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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER)	
)	
)	
The Protestant Episcopal Church In The)	Case No.: 2013-CP-18-00013
Diocese Of South Carolina; The Trustees of)	
The Protestant Episcopal Church in South)	
Carolina, a South Carolina Corporate Body;)	**TECSC'S MEMORANDUM**
et al.,)	**IN SUPPORT OF MOTION**
)	**TO COMPEL PRODUCTION**
PLAINTIFFS,)	**OF DOCUMENTS**
)	
v.)	
)	
The Episcopal Church (a/k/a, The)	
Protestant Episcopal Church in the)	
United States of America); The Episcopal)	
Church in South Carolina,)	
)	
DEFENDANTS.)	
)	

Defendant The Episcopal Church in South Carolina ("TECSC") hereby submits this Memorandum in Support of its Motion to Compel Production of Documents.

I. BACKGROUND

On March 27, 2013, TECSC served Plaintiffs with its first request for production of documents. Request No. 11 provided as follows:

> Produce all correspondence and other communications, including e-mails, prior to November 17, 2012, between Bishop Mark J. Lawrence and C. Alan Runyan, referring, relating to, concerning, or discussing the relationship between the Diocese of South Carolina and The Episcopal Church.

On August 15, 2013, Plaintiffs objected to this request claiming attorney-client privilege and produced a privilege log. TECSC does not agree that any of these documents are privileged. After conferring with Plaintiffs' counsel and failing to resolve the issue, TECSC filed the instant Motion to Compel.

II. SUMMARY OF ARGUMENT

This Motion to Compel should be granted on three independent grounds.

First, any attorney-client privilege as to the Diocese's documents prior to the Plaintiffs' purported withdrawal belongs to TECSC as the *continuing* Diocese and cannot be asserted by Plaintiffs.

Second, prior to Plaintiffs' purported withdrawal from TEC, Mr. Runyan represented the then-unified Diocese, which included the members of the constituency that is now reorganized as TECSC, as well as the constituency now holding themselves out as the Plaintiffs. In other words, Mr. Runyan jointly represented the alleged diocesan parties on opposing sides of this litigation. The law is clear that jointly represented parties cannot assert privilege against each other as to the period of joint representation.

Third, the attorney-client privilege cannot be asserted against TECSC or TEC as beneficiaries of Bishop Lawrence's fiduciary duties prior to the Plaintiffs' purported withdrawal.

III. ARGUMENT AND AUTHORITY

A. Any Attorney-Client Privilege As To The Diocese's Documents Prior To The Plaintiffs' Purported Withdrawal Belongs To TECSC As The Continuing Diocese And Cannot Be Asserted By Plaintiffs

Any attorney-client privilege as to the Diocese's documents prior to the Plaintiffs' purported withdrawal from TEC belongs to the *continuing* Diocese. The *continuing* Diocese is in fact TECSC because it is recognized as such by TEC, the highest ecclesiastical authority in a hierarchical[1] religious organization protected by the First Amendment from the intrusion of civil

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[1] The Honorable Judge Houck found that The Episcopal Church is a hierarchical church in his Order remanding this case. Order, Civil Action No. 2:13-00893-CWH at 4 n.2 (D.S.C. June 10, 2103). See also Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872); Dixon v. Edwards, 290 F.3d 699, 716 (4th Cir. 2002) ("The Episcopal Church is hierarchical."); Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Ga., Inc., 699

courts on such matters. See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976); Dixon v. Edwards, 290 F.3d 699, 714 (4th Cir. 2002) ("It is axiomatic that the civil courts lack any authority to resolve disputes arising under religious law and polity, and they must defer to the highest ecclesiastical tribunal within a hierarchical church applying its religious law."); cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 704 (2012) ("[I]t is impermissible for the government to contradict a church's determination of who can act as its ministers."); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1872) ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them . . . .").

Assuming *arguendo* that the First Amendment should be set aside in favor of neutral principles of law, as Plaintiffs' often argue in this litigation, the controlling neutral principle of law according to South Carolina's Nonprofit Corporation Act, S.C. Code Ann. § 33-31-180 (Supp. 2012) provides as follows: "If religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this chapter on the same subject, the religious doctrine controls to the extent required by the Constitution of the United States or the Constitution of South Carolina, or both." In other words, *the* neutral principle of South Carolina nonprofit corporation law with respect to this dispute over the Diocese's corporate entities is that the ecclesiastical polity of Diocese and The Episcopal Church is controlling on corporate issues.

Accordingly, TECSC – rather than the Plaintiffs – is entitled to any privilege that may exist as to the documents at issue, both from ecclesiastical and corporate angles.

S.E.2d 45, 48 (Ga. Ct. App. 2010) (same); Episcopal Diocese of Mass. v. DeVine, 797 N.E.2d 916, 921 (Mass. 2003) (same); *Daniel v. Wray*, 580 S.E.2d 711, 714 (N.C. Ct. App. 2003) (same); Protestant Episcopal Church in the Diocese of N.J. v. Graves, 417 A.2d 19, 21 (N.J. 1980) (same).

If it were assumed, however, *arguendo*, that neither the First Amendment nor S.C. Code Ann. § 33-31-180 apply, then the document trail leading up to Plaintiffs' purported withdrawal would become indispensable to determining which party is the continuing Diocese in the first place. It is TECSC's well-founded expectation that such documents will establish that Bishop Lawrence, who was the undisputed Bishop of the Diocese prior to November 17, 2012, had knowledge that he could not lawfully cause the Diocese to withdraw from TEC and nevertheless conspired with his followers, most notably members of the Standing Committee, to attempt to do so – for example, by secretly and unlawfully issuing quitclaim deeds from the Diocese to the parishes, improperly amending the Diocese's Canons regarding its duties and allegiance to TEC, and deceitfully changing the purpose of the Diocese's nonprofit corporate entities. See Plaintiffs' Second Amended Complaint at ¶¶ 20-28. Bishop Lawrence's correspondence with Mr. Runyan, who was representing the Diocese at the time, is expected to be particularly rich with such evidence.

In sum, to set aside TECSC's constitutional First Amendment rights, ignore the neutral principle of law of S.C. Code Ann. § 33-31-180, and then allow the Plaintiffs to hide behind the privilege belonging only to the continuing Diocese at this stage in the litigation would be tantamount to applying an irrefutable presumption that the Plaintiff indeed is the continuing Diocese. The Defendants would effectively be denied an opportunity to defend themselves in this case. Instructively, faced with this same paradoxical issue in another case involving church litigation, a state court in Alabama compelled production of such documents over an objection of attorney client privilege. The Protestant Episcopal Church In The Diocese Of The Central Gulf Coast, Inc. v. The Minister, Church Wardens and Vestry of Christ Church, CV-003235, Order dated April 26, 2001 (Circuit Court Mobile County, Alabama).

B. Prior To The Plaintiffs' Purported Withdrawal From TEC, Mr. Runyan Represented The Diocese

Prior to Plaintiffs' purported withdrawal from TEC, Mr. Runyan represented the then-unified Diocese, which included the constituency that is now reorganized as TECSC, as well as the constituency now holding themselves out as the Plaintiffs. In other words, Mr. Runyan jointly represented the alleged diocesan parties on opposing sides of this litigation.

The law is clear that jointly represented parties cannot assert privilege against each other as to the period of joint representation. See Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1174 (D.S.C. 1974); Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357, 1364 (S.D.N.Y. 1983) ("the 'joint client' exception to the attorney-client privilege is well recognized"); Brown v. Green, 165 S.E.2d 534, 538, 3 N.C.App. 506, 512 (N.C.App. 1969) ("Therefore, as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged inter sese."); see also John P. Freeman, Understanding The Joint Client Exception To The Attorney-Client Privilege, South Carolina Lawyer, Vol. 1, No. 1, Pg. 32 (1989) ("In a nutshell, there can be no attorney-client privilege asserted in favor of one co-client and against another simultaneously represented co-client as to communications relating to subject matter common to the representation of both.") (A copy of this article is attached for the Court's reference.).

To be clear, Mr. Runyan cannot now claim that he only represented Bishop Lawrence in a personal capacity, or that he only represented the faction of the Diocese that ultimately joined Bishop Lawrence in purportedly withdrawing from TEC. To the contrary, Mr. Runyan explicitly claimed to represent the organization of the Diocese in letters to third parties. Also, of obvious significance, the organization of the Diocese paid Mr. Runyan's invoices for legal services rendered.

More fundamentally, Rule 1.13 of the South Carolina Rules of Professional Conduct compels the conclusion that Mr. Runyan's client was the organization of the Diocese and not just Bishop Lawrence or his faction, thereby destroying any privilege against TECSC. (A copy of Rule 1.13 is attached for the Court's reference.).

Rule 1.13(a) begins by reciting the black letter rule: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

Rule 1.13(f) further provides: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

Rule 1.13(g) provides: "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

Comment 10 to Rule 1.13 provides: "Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged."

Applying these provisions of Rule 1.13, the Court should conclude that: Mr. Runyan represented the Diocese acting through its duly authorized constituent Bishop Lawrence; Mr. Runyan had a duty to explain to Bishop Lawrence that he represented the organization of the Diocese and not him or his faction individually; if Mr. Runyan desired to represent Bishop

Lawrence or his faction, individually, he would have had to obtain the consent of the organization of the Diocese from others than Bishop Lawrence or his faction – which of course he did not do; and ultimately, therefore, that communications between Mr. Runyan and Bishop Lawrence are not privileged as to TECSC.

C. The Attorney-Client Privilege Cannot Be Asserted Against TECSC And TEC As Beneficiaries Of Bishop Lawrence's Fiduciary Duties Prior To The Plaintiffs' Purported Withdrawal

The attorney-client privilege does not work unjustly to deny beneficiaries access to the work of their fiduciaries where such work was completed supposedly on their behalf and paid for by them. See Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 351-2 (4th Cir. 1992) ("We believe the Garner analysis provides a sound basis for balancing a corporation's need to communicate confidentially with its attorneys against the shareholders' interests as beneficiaries of a fiduciary relationship."); (citing Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970) ("This case presents the important question of the availability to a corporation of the privilege against disclosure of communications between it and its attorney, when access to the communications is sought by stockholders of the corporation in litigation brought by them against the corporation charging the corporation and its officers with acts injurious to their interests as stockholders.")); Roberts v. Heim, 123 F.R.D. 614 (N.D. Cal. 1988) (limited partner class members held entitled to obtain discovery of files of law firm that represented promoter/general partner).

Importantly, the Garner decision specifically notes that advice relating to corporate action, given before that action was taken, is not necessarily protected by the attorney client privilege. Id.

The Garner case and its progeny are on point here.

Prior to November 17, 2012, Bishop Lawrence indisputably represented, acted on behalf of, and owed a fiduciary duty and a duty of loyalty to the Diocese (including the constituents that have reorganized as TECSC) and its corporate entities, and the parishes and parishioners within the Diocese, as well as TEC.

Ecclesiastical authority for those fiduciary duties included, for example: The Book of Common Prayer, "The Ordination of a Bishop," p. 513 (2007) ("...I do solemnly engage to conform to the doctrine, discipline, and worship of The Episcopal Church."); id. at 518 ("...Will you guard the faith, unity and discipline of the Church? Answer: I will for the love of God."); Constitution & Canons of The Episcopal Church, Title IV Canon 3 Sec. 1(a) ("A Member of the Clergy shall be subject to proceedings under this Title for knowingly violating or attempting to violate, directly, or through the acts of another person, the Constitution or Canons of the Church of any Diocese."); Title IV Canon 4 Sec. 1 ("In exercising his or her ministry, a Member of the Clergy shall: . . . (b) conform to the Rubrics of the Book of Common Prayer . . . (c) abide by the promises and vows made when ordained . . . (e) safeguard the property and funds of the Church and Community . . . (g) exercise his or her ministry in accordance with applicable provisions of the Constitution and Canons of the Church and of the Diocese, ecclesiastical licensure or commission and Community rule or bylaws"); Title I Canon 7, Sec. 4 ("All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which said parish, Mission, or Congregation is located."); Serbian, 426 U.S. at 724-25; Dixon, 290 F.3d at 714; cf. Hosanna-Tabor, 132 S. Ct. at 704; Watson, 80 U.S. at 727.

South Carolina corporate law also imposed such fiduciary duties on Bishop Lawrence, which as mentioned above, in conjunction with the neutral principle of law as to religious

corporations, should have been carried out with deference to The Episcopal Church's ecclesiastical polity in accordance with the First Amendment. See e.g., South Carolina Nonprofit Corporation Act, S.C. Code Ann. § 33-31-830 ("A director shall discharge his duties as a director, including his duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation. (b) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by: . . . (4) in the case of religious corporations, religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and who the director believes is reliable and competent in the matters presented. (c) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted."); S.C. Code Ann. § 33-31-842 (same as above for officers); S.C. Code Ann. § 33-31-180 ("If religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this chapter on the same subject, the religious doctrine controls to the extent required by the Constitution of the United States or the Constitution of South Carolina, or both.") ; Serbian, 426 U.S. at 724-25; Dixon, 290 F.3d at 714; cf. Hosanna-Tabor, 132 S. Ct. at 704; Watson, 80 U.S. at 727.

As discussed above, Bishop Lawrence breached his duties leading up to the purported withdrawal of the Diocese from TEC, for example, by secretly and unlawfully issuing quitclaim deeds from the Diocese to the parishes, improperly amending the Diocese's Canons regarding its

duties and allegiance to TEC, deceitfully changing the purpose of the Diocese's nonprofit corporate entities, and ultimately wrongfully causing the Diocese to attempt to withdraw from TEC. See Plaintiffs' Second Amended Complaint at ¶¶ 20-28.

In sum, Bishop Lawrence's clear fiduciary duties and breaches thereof destroy any assertion of privilege against TEC and TECSC as to any communications Bishop Lawrence had at that time.

WHEREFORE, for the above reasons, the Court should grant TECSC's instant Motion to Compel Production.

(Signature page to follow)

Dated: October 10, 2013

Respectfully submitted,

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"Understanding The Joint Client Exception To The Attorney-Client Privilege"

John P. Freeman

South Carolina Lawyer, Vol. 1, No. 1, Pg. 32 (1989)

(Attached for the Court's reference)

South Carolina Lawyer

1989.

Vol. 1, No. 1, Pg. 32. Understanding the Joint Client Exception To the Attorney-Client Privilege

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Understanding the Joint Client Exception To the Attorney-Client Privilege

By John P. Freeman

Introduction

The precept that client communications are confidential is deeply ingrained in the practice of law. On the day a South Carolina lawyer is admitted to practice he or she solemnly swears, "I will respect the confidence and preserve inviolate the secrets of my client. . . . " South Carolina Supreme Court Rules for the Examination and Admission of Persons to Practice Law in South Carolina, Rule 9.

The duty of confidentiality is rooted in agency law. *See Restatement (Second) of Agency*, sections 395, 396 (1958). It finds force in Canon 4 of the Code of Professional Responsibility, which is Rule 32 of the Supreme Court's Rules of Practice. It likewise finds force in Rule 1.6 of the new Model Rules of Professional Conduct recently approved by the Bar's House of Delegates and submitted to the South Carolina Supreme Court. Moreover, the duty of confidentiality is dealt with daily as part of the law of evidence and in civil procedure. In *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 219-20 (1981), *cert. denied*, 454 U.S. 1030 (1981), the South Carolina Supreme Court adopted Dean Wigmore's eight-point articulation of the scope of the attorney-client privilege for evidence purposes. Under Rule 26(b)(1) of both the Federal Rules of Civil Procedure and the South Carolina Rules, "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action. . . . " (Emphasis added.)

This article explores a narrow issue: What is the lawyer's duty of confidentiality when he or she has multiple clients? The classic example occurs when two clients "walk into the lawyer's office together and retain him to represent both of them in the same matter." C. Wright and K. Graham, *Federal Practice and Procedure: Evidence*, Section 5505 at 556 (1986).

Factual Settings

The potential for difficulty arises daily in varied forms. A lawyer may be asked by two individuals to set them up in business; or hired by an insurance company to represent an insured; or retained by a company to defend it and its employee; or employed to file suit on behalf of parties injured in the same accident; or asked to represent codefendants in a criminal case; or engaged to assist a husband and wife in developing a joint and mutually dependent estate plan. However it occurs, joint representation raises several practical problems involving confidentiality. Are the communications a lawyer receives from joint clients privileged as to third persons? Are the communications of one joint client privileged against the other? Apart from the reach of the attorney-client privilege, are communications from one client protected as "secrets" from disclosure to the other client?

Ethical Underpinnings

As noted above, the South Carolina lawyer's oath of office specifically requires that the lawyer preserve inviolate his or her client's "secrets" and "confidences". The Code of Professional Responsibility defines a "confidence" as "information protected by the attorney-client privilege," while the definition of a "secret" is far broader-- "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client."

A lawyer's disclosure to client A that co-client B has been stealing from A would likely be embarrassing to B; hence, the information, if "gained in the professional relationship," would likely be a "secret" though it may not be a "confidence"--that is, information covered by the attorney-client privilege.

In contrast to both the Oath of Office and the Code of Professional Responsibility, the Model Rules of Professional Conduct do not attempt to differentiate between categories of confidential information. Instead, Model Rule 1.6(a) simply and broadly seeks to protect "information relating to the representation of the client."What is a lawyer's obligation as counsel if he or she learns that

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one joint client has wronged another? Can the lawyer disclose the wrongdoing to the injured client? Must the lawyer disclose the wrongdoing to the injured client? Can the lawyer represent the injured client against the wrongdoer?

The threshold issue, of course, is whether joint representation is permissible at all. Under Code of Professional Responsibility DR 5-105(C), joint representation is not permissible unless it is obvious that a lawyer can adequately represent the interests of each

client.

Assuming there is no impermissible conflict, representation is proper provided the clients consent after being given full disclosure of all material facts relating to the intended representation.This same basic principle of objective fairness, full disclosure and informed consent is carried over in Model Rule 1.7.

One material fact to disclose is the effect of the joint representation on the attorney-client privilege. Indeed, the new Model Rules of Professional Conduct provide that a lawyer who acts as an "intermediary" between clients *must* disclose at the outset of representation the effect of the joint representation on the attorney-client privilege. See Model Rule 2.2(a) and the accompanying Comment. The Comment to Rule 2.2 provides in part that:

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example in helping organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients.

Lawyers who have not been making such disclosure of the effect of joint representation on the attorney-client privilege every time they represent joint client--whether as an "intermediary" or as co-counsel in litigation or otherwise--should start doing so immediately.

From an *evidentiary* standpoint, the basic ground rules covering joint client communications are simple. In essence, confidential communications made during joint representation (whether or not made in another co-client's presence) are privileged as to all outside parties. However, during the period of joint representation there is no attorney-client privilege operating as between the co-clients. Without an agreement to the contrary, communications received from one joint client are not privileged as to another. They may be shared, or even used to the speaker's disadvantage, should the parties to the joint consultation subsequently

become opposing parties in litigation. See generally *Quintel Corp., N.V. v. Citibank, N.A.*, 567 F. Supp. 1357, 1364 (S.D.N.Y. 1983) ("the 'joint client' exception to the attorney-client privilege is well recognized"); *Valente v. Pepsico*, 68 F.R.D. 361 (D.Del. 1975) (documents prepared by counsel of parent for use of Pepsico directors who were also directors of subsidiary Wilson held not privileged as to Wilson based on joint client exception); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1174-75 (D.S.C. 1974) (discussing the joint client exception); *Brown v. Green*, 3 N.C. App. 506, 165 S.E.2d 534 (1969) (statements made in the presence of a joint client are not considered confidential communications in a later action between the parties). See also *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970) (for good cause shown shareholders may discover privileged communications dealing with corporate officers' discharge of their fiduciary duties); *Roberts v. Heim*, 123 F.R.D. 614 (N.D. Cal. 1988) (limited partner class members held entitled to obtain discovery of files of law firm that represented promoter/general partner).

Ethical Obligations

The evidence law dealing with privileged information derived from the representation of joint clients is thus fairly clear. The issue then is whether the rules change due to the ethical obligation to preserve inviolate not just privileged information, but non-privileged client *secrets* as well.

Relevant here is the lawyer's duty to give information. *Restatement (Second) of Agency*, Section 381 (1958), requires that:

Unless otherwise agreed, an agent [and lawyers are agents] is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

Model Rule 1.4 likewise demands:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with all reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Restatement Second Section 381 and Model Rule 1.4 are premised on delivery of a level of service that a client reasonably would be entitled to expect. As between the duty to convey information and the duty to keep confidences and secrets, which ought to prevail in the joint client setting? Very arguably, the stronger duty owed is the duty to convey information. The parties' reasonable expectations in the joint client setting, even absent advance disclosure and consent, ordinarily would not embrace concealment of facts one from the other. After all, the logic underlying the joint client exception to the attorney client privilege is that:

[T]he communicating client, knowing that the attorney represents the other party also, would not ordinarily intend that the facts communicated should be kept secret from him. C. McCormick, *McCormick on*

Evidence Section 91, at 220 (3d ed. E. Cleary ed. (1984).

Suppose Lawyer Brown represents two co-venturers, Smith and Jones, in an investment deal. Brown learns from Smith that Smith has cheated the business and thus stolen from Jones. News of the theft is surely something "relevant to affairs entrusted" to Brown and Brown certainly has notice that Jones "would desire to have" this information. One legal malpractice expert had this to say about the Smith-Jones problem:

The effect of the joint confidences rule is that, if one of the clients suddenly discloses to the lawyer that he has done or intends to do something that might adversely affect the other, the lawyer not only is permitted to but may be required to disclose that information to the others in the joint client group. Failure to disclose could make the lawyer liable to the party who was entitled to the disclosure. Most lawyers (including me when I was practicing) are unaware of this problem. The astute ones deflect the problem by reaching a clear understanding with all of the joint clients at the outset as to whether secrets of any one of them shall or shall not be disclosed by the lawyer to the others.

Reardon, *Malpractice Loss Protection*, 32-33 (1988) (CLE Course Outline on file with the author).

Representation Inherently Impaired

The crucial point is that each client is entitled to 100% of counsel's loyalty, not some lesser number. In the joint client setting, each client, absent disclosure and consent, is entitled to be treated as if he or she were the only client. In the joint client situation, when it comes to adverse information, something has to give. If A confesses to his lawyer that he has been stealing from co-client B, the lawyer cannot both keep A's secret and discharge his duty to give information to B. Inherent in joint client representation from the outset is the risk that a joint client will get either less confidentiality or less information than he or she would otherwise receive absent the joint representation. This is a material fact that needs to be explained at the outset.

A clear understanding needs to be reached as to what the client's expectations are and what the lawyer's obligations will be if the lawyer receives information, during the professional relationship, the disclosure of which would be injurious or embarrassing to one joint client but beneficial to another joint client. The understanding reached should be memorialized in writing. A co-client who suffers severe financial injury that could have been avoided or ameliorated by disclosure of a joint client's secrets has an incentive *not* to recall orally waiving his or her right to disclosure. The malpractice risk is obvious.

Thus, full and fair disclosure to clients of the consequences of joint representation *at the outset* of employment requires disclosure that information from the clients will be privileged to third persons but (absent an agreement to the contrary) not to the joint clients. Counsel should then go on to explain how he or she intends to handle client secrets involving information that is nonprivileged but potentially highly important. For example, counsel may explain that (absent an agreement to the contrary) counsel will discharge the duty to give information, even if it means incriminating a co-client.

The Deceitful Joint Client

Suppose a lawyer jointly represents both a company and its employee sued for abusing a customer. Suppose further: The lawyer premised her willingness to undertake joint representation on the employee's protestations of innocence, which the lawyer reasonably believed; the employer did not appear to have available the scope of employment defense; the lawyer made the disclosures and the warning suggested in the preceding paragraph; and there were no agreements calling for nondisclosure of misconduct between the joint clients.

Assume further that discovery has progressed to the point where the plaintiff's case has gained credibility. At this point the employee drops the bombshell--he confesses to the lawyer that that he did, indeed, commit the wrongs alleged. Assume further, however, that, based on the facts now seen, the employer has a tenable defense that the employee's wrongs were committed outside the scope of employment. What does the lawyer do at this point? Does she disclose the confession to the employer? Does she withdraw from representing the employee and continue to represent the employer? If so, may she seek indemnity from the employee if the employer loses? Is she required to withdraw from representing *both* the employer and employee?

Sorting out the conflicting duties raised by this hypothetical problem requires coming to grips with the reality of what the employee has accomplished. In truth, the employee in the hypothetical doubly abused the employer--first by wronging the employer's customer and second

by lying his way into joint representation, which would not have occurred if the conflict had been known at the outset.

The employer deserves to know the truth. There is no superior duty of confidentiality owed the employee. The question then becomes whether the injury already done to the employer will be compounded by necessitating new counsel. The choice of how to proceed rests with the employer. If it chooses to settle with the customer and not seek indemnification from the employee, that ends the matter. If it chooses to defend on scope of employment grounds, then the lawyer should be able to represent it, if she made proper disclosure in advance of joint representation and received the employee's consent.

"Proper disclosure" would include:

* an explanation of the joint client exception to the attorney-client privilege;

* an explanation of the lawyer's duty to give information and intention to discharge that duty;

* an explanation of the potential conflict caused by the employer's indemnification right; and

* disclosure that, if the employee's story was shown to be false, counsel would withdraw from representation of the employee and would continue represent the employer, which could include representation against the employee on an indemnification claim.

Of course, once representation of the employee ceased, the employer's communications with its counsel would commence being privileged as to the employee.

Is There a Duty to Do Nothing?

Some might claim that the only "ethical" response upon learning the truth about the employee's misconduct is to say nothing to the employer about the employee's admission, declare a conflict and withdraw entirely, leaving both co- clients to fend for themselves. This short-sighted approach ignores the lawyer's ability to avoid potential problems by full disclosure and consent in advance. It also ignores the inherent unfairness of allowing a party to create equities in the party's favor by lying his or her way into the attorney-client relationship.

On the other hand, the "you-can't-represent-anybody" approach finds some support in the new Model Rules. Model Rule 2.2 deals with lawyers who undertake to represent joint clients by serving as an "intermediary." Interestingly, the Rule anticipates the possibility that joint representation may become impossible. It requires that lawyers may serve as intermediaries only where they reasonably believe "the common representation may be undertaken impartially and without improper effect on the responsibilities the lawyer has to any of the client." Model Rule 2.2(a)(3). Should the lawyer not be able to discharge the "impartiality" obligation, Model Rule 2.2(e) requires withdrawal from representation of *all* co-clients. Indirectly, the Model Rule suggests that withdrawal should also be required in litigation where a conflict arises between co-clients, since a client in litigation presumes more than that his or her lawyer will serve the client's interests "impartially"; the client ordinarily presumes counsel will be zealous and totally loyal.

Model Rule 1.9(a) also suggests the undesirability of attacking a former client regarding a matter substantially related to the prior representation. It bars a lawyer who withdraws from representation from representing another person in the same or a substantially related matter where the use of information from the previous representation would work to the disadvantage of the legal interests of the former client unless the former client consents after consultation.

Implicit in Rule 1.9(a), however, is the presumption that the "information from the previous representation" is confidential as to the second client. Where it is not, as where the second client is a former joint client, the need for protecting the former client is not obvious apart from the argument that there is an "appearance of impropriety" that arises from attacking a past client.

On the other hand, is it really improper to take a position adverse to a former joint client where the former joint client: (1) lied in bringing the joint representation into existence; (2) was fully informed in advance that there would be no confidence kept between the joint clients; (3)was fully informed in advance that, in the event an unforeseen conflict arose, the lawyer would withdraw and continue diligently to represent the other joint client who might assert claims adverse to the former joint client; (4)caused the termination of the former representation?

On these facts, is not the former joint client the architect of his or her own dilemma? What is the societal interest served by protecting the fraudulent former joint client from suffering the consequences of his or her fraud? Why should the innocent joint client suffer?

Conclusion

The point of this article is that lawyers cannot be totally loyal when they have joint clients. The Comment to ABA Model Rule 2.2 piously insists that: "In a common representation the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation." The sentiment is nice but, in truth, counsel cannot convey information that counsel is required to conceal, or vice versa. One cannot simultaneously speak up and remain silent.

Lawyers must understand that their representation in the joint client setting is inherently impaired. Clients deserve to know this. There is, in summary, a clear-cut obligation owed by a lawyer to reach an agreement with prospective joint clients, preferably in writing, as to which duty will be superior: the duty to speak or the duty to remain silent. Naturally, in reaching this agreement, the lawyer should make clear the foreseeable consequences of the choice.

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Rule 1.13 of the South Carolina Rules of Professional Conduct

(Attached for the Court's reference)

South Carolina Rules

SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

As amended through July 30, 2013

Rule 1.13. ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if,

(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT:

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when

the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)-(6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of

government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

CERTIFICATE OF SERVICE

I, Ann Skipper Ballenger, certify that Defendant The Episcopal Church in South Carolina has served the foregoing document upon all counsel of record by United States first-class mail, this the 10th day of October 2013.

Ann Skipper Ballenger

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