 1581.

32. *E.g.*, *Abraham Constr.*, 559 F.2d at 253 (finding that attorney may owe to pseudo-client all duties owed by attorney to client or some other fiduciary duty); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (noting that attorney may owe pseudo-client fiduciary duties).

33. *E.g.*, *Abraham Constr.*, 559 F.2d at 253 (finding that attorney may owe to pseudo-client all duties owed by attorney to client or some other fiduciary duty); *Kalamazoo*, 125 F. Supp. 2d at 245 (finding that attorney owes to pseudo-client all duties owed by attorney to client); *GTE N.*, 914 F. Supp. at 1581 (same); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (noting that attorney may owe pseudo-client fiduciary duties).

34. *E.g.*, *Kalamazoo*, 125 F. Supp. 2d at 231 (finding direct attorney-client relationship); Ageloff v. Noranda, Inc., 936 F. Supp. 72, 75 (D.R.I. 1996) (recognizing that attorney-client relationship may be implied). The existence of an attorney-client relationship is determined through application of substantive law and is a question of fact dependent on the circumstances unique to each relationship. MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE cmt. 17 (2003).

35. MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE cmt. 17 (2003). Notably, however, an attorney's duty to maintain a client's confidentiality attaches to information communicated from the moment "the lawyer agrees to consider whether a client-lawyer relationship shall be established" until the attorney either declines the representation or, if accepted, until the representation is terminated. *Id.*

may, thus, have surprising consequences on the attorney's conduct toward her original client and the pseudo-client.

a. Recognizing an Attorney-Client Relationship

Several courts have recognized the creation of an attorney-client relationship between an attorney and a pseudo-client engaged in a joint defense or common interest consortium with the attorney's client, reasoning that the existence of a joint defense or common interest agreement may expressly or implicitly create such a relationship.[36] Whether direct or implied, however, those courts agree that such attorney-client relationships between attorneys and pseudo-clients carry with them all the same ethical obligations of any other attorney-client relationship.[37]

No court has yet considered whether a direct attorney-client relationship may result between an attorney and a pseudo-client through a common interest arrangement. Courts have, however, considered the analogous issue whether a joint defense agreement may create such a direct attorney-client relationship.[38] It is likely that a court considering the issue under a common interest agreement would also find a direct attorney-client relationship between an attorney and a member of a common interest group, based on the similar purposes, goals, and structures of joint defense and common interest arrangements.[39]

In *City of Kalamazoo v. Michigan Disposal Service Corp.*, the United States District Court for the Western District of Michigan found that a direct attorney-client relationship formed between General

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36. *See, e.g., Abraham Constr.*, 559 F.2d at 253 (finding that joint defense agreement may create direct attorney–client relationship, while behavior pursuant to such agreement may imply such relationship); *Kalamazoo*, 125 F. Supp. 2d at 233–34 (recognizing that joint defense agreement may create implied or direct attorney-client relationship); *GTE N.*, 914 F. Supp. at 1581 (finding that joint defense agreement created implied attorney-client relationship); *cf., e.g.*, Essex Chem. Corp. v. Hartford Accident & Indem. Co., 993 F. Supp. 241, 253 (D.N.J. 1998) (remanding for review of language of joint defense agreement to determine existence of direct or implied attorney-client relationship); *Ageloff*, 936 F. Supp. at 76 (ultimately finding no attorney-client relationship, but recognizing that joint defense agreement may create express or implied attorney-client relationship).

37. *See supra* note 31 and accompanying text.

38. *See Kalamazoo*, 125 F. Supp. 2d at 232. The common interest doctrine emerged as courts considered whether the joint defense doctrine applied to attorney-client privileged communications shared among civil co-plaintiffs or non-parties to advance common legal interest. *See* Schaffzin, *supra* note 17, at 61. Many courts continue to refer to the common interest doctrine as the "joint defense privilege," even as applied to co-plaintiffs or non-parties. *Id.* at 61 n.38.

39. See *supra* note 38 for a discussion of the roots of the common interest doctrine in the joint defense privilege.

Motors's counsel, Dykema Gossett, and its pseudo-client, Brunswick Corp., when GM entered into a joint defense agreement with Brunswick.[40] Dykema Gossett had previously represented GM in a cost recovery action commenced in 1992 pursuant to the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) of 1980[41] brought by the City of Kalamazoo against GM and Brunswick, among others.[42] Eight years later, Dykema Gossett undertook representation of plaintiffs the City of Kalamazoo and the Cork Street Landfill Group in a similar action against ten defendants, including Brunswick; GM, Dykema Gossett's former client, was not a party to this second dispute.[43] Brunswick moved to disqualify Dykema Gossett as counsel to plaintiffs, citing a conflict of interest.[44]

In considering this motion, the court considered Brunswick's argument that it had become Dykema Gossett's former client by virtue of the relationship created when GM and Brunswick entered into a joint defense agreement to retain common counsel and to coordinate a common defense against the City of Kalamazoo in the earlier case.[45] The court examined the terms of the joint defense agreement, which required its members and their counsel to maintain the confidentiality of information shared among the group.[46] The agreement further included language expressly stating that an attorney serving on a committee for the joint defense consortium did not create an attorney-client relationship with the other members of the consortium simply by serving on the committee.[47] The court noted, however, that the joint defense agreement did not include any provision affirmatively stating that no attorney-client relationship existed between common counsel, as opposed to independent counsel serving on a committee, and members of the consortium.[48]

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40. 125 F. Supp. 2d 219, 232 (W.D. Mich. 2000).

41. 42 U.S.C. § 9613 (2000). Pursuant to CERCLA, the City of Kalamazoo sought contribution from GM to recover its costs of remediating a Superfund site. *Kalamazoo*, 125 F. Supp. 2d at 223.

42. *Kalamazoo*, 125 F. Supp. 2d at 223.

43. *Id.* at 220.

44. *Id.*

45. *Id.* at 223. Pursuant to the joint defense agreement, each member could opt out of common representation and retain separate counsel on any matter. *Id.* at 224.

46. *Id.* at 223. The joint defense agreement included multiple, lengthy paragraphs imposing the duty of confidentiality on any member of the consortium and its counsel receiving information shared by another member. *Id.* at 225–27.

47. *Id.* at 224. For the text of the joint defense agreement, see *infra* note 80.

48. *Id.* In fact, the court stated in dicta that the contract language effectively prevented an attorney-client relationship from developing between independent counsel serving on a committee for the joint defense and other members of the joint defense consortium. *Id.* at

Having determined that the language of the joint defense agreement left room for the creation of an attorney-client relationship under certain circumstances, the court found that Dykema Gossett performed the role of common counsel to the joint defense consortium.[49] As common counsel to the joint defense consortium, the court recognized a direct attorney-client relationship between Dykema Gossett and all members of the consortium, including Brunswick.[50] Because Brunswick was, thus, a former client of Dykema Gossett, the court held that Dykema Gossett could not then represent the City of Kalamazoo in a substantially related matter adverse to Brunswick[51] and granted Brunswick's motion to disqualify Dykema Gossett.[52]

Even where a direct attorney-client relationship is not expressly created by contract, some courts have nonetheless held that an attorney may be bound by the ethical duties owed to a client where an implied attorney-client relationship has developed between the attorney and a pseudo-client.[53] An implied attorney-client relationship may develop where the nature of the relationship between an attorney and a pseudo-client, where the situation under which confidential information is exchanged, and where the terms of the agreement between an attorney and a pseudo-client create a fiduciary obligation on the attorney's part.[54] Where such a relationship is found to exist, an attorney is bound by all the duties an attorney owes to a client.[55]

In *GTE North, Inc. v. Apache Products Co.*, the United States District Court for the Northern District of Illinois found an implied attorney-client relationship between GTE North, Inc., and attorney Jon Faletto, counsel to Dean Foods Company, by virtue of the exchange of confidential information pursuant to a common interest agreement.[56] The court precluded Faletto and his firm from representing Dean in its action adverse to GTE.[57]

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233. See *infra* Part II.B.1.b for a more detailed discussion of the court's dicta on the issue of independent counsel.

49. *Id.* at 227.

50. *Id.* at 231, 238.

51. *Id.* at 245.

52. *Id.* at 242–43.

53. GTE N., Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1581 (N.D. Ill. 1996).

54. *Id.* at 1580–81; George S. Mahaffey, Jr., *All for One and One for All? Legal Malpractice Arising from Joint Defense Consortiums and Agreements, The Final Frontier in Professional Responsibility*, 35 ARIZ. ST. L.J. 21, 33, 38 (2003); *see also Kalamazoo*, 125 F. Supp. 2d at 231, 234; Essex Chem. Corp. v. Hartford Accident & Indem. Co., 993 F. Supp. 241, 253 (D.N.J. 1998). *But see* Ageloff v. Noranda, Inc., 936 F. Supp. 72, 76 (D.R.I. 1996).

55. GTE N., Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1579 (N.D. Ill. 1996).

56. *Id.* at 1581.

57. *Id.*

Prior to initiating suit against Dean, GTE entered into a joint remedial cost-sharing agreement with several other parties deemed "potentially responsible parties" by the U.S. Environmental Protection Agency, including Faletto's client, Chrysler, related to the contamination of a Superfund Site.[58] Under the cost-sharing agreement, certain potentially responsible parties, including GTE and Chrysler, agreed to pursue common actions against other potentially responsible parties and to share confidential information among the group which information would be held by each member in confidence and the sharing of which was not intended to waive the attorney-client privilege.[59] Several members of the cost-sharing agreement, including GTE and Chrysler, then entered into a second agreement to share the common costs of investigating unidentified potentially responsible parties.[60] The investigation's coordinating counsel then disseminated confidential information to all members of the group, including Chrysler's counsel, Faletto.[61]

When the investigation into other potentially responsible parties concluded, Chrysler decided not to participate in any cost recovery litigation and assigned its rights to GTE, which filed the action against Dean Foods.[62] Attorney Faletto then attempted to represent Dean in its defense against the remaining plaintiffs, including GTE.[63] Chrysler, as Faletto's former client, consented to his representation of Dean in GTE's cost recovery action.[64] GTE moved to disqualify Faletto, arguing that an implied attorney-client relationship between Faletto and GTE existed.[65] GTE further argued that the implied attorney-client relationship created a fiduciary duty on Faletto's part to maintain the confidences of GTE.[66]

The United States District Court for the Northern District of Illinois considered whether GTE was Faletto's former client, a relationship that would require GTE's consent to waive the conflict

58. *Id.*

59. *Id.* In its statement of facts, the court stated that the agreement "included confidentiality provisions which provided that all shared information between the members and their counsel shall 'be held in strict confidence by the receiving member and by all persons to whom such confidential information is revealed by the receiving member.' The agreement further provided that the disclosure of such confidential information shall not constitute a waiver of the attorney-client or work-product privilege." *Id.* at 1577.

60. *Id.* at 1577–78. The second agreement contained a confidentiality provision similar to that in the first agreement. *Id.* at 1578.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

of interest.[67] The court examined first whether a fiduciary duty existed, creating an implied attorney-client relationship, and second, if an attorney-client relationship existed, whether Faletto violated his ethical duty of loyalty to GTE by later defending Dean, an adverse party, without obtaining GTE's consent.[68]

The court determined that, where no direct attorney-client relationship exists, an attorney owes a fiduciary duty to maintain the confidence of members of a common interest arrangement where there is an actual exchange of confidential information.[69] The court further found that the language of the common interest agreement clearly established the intent that all parties would maintain the confidentiality and attorney-client privilege of all shared information, which supported its determination that Faletto undertook certain fiduciary obligations to GTE.[70] Because the court found an actual exchange of confidential information pursuant to a common interest agreement from GTE to Faletto creating a fiduciary relationship between them, it held that an implied attorney-client relationship had in fact existed between the two, imposing upon Faletto all the ethical duties an attorney owes to his client.[71] Because this relationship could not be protected if Faletto represented Dean, an adverse party, the court disqualified Faletto from representing Dean Foods.[72]

As evidenced above, several federal courts have held that an attorney-client relationship exists between an attorney and members of a joint defense or common interest consortium, at least where there is a finding that the attorney has received confidential information.[73] Those courts have imposed upon such attorneys all the duties owed by an attorney to her client, including the duty of

67. *Id.* at 1579.

68. *Id.*

69. *Id.* at 1580; *accord* Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977).

70. *GTE N.*, 914 F. Supp. at 1581. *But see, e.g.*, Essex Chem. Corp. v. Hartford Accident & Indem. Co., 993 F. Supp. 241, 247, 251 (D.N.J. 1998) (finding no relationship between attorneys for members of joint defense consortium and former client of attorney for an individual member of that consortium where there was no actual exchange of confidential information); Ageloff v. Noranda, Inc., 936 F. Supp. 72, 77–78 (D.R.I. 1996) (relying on language of joint defense agreement to determine that attorney owed no duty to pseudo-client).

71. *GTE N.*, 914 F. Supp. at 1581.

72. *Id.*

73. *E.g.*, City of Kalamazoo v. Michigan Disposal Serv. Corp., 125 F. Supp. 2d 219, 233–35 (W.D. Mich. 2000), *aff'd* 151 F. Supp. 2d 913 (W.D. Mich. 2001); *GTE N.*, 914 F. Supp. at 1580.

confidentiality, regardless of whether the attorney-client relationship was classified as direct or implied.[74]

b. Ineffectiveness of Contract Provisions

As explained above, courts considering the language of a joint defense or common interest agreement to determine whether an attorney-client relationship exists between an attorney and another member of a joint defense or common interest consortium have found that contract provisions expressly denying the creation of an attorney-client relationship may be effective in preventing the creation of a direct attorney-client relationship.[75] Those courts have also recognized that an attorney-client relationship may, nonetheless, be implied by the actions of the parties pursuant to that agreement.[76]

In *Kalamazoo*, discussed in detail above, the United States District Court for the Western District of Michigan carefully considered the provisions of the joint defense agreement between the parties and, ultimately, determined that the language of the joint defense agreement purporting to prevent the creation of an attorney-client relationship between Dykema Gossett and Brunswick was insufficient to do so.[77] The court, however, reached its conclusion after finding that Dykema Gossett acted as common counsel to all members of the joint defense committee, rather than simply as an independent member of the committee which would have been protected by the terms of the contract.[78] The joint defense agreement required its members and their counsel to maintain the confidentiality of information shared among the group[79] and expressly stated that an attorney serving on a committee for the joint

74. *E.g.*, *Abraham Constr.*, 559 F.2d at 253; *Kalamazoo*, 125 F. Supp. 2d at 245; *GTE N.*, 914 F. Supp. at 1581. *But see Essex*, 993 F. Supp. at 247, 251.

75. *See, e.g.*, *Kalamazoo*, 125 F. Supp. 2d at 233; *Ageloff*, 936 F. Supp. at 75–76.

76. *See, e.g.*, *Kalamazoo*, 125 F. Supp. 2d at 234 ("Numerous authorities recognize that, even where counsel are acting in a joint defense situation on behalf of their own clients, the circumstances of that representation may create an implied attorney-client relationship with codefendants."); *Ageloff*, 936 F. Supp. at 76 ("It is true . . . that in order to protect the exchange of confidential information, courts have held that an attorney who serves his or her client's codefendant for a limited purpose becomes the codefendant's attorney for that purpose. . . . Also, courts have recognized the existence of a 'fiduciary obligation' or 'implied professional relation' between codefendants and their attorneys.").

77. 125 F. Supp. 2d at 233, 238.

78. *Id.* at 227.

79. *Id.* at 223. The joint defense agreement included multiple, lengthy paragraphs imposing the duty of confidentiality on any member of the consortium and its counsel receiving information shared by another member. *Id.* at 225–27.

defense consortium did not create an attorney-client relationship with the other members of the consortium simply by serving on the committee.[80] The court noted in dicta that this language did serve to effectively prevent the creation of a direct attorney-client relationship between members of the consortium and counsel acting as independent members serving on a committee on behalf of the consortium.[81] Because the court found that Dykema Gossett performed the role of common counsel to the joint defense consortium, however, it recognized a direct attorney-client relationship between Dykema Gossett and the other members of the consortium.[82]

Although the district court recognized that the contract language could effectively prevent the creation of a direct attorney-client relationship, the court noted that such language could not prevent the creation of an attorney-client relationship where the conduct of the parties implied such a relationship.[83] The court focused on the fact that, during the course of the common defense, the members of the consortium and their counsel, including Dykema Gossett, exchanged confidential information.[84] Thus, despite the existence of contract provisions attempting to prevent the creation of an attorney-client relationship, the district court recognized that, had the court found no direct attorney-client

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80. *Id.* at 224. The joint defense agreement stated:

> No member, or representative, or counsel for any Member, has acted as counsel for any other Member with respect to such Member entering into this Agreement, except as expressly engaged by such Member with respect to this Agreement, and each Member represents that it has sought and obtained any appropriate legal advice it deems necessary prior to entering into this Agreement.
>
> No Member or its representative serving on any committee or subcommittee shall act or be deemed to act as legal counsel or a representative of any other [M]ember, unless expressly retained by such Member for such purpose, and, except for such express retention, no attorney/client relationship is intended to be created between representatives on any committee or subcommittee and the Members.

Id.

81. *Id.* at 233 ("With regard to those counsel merely participating in joint defense activities on behalf of their respective clients, no attorney-client relationship attaches to any other defendant."); *see also Ageloff*, 936 F. Supp. at 75–76 (relying on language of joint defense agreement to determine that attorney owed no duty to pseudo-client).

82. *Kalamazoo*, 125 F. Supp. 2d at 223. The court found that the joint defense agreement did not include any provision affirmatively stating that no attorney-client relationship existed between common counsel (as opposed to independent counsel serving on a committee) and members of the consortium. *Id.*

83. *Id.* at 234.

84. *Id.* at 227.

relationship, it very well could have recognized an implied attorney-client relationship.[85]

Because contract provisions attempting to prevent the creation of an attorney-client relationship may be effective only to prevent the creation of a direct, but not an implied, attorney-client relationship and because the ethical obligations owed by an attorney to a pseudo-client are identical regardless of whether an attorney-client relationship is deemed direct or implied,[86] contract provisions such as these have little practical effect. Should a court determine that contract language successfully blocked the creation of a direct attorney-client relationship, the court would, nonetheless, look to the conduct of the parties to determine whether an implied relationship arose. Because the ethical duties owed to a client under an implied attorney-client relationship mirror those owed under a direct attorney-client relationship, an attorney would be ethically bound to the pseudo-client even absent a direct relationship. Thus, contract language attempting to prevent the creation of an attorney-client relationship between an attorney and a pseudo-client is ineffective to prevent the imposition of new ethical obligations upon the attorney.

2. Does the Pseudo-Client Remain Just Another Third Party?

Although some courts have recognized an attorney-client relationship between an attorney and his or her pseudo-client, most authorities treat the pseudo-client instead as a third party to whom the lawyer may owe some contractual or fiduciary duties.[87] Those authorities first note that the mere participation in a common interest consortium does not create an attorney-client relationship.[88] These authorities recognize, however, that an attorney may owe a fiduciary obligation to a client's co-defendant.[89] Specifically, the actual sharing of confidential information creates a fiduciary duty

85. *Id.* at 234–35.

86. *E.g., id.* at 245; GTE N., Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1581 (N.D. Ill. 1996).

87. Erichson, *supra* note 4, at 418; Essex Chem. Corp. v. Hartford Accident & Indem. Co., 993 F. Supp. 241, 252–53 (D.N.J. 1998).

88. Turner v. Firestone Tire & Rubber Co., 896 F. Supp. 651, 654 (E.D. Tex. 1995); *Essex Chem. Corp.*, 993 F. Supp. at 251; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (1995); Mahaffey, *supra* note 54, at 37.

89. Ageloff v. Noranda, Inc., 936 F. Supp. 72, 76 (D.R.I. 1996).

on the part of the attorney to maintain the confidentiality of the pseudo-client.[90]

The American Bar Association addressed this issue in the context of a joint defense consortium in 1995.[91] The lawyer requesting the opinion of the ABA represented certain insurance companies in litigation wherein up to thirty different insurance companies were named defendants.[92] These defendants would routinely join forces by forming a joint defense consortium, wherein the members would execute a standard agreement which stated "that lawyers for the constituent insurance companies do not represent the other members of the consortium."[93] The lawyer in question had since left his firm and sought to represent a potential client in a claim against members of the consortium other than the lawyer's former clients.[94]

At that time, the attorney requested the advice of the ABA as to whether he would be precluded from representing parties adverse to members of a joint defense consortium in which a former client of the attorney had been a member.[95] When the joint defense consortium was originally formed, all members agreed in writing that lawyers for the constituent companies in the consortium do not represent the other members of the consortium.[96] Relying on this provision in the agreement, the ABA concluded that such a lawyer would owe no more than a fiduciary obligation to maintain the confidentiality of any information exchanged.[97] The ABA clearly stated, however, that such a lawyer "would not . . . owe an *ethical* obligation to them, for there is simply no provision of the Model Rules imposing such an obligation."[98]

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90. *Turner*, 896 F. Supp. at 654; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395; Mahaffey, *supra* note 54, at 36. In *Turner*, the United States District Court for the Eastern District of Texas declined to disqualify an attorney based on a conflict of interest, finding that no irrebuttable presumption that confidential information has been exchanged arises absent a direct attorney-client-relationship. 896 F. Supp. at 653. Moreover, the court determined that, absent an actual exchange of confidential information, an attorney owes no fiduciary duty to a pseudo-client. *Id.* at 654.

91. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* In response to the lawyer's inquiry as to his relevant ethical obligations under these circumstances, the ABA issued a formal ethics opinion concluding that "A lawyer who has represented one, but only one, of the parties in a joint defense consortium does not thereby acquire an obligation to the other parties to the consortium that poses an ethical bar to the lawyer thereafter taking on a related representation adverse to any of the other parties." *Id.*

98. *Id.* (emphasis in original).

3. A Difference Without a Distinction

As explained in detail above, the approach of courts to the issue of the attorney-pseudo-client relationship is varied. Whether courts find that the relationship between an attorney and a pseudo-client is a direct attorney-client relationship, an implied attorney-client relationship, or a fiduciary relationship, the result is the same: an attorney necessarily undertakes some additional ethical responsibilities to the pseudo-client, including the duty of confidentiality. Where courts have found either a direct or implied attorney-client relationship, they have imposed upon the attorney with respect to the pseudo-client all the same ethical responsibilities owed to the original client.[99] Those authorities that have instead found only a fiduciary relationship between the attorney and the pseudo-client have, at a minimum, imposed upon the attorney the fiduciary obligation of maintaining the pseudo-client's confidence.[100] Whatever the classification of the relationship, the end result will force attorneys to consider the interests of pseudo-clients in some capacity that may impact the representation that the attorney may provide to his or her original client.

III. THE COMMON INTEREST DOCTRINE MAY FORCE THE CLIENT TO FOREGO REPRESENTATIONAL RIGHTS, INCLUDING HIS CHOICE OF COUNSEL

Defining the duties owed by an attorney to a pseudo-client is certainly essential to understanding the rights and obligations of both attorneys and pseudo-clients.[101] The issue, however, focuses on

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99. *See, e.g.*, City of Kalamazoo v. Michigan Disposal Serv. Corp., 125 F. Supp. 2d 219, 245 (W.D. Mich. 2000), *aff'd* 151 F. Supp. 2d 913 (W.D. Mich. 2001); GTE N., Inc. v. Apache Prods. Co., 915 F. Supp. 1575, 1581 (N.D. Ill. 1996). See *supra* part II.B.1.b for a detailed discussion of the similar ethical obligations owed to a pseudo-client under a direct or implied attorney-client relationship.

100. Turner v. Firestone Tire & Rubber Co., 896 F. Supp. 651, 654 (E.D. Tex. 1995); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 ("[T]he lawyer's obligations to the party he represented may present such a bar, and the lawyer will almost certainly have undertaken fiduciary obligations to the other parties that have the same effect."); Mahaffey, *supra* note 54, at 36.

101. *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (rejecting theory that joint representation creates attorney-client relationship with pseudo-client, but recognizing that fiduciary and contractual duties may still exist); Fitzsimmons & Queen, *supra* note 13, at 165–70 (identifying theories that joint defense agreement creates attorney-client relationship, imposes duty of confidentiality, or imposes no duty); King & Patterson, *supra* note 13, at 10–11 (proposing that joint multiple party representations impose only a duty of confidentiality on parties); Rochvarg, *supra* note 4, at 344–45 (rejecting

the protection of the pseudo-client from the attorney or the attorney from the pseudo-client. In each case discussed above, for example, the issue was the protection of the pseudo-client from a perceived conflict of interest in a later case.[102] Such a determination fails to consider the protection of the original client from such potential conflicts.

The question that has not been asked is how the ethical or fiduciary duties assumed by an attorney to benefit the pseudo-client affect the attorney's ethical duties to her original client. To protect the original client from the outset, an attorney must fully understand and explain to the client the implications of assuming those duties should the attorney's obligations to the client and the pseudo-client ever conflict. Moreover, much has been written on obtaining the informed consent of a client before waiving the duty of confidentiality by entering into a common interest arrangement,[103] but few have considered the necessity of fully informing the client of the potential conflicts of interest, and the consequences thereof, caused by the attorney's assumption of duties to the pseudo-client.

In many cases, a client who enters a common interest arrangement effectively agrees to accept something less than the confidentiality, diligence, and loyalty that the Model Rules of Professional Responsibility require an attorney to provide. To fulfill her duties under the Model Rules, an attorney must consider the effect of a common interest arrangement on her ethical obligations to her client, as well as to any third party, before entering into such an agreement on behalf of that client. The most obvious ethical duty implicated by the common interest doctrine is that of confidentiality.[104] Less obvious are the effects of the common interest doctrine on an attorney's duties of diligence[105] and loyalty.[106] A

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theory that joint representation creates attorney-client relationship; proposing that such representation creates independent duty to pseudo-client).

102. See *supra* Part II.B for a detailed discussion of cases addressing the protection of pseudo-clients from future conflicts of interest.

103. Erichson, *supra* note 4, at 386; Fitzsimmons & Queen, *supra* note 13, at 146–47; David B. Leland, *Attorney-Client Privilege*, 68 GEO. WASH. L. REV. 598, 601 (2000); *see also* Fischer, *supra* note 2, at 634 (stating that common interest doctrine allows co-parties to coordinate strategies even outside of litigation context); Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 903 (2005) (discussing client's informed consent in context of joint defense agreement).

104. See *infra* notes 111–19 and accompanying text for a discussion of the effect of the common interest doctrine on an attorney's duty of confidentiality.

105. See *infra* notes 130–32 and accompanying text for a discussion of the implications of the common interest doctrine on an attorney's duty of diligence.

106. See *infra* notes 119–24 and accompanying text for a discussion of the common interest doctrine's effect on an attorney's duty of loyalty.

client must necessarily sacrifice some of his rights under the attorney-client relationship to reap the benefits of information-sharing made possible by the common interest doctrine.[107]

Under many circumstances, the informed consent of a client may waive certain of these ethical duties.[108] Unfortunately, commentators and practitioners alike overlook the risks posed by the common interest doctrine, as well as the severity of those risks, when communicating the pros and cons of entering a common interest arrangement. Without full disclosure of the risks posed by the common interest doctrine, a client may unknowingly give up more than he bargained for. Arguably, this could render the client's consent uninformed, eviscerating the ethical basis on which the attorney justified the abdication of her ethical responsibilities.

Absent informed consent or in a circumstance in which the conflict is non-consentable, the attorney must withdrawal her representation.[109] Such withdrawal may substantially interfere with a client's choice of counsel, resulting in significant harm.[110] At the very least, withdrawal will pose a mild to severe disruption in the client's representation.

Returning to the earlier hypothetical, Attorney Arnot received Acme's consent to breach her duty of confidentiality; she failed, however, to obtain its consent to breach her duties of diligence and loyalty. To fully inform Acme of the risks of entering into a common interest arrangement, Attorney Arnot would have to discuss the implications of common representation, including the risk that, should the interests of Acme and Beta later diverge, Attorney Arnot's ethical or fiduciary duties to Beta may create a conflict of interest forcing her to withdraw as counsel to Acme, denying it its choice of counsel.

For example, Acme and Beta, as competing real estate developers in the same city, may very well be adversaries in a later attempt to obtain the rights to develop a unique parcel of land. Attorney Arnot's consideration of Beta's interests in the past may create a conflict precluding her representation of Acme in its future actions against Beta. Thus, there exists a strong possibility that embarking on a common interest strategy, although at all times intended to benefit Acme, may ultimately result in its harm. Acme may very

107. See *supra* Part II.A for a discussion of the advantages of the common interest doctrine.

108. See *infra* Part IV for a discussion of the possibility of waiver of the duties of confidentiality, diligence, and loyalty by informed consent.

109. See *infra* Part III.B for a discussion of the possibility of attorney withdrawal.

110. See *infra* Part III.B for a discussion of the effects of attorney withdrawal on a client's ability to select his or her own counsel.

well determine that the harm posed by the potential withdrawal of Attorney Arnot in future litigation is minimal. Attorney Arnot, nonetheless, must obtain Acme's informed consent concerning the potential conflict of interest between its interests and those of Beta before entering the common interest arrangement.

A. Impact of the Common Interest Doctrine on an Attorney's Ethical Obligations to the Client

The obligations incurred by an attorney on behalf of a pseudo-client by virtue of the common interest doctrine may put an attorney in a difficult ethical position. Many scenarios exist by which an attorney's ethical duties to her client are directly challenged by her obligations to the pseudo-client. The most commonly challenged duties to a client will be those of confidentiality, loyalty, and diligence.

Because the common interest doctrine necessarily involves the divulging of confidential attorney-client privileged information,[111] the most obvious ethical duty implicated in a common interest arrangement is an attorney's duty of confidentiality. Confidentiality is at the heart of the attorney-client relationship.[112] Courts uniformly recognize the important purpose of the duty of confidentiality—to encourage open and honest communication between attorney and client.[113] Confidentiality builds a client's trust in his attorney, thus enabling the attorney to provide the best and most efficient legal advice.[114] Good legal advice benefits not only the client, but the courts and the public as well, by promoting justice and judicial ef-

111. See *supra* Part II.A for further explanation of the common interest doctrine.

112. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2003) ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship."); Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381, 394 (2005); Patrick T. Casey & Richard S. Dennison, *The Revision to ABA Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society*, 16 GEO. J. LEGAL ETHICS 569, 569 (2003) ("Confidentiality is considered one of the most vital and fundamental attributes of the attorney-client relationship.").

113. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89–129, 902 F.2d 244, 249 (4th Cir. 1990); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2; Richmond, *supra* note 112, at 395.

114. *Upjohn*, 449 U.S. at 389–91; MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 ("The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.").

ficiency.[115] Thus, courts generally seek to protect confidential communications as a matter of sound public policy.[116]

The common interest doctrine, however, requires an attorney to breach the important duty of confidentiality. To enter a common interest arrangement with another, the client must necessarily consent to the disclosure of confidential information to other members of the commonly allied group. Essentially, this requires a narrow waiver limiting disclosure of confidential information to only those members of the common interest consortium.[117]

In addition to owing her client the duty of confidentiality, an attorney in a common interest arrangement assumes the obligation to maintain the confidence of the pseudo-client as well.[118] This duty may conflict with the original client's later desire to reveal such information to advance his own cause. For example, the client may later wish to use the confidential information shared by the pseudo-client to enhance his position in settlement with a common adversary, to introduce the confidential information as evidence, or to cross-examine the pseudo-client at trial to enhance the client's case. After the attorney assumes this obligation to the pseudo-client, however, she is unable to use the confidential information to the pseudo-client's disadvantage in this way because the new duties she has assumed on behalf of the pseudo-client prevent her from doing so. Moreover, if the parties' interests later diverge, the attorney remains obligated to maintain the pseudo-client's confidence, although her duties to maintain her own client's confidence as to the pseudo-client have been waived.

Not only does the pseudo-client's confidentiality trump that of the client, this duty to the pseudo-client may create a conflict between the attorney's duty of confidentiality to the pseudo-client and her duties of loyalty and diligence to the original client. The attorney's loyalty to her client is undermined by her new commitment to the pseudo-client. Additionally, the attorney's ability to pursue the client's interests with commitment and zeal is materially limited by her conflicting duty—ethical or fiduciary—to maintain the confidence of the pseudo-client.

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115. *Upjohn*, 449 U.S. at 389 ("[The attorney-client privilege's] purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2.

116. *See, e.g.*, *Upjohn*, 449 U.S. at 389; *In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d at 249.

117. See *infra* Part IV for a discussion of the use of informed consent to waive the duty of confidentiality.

118. *See supra* Part II.B.3.

An attorney's duties of loyalty, including independent judgment[119] and the prohibition on accepting representation adverse to a client,[120] are also implicated by the common interest doctrine.[121] The purpose of the duty of loyalty and the corresponding prohibition on maintaining conflicts of interest is to protect the lawyer-client relationship by precluding situations which could foster feelings in the client of betrayal by the attorney or beliefs that the lawyer will pursue some interest other than the client's.[122] Such feelings of distrust interfere with the attorney's ability to render sound legal advice.[123]

In addition to precluding representation of a party directly adverse to his or her client,[124] the duty of loyalty also prohibits any representation in which "there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."[125] Such a risk often exists where an attorney represents multiple parties in the same action; the attorney's duty of loyalty to one client may foreclose an option in the best interest of another client.[126] Common representation creates additional potential for conflicts of interest attributed "by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question."[127] Despite this conflict of loyalties, each client is entitled to the attorney's undivided loyalty and diligence, as impossible as that task appears.[128]

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119. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2003) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

120. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2003). A directly adverse conflict may exist in several circumstances. The most obvious example of a direct conflict is where an attorney seeks to represent one client in an action directly adverse to another client. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003). An attorney is further precluded from representing one client in a matter against a client whom the attorney represents in a wholly unrelated matter. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6. Additionally, a direct conflict exists where an attorney seeks to cross-examine a client resulting in harm to that client while representing another client. *Id.* Because representing adverse parties in a direct conflict of interest is likely to damage the attorney's relationship of trust with both clients, Model Rule 1.7(a)(1) prohibits such representation.

121. This duty is so important that the Model Rules of Professional Responsibility devote at least four rules aimed at prohibiting conflicts of interest that would interfere with an attorney's duty of loyalty. *See* MODEL RULES OF PROF'L CONDUCT RR. 1.7–1.10 (2003).

122. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6.

123. *Id.*

124. *Id.*

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

126. *Id.*

127. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 23.

128. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 33.

Such a conflict can arise in a common interest arrangement where an attorney's duties of loyalty and independent judgment to a client may be materially limited by the attorney's simultaneous fiduciary obligations to a pseudo-client.[129] Returning to the earlier hypothetical in which Acme and Beta have entered a common interest arrangement in their separate claims against the City of Xylon, Attorney Arnot's loyalty to Acme, as well as her independent judgment, are likely to be materially limited by her duty to maintain Beta's confidence. For example, a situation may develop where Acme may engage in settlement negotiations with Xylon. Acme may benefit in its settlement with Xylon by disclosing to Xylon confidential information shared by Beta with Acme in the context of their common interest arrangement. Acme may wish to disclose this information; nonetheless, Attorney Arnot would be ethically prohibited from disclosing to Xylon confidential information shared by Beta in the context of the common interest arrangement. If Attorney Arnot refuses to disclose the information, Acme is likely to call her loyalty into question.

Additionally, the common interest doctrine presents a challenge to an attorney's duty of diligence. Diligence[130] requires an attorney to hold her client's interests paramount and to act with commitment and zeal on the client's behalf.[131] When an attorney enters into a common interest arrangement on behalf of her client, however, she faces the challenge of maintaining the client's interest as paramount while necessarily agreeing to accept some obligation of confidentiality on behalf of the other members of the common interest arrangement. Returning to the earlier example, it would be difficult for Attorney Arnot to hold the interests of Acme paramount while simultaneously protecting Beta from Acme's desire to use Beta's confidential information to obtain a settlement favorable to Acme.

For all of the above reasons, the duties owed by an attorney to a pseudo-client corresponding with the common interest doctrine can significantly undercut the client's own entitlement to confidential, diligent, and loyal representation.

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129. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 9.

130. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2003) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

131. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1. Diligence also requires that an attorney accept only representation he or she believes he or she can continue to its conclusion. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 4. Because an attorney's ability to represent a client to the conclusion of a legal matter is jeopardized by responsibilities to a pseudo-client created by a common interest agreement, the risk of withdrawal further challenges an attorney's ability to honor her duty of diligence. See *infra* Part III.B for further discussion of potential withdrawal.

B. Uninformed Consent and the Hidden Danger of Withdrawal

As explained above, because the common interest doctrine burdens an attorney with some obligation—ethical or fiduciary—to a pseudo-client, such a duty jeopardizes an attorney's ability to provide confidential, diligent, and loyal representation to her client. Her client may nonetheless determine that the perceived benefits of entering a common interest consortium are so great that he may be willing to forego his representational rights through waiver, where permitted. For such a waiver to be effective, however, it must be informed; if the client is not aware of all significant risks before entering into the common interest arrangement, then he cannot confer informed consent. His attorney must explain the many risks of the common interest doctrine, including the risks to confidentiality, diligence, and loyalty, as well as the overarching risk of attorney withdrawal.

Obtaining a client's informed consent is only effective if the client understands and appreciates the risks presented by the conflict.[132] An attorney, however, need not disclose the risks of every course of action and obtain consent whenever the "mere possibility of subsequent harm" arises.[133] To determine whether to disclose certain risks to gain consent, an attorney must evaluate "the likelihood that a difference in interests 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."[134] Determining what information must be disclosed to render a client's consent "informed" depends on the risks involved in the given situation.[135]

Unfortunately, as played out in case law and in scholarly discussions, many attorneys fail to obtain the informed consent of their clients before entering into a common interest arrangement. These shortcomings may arise from a failure to address either any risk generally associated with the common interest doctrine or any risk other than that associated with the immediate waiver of confidentiality. Where consent falls short of being "informed," it is the attorney who is left holding the bag: relying on consent later deemed uninformed, an attorney may realize all too late that she breached the ethical duties of confidentiality, loyalty, and diligence

132. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22.
133. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8.
134. *Id.*
135. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 18.

in entering a common interest arrangement on behalf of her client.

A client's consent may also be deemed uninformed if an attorney fails to counsel her client on the risks of potential attorney disqualification or mandatory withdrawal. Absent counsel's guidance, a client is not likely to comprehend that, even where the interests of the client and the commonly interested party later become adverse, the attorney maintains certain obligations to the commonly interested party that may then conflict with the client's interests. The attorney's ability to render loyal, diligent, and independent representation at a later time may then be materially compromised, forcing the attorney to withdraw his or her representation of the client.

Returning to the earlier hypothetical, for example, a situation could arise where, through the common interest arrangement concerning its suit against Xylon, Acme discloses to Beta certain confidential trade information concerning the formula that Acme applies to value undeveloped land. In later litigation against Acme, this information disclosed by Acme would be useful to Beta; Attorney Bellows, however, would be ethically prohibited from utilizing the information he received from Acme, his pseudo-client, although it is in the best interests of his client for him to disclose that information. This situation would require Attorney Bellows to withdraw as Beta's counsel because his obligations to Acme prevent him from providing diligent and loyal legal advice to Beta.

Attorney withdrawal may have a significant adverse impact on a client's interests. Specifically, attorney withdrawal or disqualification deprives a client of his choice of counsel. Courts across jurisdictions recognize that, in most circumstances, parties maintain the right to choose their counsel.[136] Depriving a client of his or her choice of counsel can result in great harm to the client,[137] for example, by preventing a client from using the services of its long-time counsel who has become familiar with the practices of the client.

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136. *See, e.g.*, Macheca Transp. Co. v. Phila. Indem. Ins., 463 F.3d 827, 833 (8th Cir. 2006) (quoting Banque Arabe et Internationale d'Investissement v. Ameritrust Corp., 690 F. Supp. 607, 613 (S.D. Ohio 1988)); Cole v. U.S. Dist. Ct., 366 F.3d 813, 817 (9th Cir. 2004); City of Kalamazoo v. Michigan Disposal Serv. Corp., 125 F. Supp. 2d 219, 222–23 (W.D. Mich. 2000), *aff'd* 151 F. Supp. 2d 913 (W.D. Mich. 2001); Essex Chem. Corp. v. Hartford Accident & Indem. Co., 993 F. Supp. 241, 254 (D.N.J. 1998).

137. *Cole*, 366 F.3d at 817 ("[A] counsel's wrongful disqualification, which cannot be immediately appealed, can cause great harm to a litigant."); *Essex Chem. Corp.*, 993 F. Supp. at 254 (characterizing such deprivation as a "grave disservice to the affected client"); King & Patterson, *supra* note 13, at 12–13.

Under any circumstances, the withdrawal of counsel familiar with the client and the issues will adversely affect the client, but it could critically harm the client's case if the withdrawal was required at a critical stage of representation.[138] Additionally, an attorney's obligation of diligence demands that a lawyer accept representation only where she believes that she can carry out the representation to its conclusion;[139] to accept representation that an attorney did not believe that she could carry out to its conclusion would leave her client in a lurch, scrambling for substitute representation in the middle of litigation. Because a common interest arrangement risks creating a conflict of ethical obligations owed by an attorney to her client and to a pseudo-client, entry into a common interest arrangement increases the risk of mandatory withdrawal from representation. Thus, the possibilities of attorney disqualification or withdrawal represent significant risks posed by the common interest doctrine. An attorney's failure to adequately discuss these possibilities with her client could also render any consent to enter a common interest arrangement uninformed.

IV. EYES WIDE OPEN: INFORMED CONSENT THROUGH COST-BENEFIT ANALYSIS

Until more uniformity develops in the law of common interests, there is no quick or easy fix to the ethical dilemmas created by the common interest doctrine. Because contract language cannot prevent the imposition of ethical or fiduciary duties under a common interest agreement,[140] the most obvious solution is simply not reliable at this time. The only way to protect an attorney and her client at the outset is to open her client's eyes to the risks of the common interest doctrine and to obtain the client's informed consent.

To diligently address the ethical issues raised through informal aggregation, an attorney must first obtain the client's informed consent[141] to waive not only confidentiality, but also some degree of

138. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29; MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 32.

139. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 4 (2003) ("[A] lawyer should carry through to conclusion all matters undertaken for a client.").

140. See *supra* Part II.B.3.

141. "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2003).

diligence and loyalty as well.[142] To participate in a common interest arrangement in which the members will exchange confidential information, the attorney must obtain the client's informed consent to disclose confidential information or his implied authorization to such disclosure.[143] Given the important role of the duty of confidentiality, an attorney is obligated to not only personally keep information confidential, but also to act in a manner to protect the information from disclosure by others.[144]

To adequately inform the client, an attorney should also counsel the client on the risks associated with waiving a conflict limiting the attorney's duty of confidentiality.[145] The most obvious risk posed by the common interest doctrine to the client's entitlement to confidentiality is that the client may be precluded from asserting the attorney-client privilege against the pseudo-client should the two later become embroiled in litigation adverse to one another.[146] Additionally, an attorney should explain both the risk to the client's confidentiality that is presented by the attorney's obligation to divulge confidential information to the pseudo-client under the common interest agreement, and the attorney's obligation not to divulge confidential information received from the pseudo-client.[147]

The risks to the client's entitlement to diligence, loyalty, and independent judgment are significant in a common interest arrangement. To honor the duty of loyalty and to protect the lawyer-client relationship, an attorney must identify such existing or potential conflicts of interest before accepting the representation

142. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 18 ("When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.").

143. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003). See *supra* note 141 for further discussion of informed consent.

144. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16.

145. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 30 ("A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised."); MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 31 ("The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.").

146. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 30.

147. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 31.

of a client or as early as such potential conflict arises.[148] To prospectively waive a conflict of interest, a client must understand the identity of the potentially adverse party, the nature of any potential dispute, and the effect of the waiver on the client's interests.[149] Of course, the attorney must first determine that such a potential conflict created between the interests of the client and the pseudo-client is consentable, meaning that the attorney can ethically obtain a client's informed consent waiving the conflict. The test for consentability requires that the attorney be able to conclude that he or she will be able to provide competent and diligent representation to the client, that the representation is permitted by law, and that the representation does not involve directly adverse claims between two clients in the same proceeding.[150] Should the attorney be limited in her ability to diligently and independently pursue her client's interests because of the conflict between her duties to the client and her obligations to the pseudo-client, the attorney's loyalty to the client may be directly challenged and the client may feel betrayed. The attorney, therefore, must fully explain this risk to her client and obtain his consent before entering into a common interest arrangement.[151]

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148. Where a conflict of interest exists before an attorney accepts a client's representation, the attorney must either obtain the client's informed consent to the conflict or decline the representation. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 3. Where a conflict of interest does not manifest until after an attorney accepts the representation, the same rules apply—the attorney must either obtain the client's informed consent or withdraw his or her representation. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 4. If the conflict involves more than one client, then the lawyer must determine whether he or she can continue to represent either client; such a determination turns on whether the attorney can honor his or her duties to the clients. *Id.*

149. City of Kalamazoo v. Michigan Disposal Serv. Corp., 125 F. Supp. 2d 219, 243 (W.D. Mich. 2000), *aff'd* 151 F. Supp. 2d 913 (W.D. Mich. 2001).

150. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1)–(3). See *infra* note 151 for further discussion of consentability.

151. The Model Rules contemplate the simultaneous representation of parties with common interests, provided that the provisions of Model Rule 1.7 concerning consent are met. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 23. An attorney may continue to represent a client despite the existence of a conflict of interest as long as the conflict is consentable and the client gives his or her informed consent in writing. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) & cmt. 14. A conflict of interest is consentable if the attorney reasonably believes that he or she can provide competent and diligent legal representation to the client, the representation is permitted by law, and the representation does not involve directly adverse claims between two clients in the same proceeding. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1)–(3). The purpose behind rendering certain conflicts nonconsentable is to protect clients from consenting to proceed despite a conflict so limiting that an attorney could not provide competent and diligent representation. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 15. If a conflict is nonconsentable, then the attorney must either decline representation not yet undertaken or withdraw from representation already accepted. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(2). If a conflict is consentable, then an attor-

Finally, it is imperative that counsel explain the risks of future disqualification or attorney withdrawal should the common parties later become adverse; to ignore this issue is to put the client at great risk of losing counsel's services at a critical time. As explained above, should any of the potential conflicts between an attorney's duties to her client and a pseudo-client materially compromise her ability to render loyal, diligent, and independent representation, counsel would be required to withdraw her representation.[152] This may adversely affect the client by limiting his right to choose his own counsel and by potentially harmfully disrupting representation at a crucial stage.[153] An attorney, therefore, must explain the risks to her continued representation, as well as to her ability to maintain the client's interests as paramount, posed by a common interest arrangement prior to entering into such an arrangement.

Along with these risks, the attorney must explain the advantages inherent in a common interest arrangement. One such advantage of a common interest arrangement is the avoidance of duplicating efforts and costs to reach the same end. This is coupled by the advantage of gaining confidential information held by another party to the common interest arrangement to use to the client's own advantage. Additionally, the length of pretrial litigation may be substantially reduced by avoiding the duplication of efforts through information-sharing. This, in turn, streamlines litigation to the benefit of all parties, as well as the court.[154]

The costs and benefits of employing the common interest doctrine will vary from case to case and will turn on the specific circumstances of each client. For example, a small client may have a closer relationship with his attorney than a larger corporation might; thus, the small client may be less likely to forego the future sacrifice of his choice of counsel. A small client may also feel harder hit than a larger corporate client were his attorney forced to withdraw at a critical stage of representation because the smaller client may have fewer resources or contacts to enable him to obtain substitute counsel quickly. On the other hand, a large corporation may recognize a greater likelihood that future litigation will put counsel in a position where she must withdraw from representing the client—because some conflict exists between the duties she owes to the client and those that she may owe to the pseudo-client—than

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ney may proceed with the representation after obtaining the client's informed consent to the conflict. *Id.*

152. See *supra* Part III.B for a discussion of attorney withdrawal.

153. See *supra* Part III.B for a discussion of attorney withdrawal.

154. See *supra* Part II.A for a detailed discussion of the advantages of the common interest doctrine.

the likelihood that an individual would be involved in future litigation adverse to the currently commonly interested party.

Returning to the earlier hypothetical, for example, it seems quite probable that Acme and Beta, as real estate developers in the same city, may become adverse parties in the future. They may compete over the rights to develop the same tract of land, for example. This likelihood is increased because both parties to this common interest agreement are sophisticated businesses conducting similar transactions in the same municipality. This increased likelihood of future adversity increases the likelihood that Attorney Bellows, having received confidential information from Acme through the current common interest arrangement, will be forced to withdraw his representation of Beta in future litigation against Acme. This probability must factor into the balancing of the risks and benefits of entering a common interest arrangement.

On the other hand, the risk of future withdrawal is very low in a different hypothetical where Attorney Arnot instead represents Ms. Adleigh, an individual seeking damages from Delco Pharmaceuticals for injuries sustained when she ingested Sleepalot, a drug manufactured by Delco, and Attorney Bellows represents Mr. Benedict, an individual seeking similar damages from Delco. Because the parties to the common interest agreement in this hypothetical are individuals whose only tie is that they were injured by taking the same medication, the risk of future litigation in which Ms. Adleigh and Mr. Benedict are adverse is relatively low. Thus, it is much less likely that Attorney Bellows would be put in a situation where the confidential information he receives from Ms. Adleigh can be used to Mr. Benedict's advantage in later litigation, under which circumstances, he would be forced to withdraw as Mr. Benedict's counsel.

A client's decision based on a fully disclosed presentation of the costs and benefits of entering a common interest arrangement is unimportant from the perspective of informed consent. It is the act of thus informing the client, not the outcome, that is essential. Such a presentation will serve to protect not only the client's interests, but also the interests of the attorney who must rely on the client's consent before abdicating her ethical duties to the client.

V. CONCLUSION

Independent of the continuing debate to define the relationship and duties owed by an attorney to a member of a common interest group, it is clear that a strong potential may exist for a future con-

flict of interest to develop between commonly interested parties which would materially limit an attorney's ability to deliver legal representation with the diligence and loyalty to which every client is entitled. The consequence of such a development may be the material limitation of a client's ability to choose his or her counsel. Thus, an attorney cannot ethically enter into a common interest arrangement without violating her duties to her original client unless she explicitly addresses all the material risks posed to the client by such common representation and the client consents to the arrangement.