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Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?

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I. INTRODUCTION

A corporation, as a legal entity, can be held criminally liable¹ for activities done by its employees on the corporation's behalf.² Since every employee³ of the corporation⁴ who has taken such actions could also find himself individually liable for his activities,⁵ employees' personal

1. See *United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 737 (5th Cir. 1984); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). See also *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) ("Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties")

2. Illegal activities done on a corporation's behalf are those that have been done to promote the corporation's interests (such as defrauding investors), rather than those directed internally with the purpose of victimizing the corporation (such as embezzlement).

3. While the term "employee" can include individuals working at all levels of the corporate structure, this Article is particularly concerned with the rights, interests and treatment of the employee who is outside the corporation's control group. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (observing that the term "control group" refers to upper-echelon management); 17 C.F.R. § 230.405 (1989) (defining "control," for purposes of federal securities registration, as meaning "the power to direct or cause the direction of the management and policies" of a corporation). The Article focuses on the lower level employee because such an individual is less likely to be sophisticated about protecting his rights and because such an employee has little power within the corporate structure. Thus, unless otherwise noted, "employee" will mean a lower-echelon worker.

4. While corporations can come in all sizes, the focus of this Article will be on corporations large enough to involve a hierarchy of employees.

5. See *Susnjar v. United States*, 27 F.2d 223, 224 (6th Cir. 1928). Indeed, employees cannot avoid that personal liability by arguing that they were just doing their jobs. See 3A W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1348 (rev. ed. 1985); Note, *The Corporate Attorney-Client Privilege: Culpable Employees, Attorney Ethics, and the Joint Defense Doctrine*, 58 TEX. L. REV. 809, 839 n.148 (1980). However if an employee was unaware of the illegal nature of his acts, he might lack the specific intent necessary to be found guilty under applicable criminal statutes. See *United States v. Gold*, 743 F.2d 800, 825 (9th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985); *Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1259-60 (1979).

interests are also at stake during any criminal investigation of corporate activities.⁶ Once a corporation learns from a government agency of the possibility that its activities could result in it and/or its employees being criminally charged,⁷ the corporation will typically begin an internal investigation, using its attorney.⁸ This means that it is very likely that potentially culpable employees will first be questioned concerning these activities by the corporation's attorney.⁹ If an employee responds to the corporate attorney¹⁰ in a manner which implicates him¹¹ personally in

6. Besides the risk of criminal liability which is the focus of this Article, the employee may also feel at risk as to his job status. A company will often fire employees who have caused its problems. *See, e.g.*, UPI release (July 20, 1989) (reporting Delta Air Lines' admission of responsibility and firing of the Delta Flight 1141 flight crew before the completion of a National Transportation Safety Board investigation into the flight's crash); *infra* note 71 and accompanying text. The decision to deal harshly with an individual may depend on how important that person is to the corporation's successful endeavors. *Compare* S. FARBER & M. GREEN, *OUTRAGEOUS CONDUCT* 202 (1988) (discussing the deluge of offers to movie director John Landis, notwithstanding his indictment in the Twilight Zone case) *with id.* at 215-16 (comparing the treatment of Landis with that of other rank-and-file members of the Twilight Zone movie crew).

7. While the employee can also be at risk in a civil matter, the focus of this Article, unless otherwise noted, will be on criminal charges because the risk associated with such charges is the greatest for the lower level employee. This conclusion is reached not only because a conviction on criminal charges can result in imprisonment, but also because the low level employee is unlikely to be named as a civil defendant by a plaintiff hoping to secure a financial recovery.

8. *See generally* Black & Pozin, *Internal Corporate Investigations*, *BUS. L. MONOGRAPHS [BLM]* No. 20 (1988); Birrell, *The General Counsel at the Ramparts*, 4 *CORP. COUNS. Q.*, No. 1, at 36 (1988); Bennett, Rach & Kriegel, *The Role of Internal Investigations*, 3 *CORP. COUNS. Q.*, No. 3, at 67, 68-71 (1987); Morvillo, *Voluntary Corporate In-House Investigations—Benefits and Pitfalls*, 36 *BUS. LAW.* 1871 (1981); *infra* note 60 and accompanying text.

9. *See* Bennett, Rach & Kriegel, *supra* note 8, at 77 (noting that it is preferable that corporate counsel interview employees before they communicate with government agents); Stuntz, *Waiving Rights in Criminal Procedure*, 75 *VA. L. REV.* 761, 838 (1989) ("One finds very few white-collar criminal cases in the police interrogation chapters of criminal procedure casebooks. . . . [W]hite-collar defendants are far less likely to talk to police without a lawyer than are defendants in cases of street crime."). However, as this Article points out, it is possible that the lawyer who talks to law enforcement officials on behalf of the corporate employee may be as concerned with protecting the interests of the corporation, as with protecting those of the individual employee. *See generally infra* notes 159-61 and accompanying text.

10. Unless specifically noted, this Article will not differentiate between a corporation's inside, salaried attorneys and its outside, retained attorneys. For non-lawyer employees the risks of communication with any attorney are substantially identical so long as that attorney sees the corporation as the chief client or for other reasons has primary loyalty to the entity.

11. Throughout this Article, all pronoun references to "employee" will be indicated by masculine pronouns.

criminal conduct, he may have unknowingly lost the value of his fifth amendment privilege against self-incrimination.¹²

The employee's loss of that important right can occur because it is unlikely that corporate counsel will be acting as his personal attorney during that investigation; and therefore, his communications with corporate counsel will not be protected by either the attorney's ethical duty of confidentiality¹³ or the attorney-client privilege.¹⁴ Furthermore, because the employee's communications with the corporate attorney are not protected, the corporation could decide to reveal them to government officials.¹⁵ Such a revelation could directly lead to the employee's criminal liability, as well as cause him to lose his license or right to practice his livelihood.¹⁶

Given these risks for a potentially culpable employee, representation at a very early point by an attorney who has the employee's interests as her¹⁷ primary focus may be critical. Notwithstanding the employee's

12. See U.S. CONST. amend. V.

13. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter MODEL RULES].

14. See, e.g., CAL. EVID. CODE §§ 950-54 (West 1966 & Cum. Supp. 1989); FED. R. EVID. 503 (Proposed Draft).

15. Nothing proscribes the corporation's revealing the employee's conversations to another so long as there was no individual attorney-client relationship between the corporate attorney and the employee. See *In re Bevill*, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986) (upholding order directing corporate president and corporation's counsel to respond to questions concerning their communications where corporation had waived its attorney-client privilege); *In re Grand Jury Investigation*, 599 F.2d 1224, 1236 (3d Cir. 1979) (acknowledging that a corporation has the power to waive its attorney-client privilege and provide the government with its employees' statements); *supra* notes 13-14 and accompanying text; *infra* notes 36-40 and accompanying text. Such disclosures might be made in order to persuade the government not to prosecute the corporation. See *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1655 (1989); *infra* notes 29, 70-71 and accompanying text. Thus, an employee's communications with corporate counsel could result in the effective loss of his privilege against self-incrimination. See Gorelick, *Structuring the Internal Investigation When a Corporation is Faced with Parallel, Civil, Criminal and Administrative Proceedings*, 3 CORP. COUNS. Q., No. 4, at 1, 7 (1987); *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1630 (1985) [hereinafter *Privileged Communications*].

16. See, e.g., 15 U.S.C. § 78o(b)(4) (1982) (authorizing the Securities Exchange Commission to censure, place limitations on, suspend or revoke the registration of any broker or dealer where there has been a violation of the securities laws); N. FRANK & M. LOMBNESS, *CONTROLLING CORPORATE ILLEGALITY: THE REGULATORY JUSTICE SYSTEM* 82 (1988) (noting that one sanction available to law enforcement officials is license suspension or revocation).

17. Throughout this Article all pronoun references to "attorney" and its synonyms (e.g., "lawyer", "counsel", and "practitioner") will be indicated by feminine pronouns. For consistency in its references to attorneys, the Article will also use feminine pronouns in any reference to an attorney serving as a prosecutor.

need to receive such early, independent representation, it is unlikely that the lower-echelon employee will have such representation. First, the employee may not perceive the need for independent representation. Second, financial considerations may make the employee dependent on the corporation for representation "benefits."¹⁸ Thus, it is likely that the employee's first contact with counsel will be with an attorney who is representing only the corporation's interests. Moreover, even assuming corporate counsel is also willing to provide individual representation to the employee, the probable existence of conflicts of interest between the employee and his corporate employer and the relative power imbalance between them can result in the employee's interests being overshadowed.¹⁹ Additionally, the employee would also suffer if, when he finally has separate representation, that attorney's loyalty is adversely affected because of influence by the corporation, such as by inappropriate control and payment of her fee.²⁰

This Article examines an employee's vulnerability in contacts with corporate counsel and from inadequate representation during the pre-indictment investigation period in light of an attorney's ethical duties under the Model Rules of Professional Conduct ("Model Rules" or "Rules").²¹ The investigation period has been chosen as a focus because during this time frame the ethical rules governing lawyers are the only constraint on an attorney's manner of representation, as well as the only control on whether that representation adversely affects others, including those contacted on a client's behalf.²² Part II will first provide further

18. See *infra* notes 152, 188 and accompanying text.

19. See *infra* notes 131-36, 159-62 and accompanying text.

20. See *infra* notes 191, 196-99 and accompanying text.

21. See generally MODEL RULES, *supra* note 13. The Model Rules were chosen as the focus for this Article because they represent the latest formulation of what an attorney's ethical duties are. Moreover, approximately 29 states have adopted these Rules, in whole or part, see [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 01:3-4 (1989), in preference to continued adherence to the earlier drafted Model Code of Professional Responsibility. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter MODEL CODE].

22. Cf. *United States v. Turkish*, 470 F. Supp. 903, 908 (S.D.N.Y. 1978) (observing that prior to indictment, the only ones who are in a position to alert individuals to their need for separate representation are the attorney retained on a multiple representation basis and the prosecutor); Philadelphia Bar Ass'n Prof. Guidance Comm., Op. 88-37 (1989) (digested in 5 Law. Man. on Prof. Conduct (ABA/BNA) 68 (1989)) (advising that attorneys should try to discover potential conflicts early in the representation and to promptly resolve any such conflicts by voluntary withdrawal or judicial determination); Tennessee Ethics Comm., Formal Op. 86-F-104 (1986), *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Tn:Op:8, 10 (1987) ("Resolving questions of conflicts of interest and impairment of independent professional judgment are primarily the responsibility of the lawyer undertaking the representation.").

background on how the nature and interests of the corporation, in contrast to those of an employee, can impact on that employee's legal representation. Part III then examines the conduct permitted by the Model Rules in an attorney's dealings with corporate employees. Three typical situations for an employee will be considered in this analysis because it is possible that an employee may experience one or all of these statuses during the investigative stage. These three possible situations are—1) an employee is unrepresented by separate counsel and is approached by the corporation's attorney for an interview; 2) an employee is represented by the corporation's attorney at the same time and on the same matter for which the attorney is representing the corporation, such as during an administrative or grand jury hearing; and 3) the employee at some point is provided representation by separate counsel who is being paid by the corporation.

Part III's analysis will demonstrate how employees are too often disadvantaged and their corporate employer's interests favored because the employee's conflicts of interest with or involving the corporate employer often go unrecognized or are minimized by both corporate and separate counsel. By exploring the duties presently imposed by the Model Rules, this Article concludes that both the corporation's attorney and an employee's separate counsel should have a greater duty to protect the employee's interests than the Rules currently mandate. In this regard Part IV presents several proposals for clarifying and strengthening the Model Rules and their comments. Adoption of these proposals would emphasize more clearly an attorney's responsibilities to identify conflict of interest situations both to herself and to an employee, and either to provide critical information to the employee or to secure his informed consent at various key junctures which could affect his interests.²³

23. As will be discussed, there are a number of instances that would require the employee's consent in the relationship between him and his attorney under the Model Rules. For example, the employee will need to give consent if his attorney's representation of his interests is in conflict with the interests of other clients. See MODEL RULES, *supra* note 13, Rules 1.7, 1.9(a); *infra* notes 118-19, 123 and accompanying text. Consent is further required if the representation conflicts with the lawyer's personal interests. See MODEL RULES, *supra* note 13, Rule 1.7(b); *infra* notes 119, 123, 211-13 and accompanying text. The employee's consent is also required if his attorney is being paid by another, such as the corporation. See MODEL RULES, *supra* note 13, Rule 1.8(f); *infra* note 198 and accompanying text. Moreover, the employee's attorney normally cannot use his confidences without his consent. See MODEL RULES, *supra* note 13, Rule 1.6(a); *infra* note 48 and accompanying text. This is so especially if such use would operate to the employee-client's disadvantage. See MODEL RULES, *supra* note 13, Rule 1.8(b); *infra* notes 174-76, 179 and accompanying text. This prohibition on the use of a client's confidences without his consent usually continues even after employment has terminated. See MODEL RULES, *supra* note 13, Rule 1.9(b); *infra* notes 164-66 and accompanying text. In these consent

II. CHARACTERISTICS AND INTERESTS OF THE CORPORATION AND OF EMPLOYEES WHICH AFFECT AN EMPLOYEE'S LEGAL REPRESENTATION

Before analyzing the Model Rules applicable to an attorney's relationship with a corporate employee, this Section will review certain fundamental characteristics and interests concerning both the corporation as a legal entity and the employee within the corporate hierarchy. These points are essential to an understanding of how the corporate employee can be vulnerable to both his employer and his employer's attorney.

A. *The Corporation: Its Operation and Legal Representation*

The corporate form of business enterprise dominates the American scene. A corporation is more likely than other business forms to provide job opportunities for large numbers of employees, as well as to become or have the potential of becoming a very large and impersonal entity.²⁴ Although a statutorily created fictional person,²⁵ a corporation can conduct business in its own name with virtually all the powers of a natural person.²⁶ However, each corporate organization shares the common feature that "real" people must underlie every aspect of the corporation. Every decision and every act must be performed by some individual.²⁷ Thus, the nature of the corporation and its method of operation cause the entity to have a commensal relationship with its employees.

Because both the corporation and the individuals who act on the corporation's behalf can be held criminally liable,²⁸ the corporation will want to demonstrate, if possible, that the activities conducted by the individuals were unauthorized so that it may escape liability or gain

situations which are critical for an employee, this Article proposes the Model Rules be amended to provide more stringent guidelines for securing the employee's consent. See generally Part IV *infra*.

24. See generally, R. CLARK, CORPORATE LAW § 1.1 (1986); H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 1, at 1-6 (1983).

25. See H. HENN & J. ALEXANDER, *supra* note 24, § 78; Jonas, *Who is the Client?: The Corporate Lawyer's Dilemma*, 39 HASTINGS L.J. 617, 617 (1988).

26. See MODEL BUSINESS CORP. ACT § 3.02 (1984); H. HENN & J. ALEXANDER, *supra* note 24, § 79. Corporations, however, cannot appear in most courts unless they are represented by an attorney. See *Simbrow, Inc. v. United States*, 367 F.2d 373 (3d Cir. 1966); *Flora Constr. Co. v. Fireman's Fund Ins. Co.*, 307 F.2d 413 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963). Further, corporations do not have a fifth amendment right against self-incrimination. See *Braswell v. United States*, 487 U.S. 99 (1988).

27. See *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) (recognizing that employees at all levels can take actions which can bind the corporation); MODEL RULES, *supra* note 13, Rule 1.13(a) & comment, para. 1 ("An organizational client . . . cannot act except through its officers, directors, employees, shareholders and other constituents.").

28. See *supra* notes 1, 5 and accompanying text.

leniency.²⁹ The existence of these corporate realities—that individuals must act for the corporation and that those individuals can be the corporation's scapegoat—provide the bases for perennial potential conflicts of interest between corporate employees and the corporation.

When a legal crisis occurs, it is also axiomatic that a corporation will have substantially more power, knowledge and resources to protect its rights and interests than does the typical lower-echelon employee of that corporation. In response to a crisis, the corporation will likely secure legal advice at an early point.³⁰ The attorney retained by the corporation for that purpose owes her loyalty solely to her client, the entity.³¹ Model Rule 1.13 clearly identifies that a practitioner who is hired by a corporation to provide legal representation takes on the entity as her client.³² The attorney is to exercise her independent professional judgment solely for the corporation and not for those who comprise the entity, such as its shareholders, directors, or employees.³³ Moreover, the corporate at-

29. See *United States v. Bernstein*, 533 F.2d 775, 788 (2d Cir.) (observing that a corporation could advance a defense that an employee had acted ultra vires on his own), *cert. denied*, 429 U.S. 998 (1976); *U.S. Dep't of Justice, Principles of Federal Prosecution*, Part D (Entering into Plea Agreements), Part F (Entering into NonProsecution Agreements in Return for Cooperation) (1980); Fox & Romano, *How Corporate General Counsel Should Deal with a Federal Criminal Investigation*, 13 A.L.I.-A.B.A. COURSE MATERIALS J. 63, 73 (Aug. 1988) (noting that the federal government will be lenient when a corporation admits its guilt and enters into a plea bargain at an early point); Cohen, *With Signed Checks, Formal Guilty Plea, Drexel Ends Ordeal*, Wall St. J., Sept. 12, 1989, § A, at 3, col. 4 (reporting that Drexel Burnham Lambert pled guilty to lesser charges to avoid an indictment on racketeering offenses); Nat'l L.J., Sept. 25, 1989, at 6, cols. 1-2 (noting that even after Drexel Burnham Lambert's guilty plea, "[t]he company is continuing to cooperate with the government in the pending case against [Michael] Milken").

30. See Bennett, Rach & Kriegel, *supra* note 8, at 70-71; Fox & Romano, *supra* note 29, at 72.

31. See MODEL RULES, *supra* note 13, Rule 1.13. When the Model Rules were adopted in 1983, this representational focus on the entity was made mandatory for the first time. The former Model Code had had no mandatory requirements, or Disciplinary Rules, covering organizations specifically. Two of the Model Code's aspirational statements, known as Ethical Considerations, had discussed entity relationships briefly. See MODEL CODE, *supra* note 21, EC 5-18, -24. Model Rule 1.13 was the organized bar's recognition of the change in the nature of legal practice, from a profession which historically had dealt mostly with individuals who might need legal assistance to one where many practitioners deal only with organizational clients and their constituents. See Kutak, *A Commitment to Clients and the Law*, 68 A.B.A.J. 804, 805 (1982). See also Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 OR. L. REV. 1, 1 (1989) ("Two out of three attorneys spend most of their professional time working for organizational clients.").

32. See MODEL RULES, *supra* note 13, Rule 1.13(a); *accord*, *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

33. A corporation's constituents would include its directors, officers, employees, and shareholders. See MODEL RULES, *supra* note 13, Rule 1.13(d) & comment, para. 1.

torney may not also provide representation to any of the constituents in their individual capacities if her loyalty to the corporation would be compromised.³⁴

By clarifying the loyalty focus of a lawyer retained or employed by a corporation, the drafters of the Model Rules hoped to help lawyers avoid becoming enmeshed in conflicting representations of both the entity and its constituents.³⁵ However, the theory that an attorney hired by a corporation to provide it representation has only the entity as a client is simple to understand but is not necessarily easy for the attorney to implement, nor is it a theory non-lawyers necessarily comprehend without explanation.

In practice an attorney must deal with the entity's constituents because communication both by the attorney to the corporation and vice versa must be handled with individuals who are not themselves the client. Any communications between the attorney and the corporation's employees concerning the legal crisis will be protected from disclosure to outsiders by both the attorney's ethical duties to her corporate client³⁶ and the attorney-client evidentiary privilege.³⁷ However, the individual employees who provide such communications may not appreciate that in the course of her representation of the corporation, the attorney may share their information with those higher up in the organization.³⁸ They may also not realize that the corporation may decide it is in its interest to reveal those communications to outsiders, such as governmental authorities,³⁹ and that, absent an individual attorney-client relationship with the employee, it will be solely within the corporation's prerogative, and not that of the employee, to consent to or withhold use of such confidential information.⁴⁰

34. See *id.* Rule 1.13(e).

35. See Bowman, *The Proposed Model Rules of Professional Conduct: What Hath the ABA Wrought?*, 13 PAC. L.J. 273, 308 (1982); Ehrlich, *Common Issues of Professional Responsibility*, 1 GEO. J. OF LEGAL ETHICS 3, 10 (1987); Hazard, *Rules of Legal Ethics: The Drafting Task*, 36 REC. N.Y. CITY B. A. 77, 82 (1981).

36. See MODEL RULES, *supra* note 13, Rule 1.6; *id.* Rule 1.13 comment, para. 3.

37. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (questionnaires completed by employees at the request of corporate counsel as part of an internal investigation were protected by the attorney-client privilege).

38. See 1 G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 236 (1988) [hereinafter HAZARD & HODES] (observing that unless employees are warned concerning the corporate attorney's representational focus, they may unwittingly confide in her to their detriment); MODEL RULES, *supra* note 13, Rule 1.13(b).

39. If the corporation chooses to waive its attorney-client privilege, the information may be turned over to government agency personnel or prosecutors in exchange for leniency toward the corporation. See *supra* notes 15, 29 and accompanying text; *infra* note 71.

40. See *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d

B. The Dual Roles of a Corporate Employee and His Legal Representation

The creation of the corporation with an independent legal status has made the status of employees working for such entities legally complicated. Because the corporation cannot act for itself, an individual who becomes a corporate employee virtually takes on an additional identity, whose role is to perform service on behalf of his employer.⁴¹ Different rules of law may apply depending on whether the person is in his individual role, or is in the role of corporate employee. Thus, the rights and interests that the person who is a corporate employee may have or can assert will differ depending on which role he is playing at a particular point in time.⁴² Significantly, an employee cannot assert a fifth amendment privilege on behalf of the corporation,⁴³ but he can "take the fifth" if he is asserting the privilege personally.⁴⁴

The typical lower-echelon employee has probably had limited experience with legal matters.⁴⁵ He may be aware of certain broad categories

Cir. 1986) (corporate officer could not prevent the disclosure of communications with corporate attorney concerning corporate affairs where entity had waived its privilege); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1977) (dictum) (noting the privilege ordinarily belongs to the corporation and an employee cannot prevent disclosure by claiming the privilege unless he sought personal legal advice from corporate counsel or that counsel acted as a joint attorney); Gallagher, *Legal and Professional Responsibility of Corporate Counsel to Employees During an Internal Investigation for Corporate Misconduct*, 6 CORP. L. REV. 3, 9-10 (1983) (observing that the corporation can waive its privilege and provide the government with a corporate official's statements).

Besides the employee's inability to prevent the revelation of the information he has provided the corporation, he may not even be able to gain access to the interview notes maintained by corporate counsel. See Memorandum of Law in Support of Defendant's Motion for New Trial at 25-26, *United States v. Jones*, No. 88 Cr. 824 LBS (S.D.N.Y., filed May 13, 1989) (stating that corporate counsel who had represented the defendant-employee before her indictment had refused to provide the employee's trial attorney with the notes made at the time of the defendant's preparation for her grand jury testimony). *But see In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988) (ruling that a corporation must turn over employee statements to an employee because the attorney-client privilege was not available to the corporation after it made disclosures to the government), *cert. denied*, 109 S. Ct. 1655 (1989).

41. See *In re FMC Corp.*, 430 F. Supp. 1108 (S.D.W. Va. 1977) ("Although a corporation necessarily acts through its agents and employees, those same agents and employees retain their separate identities."). See generally RESTATEMENT (SECOND) OF AGENCY §§ 2(2) & comment d, 220(1) & comment g (1958).

42. This principle underlies the law of agency, that when the corporate employer consents to having the employee act on its behalf, the employee's activities in the course of his employment become those of the employer. See generally RESTATEMENT (SECOND) OF AGENCY §§ 1, 7, 140 (1958).

43. See *Braswell v. United States*, 487 U.S. 99 (1988).

44. See U.S. CONST. amend. V.

45. Legal advice concerning divorce or probate matters would be the most common type of prior experience such a person might have had with lawyers.

of criminal behavior,⁴⁶ but he may not appreciate that specific activities, perhaps ones even encouraged by his superiors, can cause him to be criminally liable.⁴⁷ His contacts with lawyers have probably also been limited, and his impressions of attorneys and their roles may be influenced by heavy doses of TV drama-watching. Like most lay people, he will no doubt believe that the cornerstones of a relationship between an attorney and a client are loyalty and confidentiality by the attorney.⁴⁸ Thus, an employee would probably say that if he needed an attorney, he would expect her to "go to bat" for him and to keep secret anything she was told.

An employee will typically have a certain amount of personal commitment to his employer.⁴⁹ He will therefore identify with the corporation and presume that both his actions and those of the corporate attorney advance both their own and the corporation's best interests. An employee's feelings of loyalty to his corporate employer would also be intertwined with some feelings of apprehension in his relationships with his job superiors. Part of that apprehension would arise directly from a concern about retaining his employment.⁵⁰ Thus, if his supervisor asked

46. He would no doubt be aware that activities such as assault, driving while intoxicated, murder, and fraud are illegal, without knowing specific details about the elements of those crimes.

47. For example, until 1987 stock parking was not considered a crime by the brokerage industry nor did prosecutors take criminal enforcement action against parking except when it masked more significant violations of the securities laws. See Bialkin, Baio & Schneier, *Counseling the Client in Enforcement Inquiries: The Criminalization of "Parking,"* U. San Diego 15th Annual Securities Regulation Institute (Jan. 1988) (unpublished manuscript); Sontag, *Anatomy of Two Cases*, 11 Nat'l L.J., Sept. 4, 1989, at 1, col. 1, 31, col. 3.

48. See *What America Really Thinks about Lawyers*, Nat'l L.J., Aug. 18, 1986, at S-1, S-3 (finding that 38 percent of those polled felt that the most positive aspect of lawyers was that "[t]heir first priority is to their clients"). For the source of the attorney's duties of loyalty and confidentiality, see ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1476 (1981) ("Among a lawyer's foremost responsibilities are fidelity to a client and preservation of confidences and secrets of a client."); MODEL RULES, *supra* note 13, Rule 1.7 comment, para. 1 ("Loyalty is an essential element in a lawyer's relationship to a client."); *id.* Rule 1.6 comment, para. 4 ("A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation."); G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 20, 33 (1978) (observing that two key tenets of a lawyer's professional conduct are keeping a client's confidences and loyalty in the attorney-client relationship).

49. The extent of that loyalty is related to the employee's ability to participate in the organization and the level of his job satisfaction. See generally Trombetta & Rogers, *Communication Climate, Job Satisfaction and Organization Commitment*, 1 MGMT. COMM. Q. 494, 508-11 (1988).

50. See O. KAHN-FREUND, *LABOUR AND THE LAW* 6 (2d ed. 1977) (observing that the relationship between the employer and an employee is one "between a bearer of power

him to do a particular task or suggested a certain method of working, he would likely conform to those requests, and he might do so even though he had a concern about its legality.⁵¹ Similarly, if his superior asked him to cooperate with an attorney who was going to interview everyone in his department, the employee would be inclined to cooperate partly out of loyalty and partly out of apprehension about his job tenure.⁵²

The employee's general understanding about the attorney-client relationship would not necessarily cause the employee who has contact with the corporate attorney to appreciate the exclusive focus of that attorney's loyalty.⁵³ That vague knowledge also would not forewarn the employee that his communications with the attorney would not be protected at his behest.⁵⁴ In addition, his inclination to cooperate with the attorney because of his feelings of both loyalty and fear would make him vulnerable to suggestions by the attorney which might not be in

and one who is not a bearer of power"); Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 892 (discussing the importance of the job for the average American); Tobias, *Current Trends in Employment Dismissal Law: The Plaintiff's Perspective*, 67 NEB. L. REV. 178, 181-82 (1988) (same); Solomon, *Managing*, Wall St. J., Sept. 22, 1989, § B, at 1, col. 1 (noting that many employers are abusive of employees).

51. See *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 695-96, 60 Cal. Rptr. 398, 404 (1967) (laboratory technician protested assignment to falsify test results of a new drug on monkeys, but complied after being told: "He . . . is higher up. You do as he tells you and be quiet."); Solomon, *Managing*, Wall St. J., Sept. 22, 1989, § B, at 1, col. 1 (noting that employees rarely complain about supervisors' excesses because of fear they will be fired or humiliated); *60 Minutes: Harm's Way* (CBS television broadcast, Oct. 8, 1989) (following his conviction for his part in Genisco Technology Corp.'s fraudulent manufacturing and testing of military hardware, one employee told correspondent Mike Wallace that his submission of fraudulent data "had something to do with the pressure that was exerted by my superiors."). See also Kempton, *Drexel, Lies and Lisa Jones' Fate*, Newsday, Sept. 27, 1989, at 6 (observing after the sentencing of Lisa Jones, the Drexel Burnham Lambert trading aide convicted for perjury, that her repeated lies were possibly based on loyalty).

52. The apprehension would arise because an employee's refusal to cooperate by answering questions could be grounds for terminating his employment on the basis of breach of duty of loyalty. See Black & Pozin, *supra* note 8, § 4.03[2], at 4-7.

53. The employee is likely to see himself as a member of the corporate team, and to expect the team attitude from all other corporate agents as well. The employee therefore will be apt to see himself as part of the corporation and will view the corporate attorney as "our" attorney. This would be even more likely if corporate counsel is also an employee.

54. For examples of cases where a corporation has waived its attorney-client privilege and employees have been powerless to protect their statements, see *In re Beville*, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986); *United States v. Bartlett*, 449 F.2d 700 (8th Cir. 1971), *cert. denied*, 405 U.S. 932 (1972); *United States v. DeLillo*, 448 F. Supp. 840 (E.D.N.Y. 1978); *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich.), *aff'd*, 570 F.2d 562 (6th Cir. 1977).

his personal interest.⁵⁵ One such suggestion might be that the employee not contact government prosecutors, when such a contact might in fact benefit the employee because it could result in his securing immunity in exchange for his testimony against the corporation.⁵⁶ Thus, the ordinary employee is not likely to comprehend the attorney's role fully and because of the pressures on the employee to cooperate, he is likely to give the attorney information without realizing that the corporation can use it to his detriment and for its own interests.⁵⁷ He is also likely to go along with perceived requests made by either his superiors or the corporate attorney without necessarily considering whether his interests would be better served by less cooperation.

In order to prevent misunderstandings about the nature of a corporate attorney's relationship with employees, many commentators believe that such an attorney should clarify for these constituents at a very early point that her role is as the corporation's attorney.⁵⁸ However, while the Model Rules took a step in the right direction in recognizing the significance of corporate representation as a form of practice and providing some ethical guidance, the drafters did not fully comprehend and deal with the complexities of legal representation on behalf of clients by attorneys whose practices involve entity and/or constituent representation. Therefore, one key deficiency is that Model Rule 1.13 does not require that employees be given an early warning about the corporate attorney's role.⁵⁹ The next Section will further examine this and other deficiencies in the Model Rules as they affect the legal representation available to employees.

III. EMPLOYEE VULNERABILITY DURING THE INVESTIGATIVE STAGE

When there is corporate misconduct, employees will have information about or will have been involved in that misconduct. Once a corporation

55. Another reason the employee would be open to possible manipulation by the attorney is that he might view her as an expert to whom he should give a certain deference. See Address by Geoffrey C. Hazard, Corporate Counsel Institute (Oct. 12, 1988), *quoted in* 4 Law. Man. on Prof. Conduct (ABA/BNA) 351 (1988) ("You [corporate counsel] have a responsibility not just to the client but to the people that you're working with. They see you as a specialist in a body of information that's not accessible to them."); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, in THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 306, 307-08 (G. Hazard & D. Rhode 2d ed. 1988) (concluding that the layperson is dependent on the attorney as an expert, resulting in an unequal relationship).

56. See *infra* notes 84-91, 128, 131-32 and accompanying text.

57. See 1 HAZARD & HODES, *supra* note 38, at 236 ("Unless warned, [employees] may confide in the lawyer even when their interests diverge from those of the entity.').

58. See, e.g., G. HAZARD, *supra* note 48, at 50; C. WOLFRAM, MODERN LEGAL ETHICS § 13.7.2, at 736 (1986); Bennett, Rach & Kriegel, *supra* note 8, at 74-75, 79; Gallagher, *supra* note 40, at 13.

59. See *infra* notes 72-83 and accompanying text.

learns that it is being investigated for possible violations of the law, it will hire counsel, or possibly use its in-house counsel, to conduct an internal investigation to ascertain if there has indeed been any corporate illegality.⁶⁰ It is during this internal investigative stage that an employee might first have contact with an attorney concerning his role in the conduct under examination, and his contact can be with one or both of two types of attorneys.⁶¹ The first type the employee may hear from is the corporation's own lawyer, who may or may not be willing and able to also represent the employee's interests.⁶² However, the employee may also secure or be referred to separate counsel.⁶³

The Model Rules provide different guidelines for an attorney concerning her dealings with an employee depending on whether the attorney and the employee are in a client or non-client relationship. This Section will analyze the Rules applicable to both corporate and separate counsel in their relationships with employees and, by that analysis, show how the employee who may have liability exposure can be vulnerable to abuse during the investigative stage no matter with which attorney type he is dealing.

60. It is most likely that an attorney will be used to conduct the corporation's internal investigation so that claims of attorney-client privilege and work product doctrine can later be made concerning the gathered information. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (attorney-client privilege and work product doctrine apply to information gathered in internal investigation); *In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2d Cir. 1979) (finding that documents arising out of internal investigation by corporate management were not within attorney-client privilege, while those resulting from second investigation by outside counsel were); Birrell, *supra* note 8, at 49. On the issue of the availability of such claims, especially when the corporation cooperates by providing information to government agencies, see Crisman & Mathews, *Limited Waiver of Attorney-Client Privilege and Work Product Doctrine in Internal Corporate Investigations: An Emerging Corporate "Self-Evaluative" Privilege*, 21 AM. CRIM. L. REV. 123 (1983); *Privileged Communications*, *supra* note 15, at 1650-59; Note, *Discovery of Internal Corporate Investigations*, 32 STAN. L. REV. 1163 (1980).

61. The employee could also have contact with a third attorney type, opposing counsel including a government prosecutor, but the duties of this third type of attorney are not the focus of this Article.

62. The corporation's attorney may also represent corporate employees if such dual representation will not violate Model Rule 1.7 on conflicts of interest. See MODEL RULES, *supra* note 13, Rules 1.13(e), 1.7; *infra* notes 112-19 and accompanying text.

63. The employee's separate counsel is most often an attorney to whom he has been referred by the corporation and who is often also paid by the corporation. See *Douglas v. Los Angeles Herald-Examiner*, 50 Cal. App. 3d 449, 462, 123 Cal. Rptr. 683, 690-91 (1975) (concluding that statute requiring employer to indemnify employee for expenditures arising out of job duties includes attorney's fees); Lester, *No Man is an Island: A Compendium of Legal Issues Confronting Attorneys When Individual Defendants Are Named in an Employment Litigation Complaint*, 20 PAC. L.J. 293, 308 (1989) (noting that most companies routinely pay for employees' attorney's fees); *infra* notes 137, 185.

A. *The Corporate Attorney's Relationship and Duty Toward an Employee*

The corporation's attorney will obviously need to talk to various employees in order to conduct an effective investigation.⁶⁴ When an employee is contacted by corporate counsel,⁶⁵ his relationship with her will differ depending on whether she approaches the employee only as an agent of the entity or offers him personal representation. Regardless of whether the corporate attorney represents the employee, the likelihood of his being disadvantaged by his dealings with her will depend on how clearly she recognizes the high probability that his interests and those of the corporation will differ, and how conscientiously she keeps his interests in mind as she provides representation to the corporation.

1. *Situation 1: The Corporate Attorney Intends No Client Relationship with the Employee.*—In many instances, the corporate attorney does not intend to enter an attorney-client relationship with any employee, but only plans to deal with employees in order to secure information needed in her representation of the corporation. The attorney knows from Model Rule 1.13(a) that the corporation, not the employees, is her client.⁶⁶ She will therefore plan her investigative interview strategy carefully so that her procedures will allow the corporation to claim that all her communications with the employees are protected by its attorney-client privilege.⁶⁷ She may have some concern about how willing the employees will be to talk with her, especially if they have committed the illegal acts.⁶⁸ If she uncovers any wrongdoing by employees during

64. The attorney needs to deal with various employees because the "knowledge of pertinent legal facts, decisionmaking authority and legal responsibility—which are centralized in individual clients—may be widely dispersed among the officers, directors, and employees who compose a corporate client." See Note, *supra* note 5, at 824. See also *Upjohn*, 449 U.S. at 391 (recognizing that those in the corporation with information needed by corporate counsel may be middle-level and even lower-level employees).

65. It is axiomatic that any employee approached directly by corporate counsel has no separate representation at the time. If an employee had his own attorney, corporate counsel would not be able to communicate with that employee, absent the consent of the employee's counsel. See MODEL RULES, *supra* note 13, Rule 4.2, *quoted infra* note 92.

66. See *id.* Rule 1.13(a) & comment, para. 3.

67. At minimum, corporate counsel will follow two basic steps. First, corporate counsel will secure a properly worded retainer letter in which the corporation's board or chief executive officer requests the investigation in order to secure legal advice, perhaps noting that litigation is contemplated. See *Birrell*, *supra* note 8, at 50; *Morvillo*, *supra* note 8, at 1873. Second, counsel will take steps to maintain the confidentiality of communications between corporate employees and counsel. See *Birrell*, *supra*, at 52-53; *Bennett, Rach & Kriegel*, *supra* note 8, at 72-73.

68. An employee may have three principal reasons for being unwilling to talk to corporate counsel: the possibility of criminal liability, civil liability or firing. However,

the course of her investigation, she must report that information to corporate management.⁶⁹ Depending on the circumstances, the attorney may well recommend that the information gathered be used offensively, including sharing data with government officials⁷⁰ and disciplining employee-culprits immediately.⁷¹

Model Rule 1.13(d) provides some guidance to a corporate attorney in her dealings with an unrepresented employee.⁷² The Rule instructs the

the reason the employee may be most cognizant of is the threat of losing his job. See Note, *Discovery of Internal Corporate Investigations*, 32 STAN. L. REV. 1163, 1172-73 (1980); *supra* notes 50-52 and accompanying text.

69. See MODEL RULES, *supra* note 13, Rule 1.4 (requiring an attorney to keep her client informed so that the client can make knowledgeable decisions regarding the representation); Birdzell, *Ethical Problems of Inside Counsel*, BUS. L. MONOGRAPHS (BLM) No. 7, § 2.03, at 2-11 (1988) ("A lawyer has a general professional obligation to inform a client of information acquired in the course of representation and material to the client's affairs."). See also *Spector v. Mermelstein*, 361 F. Supp. 30 (S.D.N.Y. 1972) (lawyer held liable for failing to inform lender client of facts concerning the risk of a loan), *aff'd in part and remanded in part*, 485 F.2d 474 (2d Cir. 1973).

70. Corporations may feel pressure to cooperate with government agencies since those agencies with suspension/disbarment authority over the corporation's ability to do business often have policies favoring early disclosure of possible wrongful conduct. See Bennett, Rach & Kriegel, *supra* note 8, at 70, 86-89; Gorelick, *supra* note 15, at 2 & app. A. Such cooperation is viewed as evidence of a corporation's integrity and is often part of the agency's consideration concerning what administrative action, if any, would be warranted. See N. FRANK & M. LOMBNESS, *supra* note 16, at 53-55; Bennett, Rach & Kriegel, *supra*, at 86; Gorelick, *supra*, at 2 & app. A.

71. See *Handler v. Securities and Exchange Comm'n*, 610 F.2d 656 (9th Cir. 1979) (upholding consent decree by corporation which included agreement to conduct a full investigation into the securities violations alleged by the SEC and identification of those within the corporation against whom legal action should be instituted); CRIMINAL PRAC. & PROCED. COMM., ANTITRUST SECTION, ABA, HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS 89 (1978) (noting that in a criminal investigation "[i]t may benefit the employer to fire the employee for violating company policy respecting compliance with the antitrust laws") [hereinafter HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS]. Where government agencies expect early disclosure of corporate wrongdoing, see *supra* note 70, part of the disclosure expected is what disciplinary actions have been taken against the culpable employees. See Bennett, Rach & Kriegel, *supra* note 8, at 86-87; cf. *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987) (indicating, in sexual harassment case, that prompt investigation and discipline of employee-culprits can preclude the employer's liability); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984) (same).

72. See generally MODEL RULES, *supra* note 13, Rule 1.13(d). The Rule does not use the term "unrepresented", but the conclusion that the Rule covers the corporate attorney's contacts with such an employee can be drawn from the fact that the attorney would not be dealing with the employee at all if he had separate counsel, absent his attorney's consent. See *id.* Rule 4.2, *quoted infra* note 92; *supra* note 65. Further, the comment for Model Rule 1.13(d) discussing what advice the corporate attorney should give to a corporate constituent with an adverse interest, such as an employee, says that

attorney to "explain the identity of the client when it is apparent that the organization's interests are adverse to those of the [employees] with whom the lawyer is dealing."⁷³ This language apparently permits the corporate attorney to not tell an unrepresented employee that the information he provides her could be used in various ways to his disadvantage, assuming the attorney does not know in advance that the particular employee she is interviewing is culpable. Thus, given the Rule's phrasing, the corporate attorney need not clarify her role for the employee until some later point when it is "apparent" that the corporation's interests and those of the employee are adverse.⁷⁴ Even when this apparentness has occurred, such as after the employee has revealed his role in the illegal conduct, the attorney only needs to advise the employee that a conflict exists, that she cannot represent him, that the discussion they have had is not privileged, and that he may wish to secure independent counsel.⁷⁵ Such information may be insufficient for an em-

the attorney should say "that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation." *See id.* Rule 1.13 comment, para. 8. Such advice would obviously be unnecessary to an employee who was already represented, assuming the corporate attorney had permission from the employee's counsel to talk to the employee.

73. *See* MODEL RULES, *supra* note 13, Rule 1.13(d).

74. The Rule's comment even suggests that such an explanation is not always necessary. *See id.* comment, para. 9 ("Whether such a warning should be given by the lawyer for the organization may turn on the facts of each case."). *See also* Morvillo, *supra* note 8, at 1874 (observing that a corporate attorney has no obligation to stop an employee's confession of an illegality); Sullivan & Africk, *Outside Counsel's Role in Coordinating the Defense Effort*, 4 CORP. COUNS. Q., No. 4, at 47, 48 (1988) (commenting that warnings to employees are inappropriate where the corporation has been harmed and counsel's job is to obtain confessions from the culprit-employees).

75. These additional suggestions for discussion with an employee come from the Rule's explanatory comment. *See* MODEL RULES, *supra* note 13, Rule 1.13 comment, para. 8. However, the Rules make it clear that such a comment does not expand the duties required. *See id.*, Scope, paras. 1, 9. Arguably Rule 1.13(d) would not prevent the situation which occurred in *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976), where the corporate attorney interviewed a regional sales director on whom the company had proof of fraud and against whom a lawsuit had already been filed. *See id.* at 672-73. The lawyer told the employee that the lawyer was representing the corporation and also that candor during the interview might clear his name. *See id.* at 675. The employee took a lie detector test apparently because he was told its results might affect whether he would be fired, even though the decision to terminate him had already been made. *See id.* Thus, while the employee knew the identity of the interviewing attorney's client, other information that might have affected his willingness to cooperate was withheld. Rule 1.13(d) by its terms requires no more than the information given this employee, and even the comment does not clearly tell a lawyer that she must tell the employee about the entity's decisions concerning that individual. *But see* 1 HAZARD & HODES, *supra* note 38, at 443 (1987) (Illustrative Case (c)) (concluding that the lawyer in *Haines* would have violated Rule 1.13(d) because he did not disabuse the employee of serious misunderstandings about the

ployee to appreciate that his confidences are unprotected or that separate counsel might use tactics in his defense that corporate counsel would not.⁷⁶

In this regard, Model Rule 1.13(d) seems to set a different and lower standard of treatment for the corporate attorney's contacts with an unrepresented employee than does Model Rule 4.3 for other lawyers' contacts with unrepresented persons.⁷⁷ The latter Rule places an affirmative obligation on a lawyer to correct any misunderstanding an unrepresented individual may have about the lawyer's role "[w]hen the lawyer knows or reasonably should know" there is such a misunderstanding.⁷⁸ When an unrepresented person was contacted by a party's

lawyer's role).

On the specific suggestion that the employee may want to get independent counsel, one commentator has observed that subsection (d) does not require the corporate attorney to explain why it might be advantageous to the employee to have separate counsel, although he feels such advice should be given. *See* Birdzell, *supra* note 69, § 2.03[2][c], at 2-15.

76. Model Rule 1.13 does not require, nor does its comment suggest, that a corporate attorney make clear to an employee that his communications are not confidential. *See* MODEL RULES, *supra* note 13, Rule 1.13 & comment; C. WOLFRAM, *supra* note 58, § 13.7.2, at 736. Moreover, the exercise of an employee's fifth amendment privilege against self-incrimination, the incentive to testify under a promise of immunity, and plea bargaining are all interests which separate counsel could pursue for the employee but on which corporate counsel would have a different perspective. *See* Birdzell, *supra* note 69, § 2.03[2][c], at 2-14 to -15.

77. *Compare* MODEL RULES, *supra* note 13, Rule 1.13(d) with *id.* Rule 4.3. *See also In re FMC Corp.*, 430 F. Supp. 1108, 1111 (S.D.W. Va. 1977) (expressing approval of the ethically sensitive manner in which government attorneys approached corporate employees, in that they identified themselves as adverse counsel, told them the nature of the investigation, and instructed them that they could have counsel present for the interview); *In re Milita*, 99 N.J. 336, 492 A.2d 380, 384 (1985) (discipline ordered where an attorney failed to correct a guard's misstatement to an unrepresented witness about whom the attorney represented); *Brown v. Peninsula Hospital Center*, 64 App. Div. 2d 685, 407 N.Y.S. 2d 586, 587 (Sup. Ct. 1978) (concluding that attorneys for a hospital breached their ethical duty under Model Code DR 7-104(a)(2), governing contact with an unrepresented person, when they failed to inform a doctor whom the hospital produced as its representative that he had a potential conflict of interest with the hospital); *infra* notes 78-80 and accompanying text.

78. MODEL RULES, *supra* note 13, Rule 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."); *see In re Milita*, 99 N.J. 336, 492 A.2d 380, 384 (1985) (discipline ordered where an attorney failed to correct a guard's misstatement to an unrepresented witness about whom the attorney represented). Further, the definitions section of the Model Rules defines the phrase "reasonably should know" specifically to mean that "a lawyer of reasonable prudence and competence would ascertain the matter in question." *See* MODEL RULES, *supra* note 13, Terminology, para. 9.

In adopting its version of the Model Rules, Louisiana made the lawyer's duty under

attorney, the drafters of Model Rule 4.3 were concerned with whether any advice given by that attorney might be misperceived as disinterested.⁷⁹ They believed that “[s]uch a misperception might influence the unrepresented person to make concessions or acquiescences that could not otherwise be obtained.”⁸⁰

The likelihood that an individual may make concessions or acquiescences, because he misunderstands the role of an attorney and fails to appreciate that the attorney has no special loyalty to him or concern for his personal interests, is arguably much greater in the situation where a corporate attorney approaches an unrepresented employee than when an attorney who is a stranger approaches an unrepresented third person. The employee’s misperception could occur because he may have had contact with the lawyer before in a nonadversarial situation.⁸¹ His con-

Model Rule 4.3 even more affirmative by providing: “A lawyer shall assume that an unrepresented person does not understand the lawyer’s role in a matter and the lawyer shall carefully explain to the unrepresented person the lawyer’s role in the matter.” Louisiana Bar Rule 4.3, *quoted in* 2 G. HAZARD & W. HODES, *supra* note 38, App. 4, at LA:4. *See also* Virginia Legal Ethics Comm. Op. No. 905 (1987), *reprinted in* II Nat’l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Va:Op:8 (1988) (finding an attorney’s contact with an employee of an adverse corporate party not improper so long as the employee had no authority to act or make decisions on behalf of the entity on the litigation subject and so long as the attorney disclosed his adversarial role to the employee).

79. The fact that the drafters of Model Rule 4.3 did not prohibit the giving of advice to an unrepresented person was a change from the Model Code. The Code had forbidden the lawyer from giving the unrepresented individual advice, other than the advice to secure an attorney if that person’s interests might be in conflict with the lawyer’s client. *See* MODEL CODE, *supra* note 21, DR 7-104(a)(2). However, the Code gave no other guidance for this situation. *See id.*

The comment to Model Rule 4.3 does contain the suggestion that attorneys “should not give advice to an unrepresented person other than the advice to obtain counsel.” *See* MODEL RULES, *supra* note 13, Rule 4.3 comment. However, even if an attorney felt free to give an unrepresented person advice under the Model Rules, she would be constrained by Model Rule 4.1 from giving false advice or otherwise making false statements. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 83-1502 (1983) (concluding that a lawyer’s letter which threatened a lawsuit by his client if certain action was taken by the addressees was permissible because it made no false statements and provided the lawyer’s opinion only from his client’s perspective); Mississippi State Bar Op. 141 (1988), *reprinted in* II Nat’l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Ms:Op:8 (1988) (concluding that an attorney communicating with an unrepresented adverse party should refrain from giving advice and making false statements); MODEL RULES, *supra* note 13, Rule 4.1.

80. *See* A.B.A. CENTER FOR PROF. RESP., THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 150 (1987).

81. Indeed, it is possible the employee has even consulted the lawyer concerning a personal legal problem. *See* Bobbitt v. Victorian House, Inc., 545 F. Supp. 1124, 1126-27 (N.D. Ill. 1982); *United States v. Turkish*, 470 F. Supp. 903, 910 (S.D.N.Y. 1978).

fusion could also be a result of the combined pressures of loyalty and apprehension already discussed. Thus, if corporate counsel had to follow the higher standard of conduct called for by Model Rule 4.3⁸² and she perceived that an employee was at all unclear that her representation of the corporation did not encompass protection of the employee's interests, the corporate attorney would have to immediately try to correct the employee's misunderstanding. Such an effort could thus be required before it became apparent that the corporation's interests were adverse to those of the employee.⁸³

82. The conclusion that there are two standards seems further supported by the fact that there were last minute changes to both Rule 1.13(d) and the explanatory comment relating to it. These changes eliminated certain similarities in language and tone that the draft Rule and comment had had with Rule 4.3. *Compare* Model Rules of Professional Conduct, Rule 1.13 (Final Draft) & comment, "Clarifying the Lawyer's Role," reprinted in 68 A.B.A.J. 1411 (1982) with MODEL RULES, *supra* note 13, Rule 1.13 & comment, "Clarifying the Lawyer's Role." The draft Rule called for an attorney to clarify that she represented the corporation "when the lawyer believes that such explanation is necessary to avoid misunderstandings on [the constituents'] part." *See* Model Rules of Professional Conduct, Rule 1.13(d) (Final Draft), reprinted in 68 A.B.A.J. 1411 (1982). However, an amendment to subsection (d) eliminated the lawyer's need to focus on the employee's comprehension. *See* MODEL RULES, *supra* note 13, Rule 1.13(d). Additionally, the drafters altered the entire explanatory discussion for subsection (d). *Compare* Model Rules of Professional Conduct, Rule 1.13 (Final Draft) comment, "Clarifying the Lawyer's Role," reprinted in 68 A.B.A.J. 1411 (1982) with MODEL RULES, *supra* note 13, Rule 1.13 comment, "Clarifying the Lawyer's Role." Prior to the changes, the explanatory comment relating to subsection (d) had also been similar to Model Rule 4.3 relative to that Rule's concern that an employee might be harmed if he misunderstood the corporate lawyer's role. *See* Model Rules of Professional Conduct Rule 1.13 (Final Draft) comment, "Clarifying the Lawyer's Role," reprinted in 68 A.B.A.J. 1411 (1982). The draft comment ended with the specific advice that "if the lawyer is conducting an inquiry involving possibly illegal activity, a warning might be essential to prevent unfairness to a corporate employee." *See id.* Furthermore, the final draft of the comment to Model Rule 1.13(d) contained a cross-cite to Model Rule 4.3, which was eliminated from the amended comment. *Compare id.* with MODEL RULES, *supra* note 13, Rule 1.13 comment, "Clarifying the Lawyer's Role." *See also* MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.13(d) & comment (1988) (adopting the originally proposed version of Model Rule 1.13(d) and comment).

83. *See* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-600(D) (1989) (modifying Model Rule 1.13(d) to require that a corporate lawyer clarify her role "whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the [lawyer] is dealing"). In proposing this modification of Rule 1.13(d), the California drafters noted:

The proposed rule also addresses a disturbing and rather common situation where the organization's attorney deals with an officer or other employee who may be exposed to serious personal legal risk if that individual's activities are disclosed to the organization's attorney, and the attorney finds it is in the interest of the organization to jettison the disclosing individual. The proposed rule makes it clear that, as soon as the attorney perceives the likelihood of such a disclosure,

The Rules also set a different standard for an attorney's relationship with corporate employees under Model Rule 3.4(f). In that rule, lawyers are admonished not to request individuals, other than their clients, to refrain from voluntarily talking to another party.⁸⁴ However, an exception is made for employees of a client so long as a lawyer reasonably believes the employee's interests will not be adversely affected by a request to remain silent.⁸⁵

The comment to Model Rule 3.4(f) gives some clues to the drafters' assumptions concerning this Rule. In explaining the meaning and purpose of this exception, the drafters stated: "Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client."⁸⁶ Employees do identify their interests with those of their employer given their concerns about retaining their employment.⁸⁷ However, if an employee fully understood at the time of a meeting with the corporate counsel how his personal interests could diverge from those of the corporation, he might not identify so closely with his employer. Therefore, the employee would be less inclined to cooperate with the corporation's attorney unless such cooperation also served his own interests.⁸⁸

This comment concerning the employee exception in Model Rule 3.4(f) seems overly generalized on an issue that could have serious ramifications for an employee. Significantly, Rule 3.4(f) contains no requirement that the corporate attorney discuss the situation with the

he or she must give a warning to the individual officer that their relationship is not confidential and that the attorney will use any such information in the best interests of the organization. The Commission believes this formulation will be of great assistance in providing protection and integrity in this rather common situation, and incidentally will protect both the organization and its counsel from suffering involuntary disqualification.

CALIFORNIA COMM'N FOR THE REVISION OF THE RULES OF PROF. CONDUCT, PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT 29 (1987) (citations omitted).

84. MODEL RULES, *supra* note 13, Rule 3.4(f) ("A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is . . . an employee or other agent of the client; and (2) the lawyer reasonably believes that the person's interest will not be adversely affected by refraining from giving such information.").

85. *See id.* Rule 3.4(f)(1)-(2).

86. *Id.* Rule 3.4 comment, para. 4.

87. *See supra* note 50 and accompanying text.

88. One commentator noted: "In our age of pervasive government regulation of business organizations, there is often such a substantial risk that an employee may find himself in a position adverse to his employer that a reasonable argument can be made that the employee should have his own counsel throughout his employment." Birdzell, *supra* note 69, § 2.03[2][c], at 2-15.

employee.⁸⁹ Rather, the attorney can reach her own decision as to whether the employee's interests will be harmed and request that the employee remain silent.⁹⁰ Many employees would be reluctant to refuse such a request.⁹¹

This comment to Model Rule 3.4 also cross-references to Model Rule 4.2 which proscribes a lawyer from communicating with represented persons without the consent of their attorney.⁹² The comment to Model Rule 4.2 notes:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.⁹³

This interpretation of Model Rule 4.2 suggests that opposing counsel is not permitted to communicate directly with any current employee whose

89. Some commentators have suggested that an attorney who requests the silence of a person related to a client should make sure that the individual appreciates that his silence is for the benefit of the client and not himself. See 1 HAZARD & HODES, *supra* note 38, at 382.

90. There may be some limitations on the lawyer's decisionmaking in that she must reasonably believe the employee will not be harmed by the request. "Reasonably believes" is defined as meaning "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." See MODEL RULES, *supra* note 13, Terminology, para. 8. Arguably, however, even if the attorney has never talked to the employee, the attorney may request that the employee remain silent provided she knows no reason why remaining silent could harm him. Cf. *In re Investigation Before the April 1975 Grand Jury*, 403 F. Supp. 1176, 1178 (D.D.C. 1975), *vacated*, 531 F.2d 600, 602-03, n.4 (D.C. Cir. 1976) (per curiam) (both courts noting that an attorney for multiple witnesses avoided dealing with the significant likelihood that his clients might have conflicts of interest by not having individual consultations with them).

91. Indeed, one illustration of the operation of this Rule has the lawyer telling the employees of his corporate client not to speak to anyone associated with the opposing party in a lawsuit, and a superior adding that any employee who disobeys that advice will be fired. See 1 HAZARD & HODES, *supra* note 38, at 384-85. The commentators' analysis of this situation would attribute the threat to the lawyer, but would still not find the attorney to have acted improperly. Despite the inherent coercion of the employees, they conclude that the employer can require the employees' silence since the company itself has a right to maintain silence, absent formal discovery. See *id.*

92. See MODEL RULES, *supra* note 13, Rule 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

93. *Id.* Rule 4.2 comment, para. 2.

scope of employment involved him in the wrongful conduct that has been alleged against the corporation.⁹⁴ Such employees are the very persons who would most likely be adversely affected by employer-imposed silence, especially if that silence prevents them from having the opportunity to negotiate for personal immunity from government prosecution or to plea bargain.

The combined effect of Model Rules 3.4(f) and 4.2 means that there can be no contact by the opposing counsel with the potentially culpable corporate employee without the consent of the corporation's attorney, even though the employee is clearly not personally represented by the corporate attorney.⁹⁵ Further, the corporation's attorney might request

94. Such an interpretation would comport with evidence rules which permit the admission of statements by a corporation's employee-agents who are either authorized to speak for the entity or whose statements concern matters within the scope of their employment. *See* Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F. 2d 626, 630 (8th Cir. 1978); Process Control Corp. v. Tullahoma Hot Mix Paving Co., 79 F.R.D. 223, 225 (E.D. Tenn. 1977); Western Union Tel. Co. v. N.C. Direnzi, Inc., 442 F. Supp. 1, 4 (E.D. Pa. 1977); CAL. EVID. CODE § 1222 (West 1966); FED. R. EVID. 801(d)(2)(C),(D). However, in considering whether opposing counsel may contact corporate employees on the subject of a controversy without permission of corporate counsel, some courts and bar associations have concluded that there should be no such contact by opposing counsel because in most cases neither opposing counsel nor the employee at the time of an interview is able to fully appreciate what is within the employee's scope of employment. *See* Niesig v. Team I, No. 31NE (N.Y. Sup. Ct., App. Div., Aug. 7, 1989) (interpreting DR 7-104(A)(1)) (digested in 5 Law. Man. on Prof. Conduct (ABA/BNA) 289 (1989)); Los Angeles County Bar Ass'n. Formal Op. 410 (1983), reprinted in 2 CAL. COMPENDIUM ON PROF. RESP. 114 (1988) (interpreting California's ethical rule on an opposing counsel's contacts with represented persons). *But see* Morrison v. Brandeis University, 125 F.R.D. 14 (D. Mass. 1989) (concluding, inter alia, that Model Rule 4.2's view of which employees are off limits is too broad, and choosing a balancing test in determining whether a party should have access to non-party employees without the presence of opposing counsel, as well as requiring opposing counsel to disclose their role to any employees contacted); Virginia Legal Ethics Comm. Op. 905 (1987), reprinted in II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Va:Op:8 (1988) (concluding that an opposing attorney may communicate with a corporate employee if the employee is in a managerial position and has no authority to act or decide for the entity on the subject matter in controversy, provided opposing counsel clearly discloses his role).

The issue of whether opposing counsel can contact former employees of a corporate adversary is similarly unsettled. However, some recent interpretations have permitted such contact. *See* Triple A Machine Shop Inc. v. State, 213 Cal. App. 3d 131, 261 Cal. Rptr. 493 (1989); Alaska Bar Ass'n Ethics Comm. Op. 88-3 (1988) (digested in 4 Law. Man. on Prof. Conduct (ABA/BNA) 266 (1988)); Florida Bar Prof. Ethics Comm. Op. 88-14 (1989) (digested in 5 Law. Man. on Prof. Conduct (ABA/BNA) 101 (1989)); Virginia Legal Ethics Comm. Op. 905 (1987), reprinted in II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Va:Op:8 (1988).

95. Indeed, if the employee had separate counsel, consent of his own counsel is sufficient to satisfy Model Rule 4.2. Opposing counsel need not also secure the permission of the corporation's attorney in that instance. *See* MODEL RULES, *supra* note 13, Rule 4.2 comment, para. 2.

that the employee not speak with the opposing party⁹⁶ and thus dissuade him from making any effort on his own to contact a government attorney involved in the investigation.⁹⁷ Unfortunately, neither Model Rules 1.13 nor 3.4(f) mandate that the corporation's attorney provide the employee with any immediate information about the investigation and/or the attorney's role that would help him to protect his own interests. In addition, both Model Rules 3.4(f) and 4.2 see the employee only as part of the corporation, and thus, the attorney is permitted to take action involving employees which will further only the corporation's interests.⁹⁸ The employee's personal interests are not recognized.

The potentially detrimental treatment of an employee which is allowed by these Rules seems at first inconsistent with the spirit of Model Rule 4.4 which instructs: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person"⁹⁹ The Rule's comment emphasizes that while a lawyer is normally expected to promote only his client's interests, she must still have regard for others.¹⁰⁰ However, if the corporate attorney were charged with violation of this Rule for embarrassing or burdening an employee, she could probably justify her behavior by demonstrating how the action taken had assisted the corporate client and therefore did not have the "substantial purpose" of harming an employee. Thus, Model Rule 4.4 might really provide little protection for third persons, even those to whom the corporate attorney arguably should have some duty.

96. Of course, such a request would be improper if the attorney believed at the time of making it that the employee would be harmed if he complied. See *supra* notes 84-85 and accompanying text.

97. As noted, the employee might have an interest in communicating with a government attorney in order to negotiate a promise of immunity or a favorable plea bargain in return for his willingness to testify against the corporation or other more culpable employees. Indeed, the corporate attorney, even if he represented the employee, would probably be precluded from recommending to an employee that he enter into such negotiations because such a step might prejudice the corporate client. See *In re FMC Corp.*, 531 F.2d 600, 603 n.4 (D.C. Cir. 1976).

98. Cf. *United States v. Linton*, 502 F. Supp. 871, 873-74 (D. Nev. 1980) (corporation's attorney who also represented employees whom prosecution intended to call as witnesses refused to permit prosecutor pre-trial interviews with employees); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 83-1498 (1983) (observing that the prohibition against talking to an adverse party applies even if the individual is willing to communicate in the absence of his attorney). But cf. 1 HAZARD & HODES, *supra* note 38, at 438 (opining that a client may reject the advice of his attorney to say nothing or to speak only in the attorney's presence).

99. MODEL RULES, *supra* note 13, Rule 4.4.

100. See *id.* comment ("Responsibility for the client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons.").

The reality for the employee under the Model Rules is that Rule 1.13 allows a corporate attorney to withhold from the employee clarification that the entity is her only client until after the employee has confessed to a personally culpable act, despite the fact that both Model Rules 4.3 and 4.4 encourage fair treatment in an attorney's relationships with non-clients. The corporate attorney is permitted to remain silent notwithstanding that she should realize that many of the employees she deals with during her investigation, especially those not in upper management, will cooperate with her simply because they fail to appreciate that her independent professional judgment is only being exercised in favor of the entity, and they therefore do not comprehend the risk to themselves from open, unrestrained conversation with the corporation's attorney. The Rules allow the attorney to freely interrogate an employee and thus encourage his confession to activities which could cause his firing or other loss of status at the worksite and/or criminal prosecution.¹⁰¹

Once the attorney has obtained disclosures damaging to the employee, the attorney can use them in whatever way will best serve her client, the corporation.¹⁰² Since the employee did not enjoy an attorney-client relationship with the corporation's attorney, the employee will probably be unable to stop the use of this information even though it substantially harms his interests.¹⁰³ The employee will be able to claim his discussions were confidential and subject to the attorney-client privilege only if he can demonstrate that it was reasonable for him to believe that the corporation's attorney was representing him individually.¹⁰⁴ While courts

101. Civil liability for an employee is also possible, but is outside the scope of this Article. See *supra* note 7 and accompanying text. Besides disadvantaging an employee through interrogation, other manipulation of the employee is permitted by Model Rule 3.4(f). See *supra* notes 84-91 and accompanying text.

102. Under the Model Rules an attorney who intends to have a client relationship only with the corporation must resolve questions of loyalty in the corporation's favor. See MODEL RULES, *supra* note 13, Rule 1.13(a) & comment, paras. 1-3.

103. See, e.g., *In re Grand Jury Investigation*, 599 F.2d 1224, 1236 (3d Cir. 1979) ("Because [lower-echelon employees] have no control over the privilege itself, their communications remain confidential only in the sense that they are not released to outsiders, and only as long as the corporate control group desires to assert the privilege. If the employees had engaged in questionable activity, the corporation clearly would have the power to waive the privilege and to turn the employees' statements over to law enforcement officials."); *In re Grand Jury Proceedings*, 434 F. Supp. 648, 649-50 (E.D. Mich. 1977) (attorney for corporation permitted to testify before a grand jury concerning communications with corporate officer where corporation had waived its privilege and no attorney-client relationship found between attorney and officer), *aff'd*, 570 F.2d 562 (6th Cir. 1978); *supra* note 40 and accompanying text.

104. In theory, the belief of the employee that he is consulting with an attorney in order to secure legal advice should govern in such a situation. See *Helman v. Murry's*

have indicated that an attorney-client relationship can exist even though there has been no payment of fees and there is no formal contract,¹⁰⁵ some courts do not find reasonable an employee's claim that he thought the corporate attorney was acting on his behalf unless the attorney has made an appearance with the employee at a grand jury or administrative hearing.¹⁰⁶

Steaks, Inc., 728 F. Supp. 1099, 1103 (D. Del. 1990); Westinghouse Electric Corp. v. Kerr McGee Corp., 580 F.2d 1311, 1319 & n.14 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *In re McGlothen*, 99 Wash. 2d 515, 663 P.2d 1330, 1334 (1983). However, that belief must be reasonable. *See* United States v. Keplinger, 776 F.2d 678, 700-01 (7th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986); Odmak v. Westside Bancorporation, Inc., 636 F. Supp. 552, 555 (W.D. Wash. 1986). Moreover, the employee may have to make it clear to the attorney that he is seeking personal legal advice. *See Keplinger*, 776 F.2d at 700-01; *In re Grand Jury Proceedings*, Detroit, Mich., Aug., 1977, 434 F. Supp. 648, 650 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978). This may be asking a lot of an employee with little experience in dealing with lawyers who may not understand that the corporate counsel is not representing him *and* the corporation. *See supra* notes 48-57 and accompanying text. Further, at the point the employee seeks to convince a court that an attorney-client relationship exists, it is usually not in the interests of the corporate attorney's corporate client for the employee to succeed. *See* Bobbitt v. Victorian House, Inc., 545 F. Supp. 1124, 1125-26 (N.D. Ill. 1982) (employee sought to disqualify corporate counsel's continued representation of corporation); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 375 (S.D. Tex. 1969) (same); Cooke v. Laidlaw, Adams & Peck, Inc., 126 A.D.2d 453, 510 N.Y.S.2d 597, 598 (N.Y. App. Div. 1987) (same). Finally, the employee suffers a disadvantage from the fact the courts usually find attorneys' statements inherently credible, and thus may believe their testimony over that of the employee. *See Keplinger*, 776 F.2d at 699.

105. *See, e.g.*, United States v. Costanzo, 625 F.2d 465, 468 (3d Cir. 1980) (attorney-client relationship is not dependent on execution of a formal contract or payment of fees), *cert. denied*, 472 U.S. 1017 (1985); *Westinghouse Electric Corp.*, 580 F.2d at 1317 (same); *Helman*, 728 F. Supp. at 1103 ("The essence of whether one communicating with an attorney is a 'client' depends upon whether that person is seeking legal advice not whether there is a payment of a fee or an execution of a formal contract."); *E.F. Hutton & Co.*, 305 F. Supp. at 388 (attorney-client relationship is not dependent on execution of a formal contract or payment of a fee). *See also* MODEL RULES, *supra* note 13, Scope, para. 3 (noting that the ethical duty of confidentiality can attach during the period when the lawyer is considering whether to enter into an attorney-client relationship); C. WOLFRAM, *supra* note 58, § 6.3.2, at 251 (same).

106. *Compare E.F. Hutton & Co.*, 305 F. Supp. at 401 (disqualifying a law firm from continued representation of a corporation where the firm's members had made appearances before related bankruptcy and administrative agency as attorney on behalf of an employee) *and* *Cooke*, 510 N.Y.S. 2d at 599-600 (holding that where corporate attorney appeared on behalf of officer at related administrative proceedings, attorney would be disqualified from representation of entity in suit brought against it by that officer) *with Odmak*, 636 F. Supp. at 555 ("[M]ere subjective belief that the person is being individually represented is not enough to support the existence of a joint privilege unless the belief is minimally reasonable.") *and Bobbitt* 545 F. Supp. at 1126 (finding that in the usual situation a corporate director should understand that when he speaks to corporate counsel the communication is "known by the corporation" and thus that

Notwithstanding that it is difficult for an employee to make a successful claim of personal representation by the corporate attorney, such a claim is a threat to her effective representation of the corporation. Absent an early clarification by the corporate attorney of who is and who is not her client, the employee might make such a claim¹⁰⁷ because he might not have comprehended that the attorney was only representing the corporation and thus believed she was representing him as well. If an attorney-client relationship by the corporate attorney with the employee were found, her ability to represent the corporation could be severely affected. For instance, the employee could seek to disqualify the attorney from continued representation of the corporation because a conflict of interest would exist given that he has or had had an attorney-client relationship with the corporation's attorney concerning the same subject.¹⁰⁸ The employee could also assert an attorney-client privilege as to

the attorney is not representing the director). However, representation of an individual can occur short of an actual appearance before an administrative proceeding. See Michigan Bar Informal Op. CI-998 (1984), *reprinted in* I Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Mi:Op:16, 16-17 (1987) (because an attorney-client relationship existed when attorney secured facts from members of a client organization and drafted their petitions for filing before state commission, attorney could not represent client organization in opposing members' petitions at commission hearing, even though the attorney had told individuals he could not represent them before the commission and they secured other counsel).

107. The claim would likely arise at a later point when the employee and the corporation find themselves in opposing positions concerning the subject of the investigation. Such opposing positions could occur in a criminal matter because a corporation and/or several of its employees are named as defendants but have different interests as co-defendants. See *United States v. Multi-Management, Inc.*, 743 F.2d 1359, 1361, 1363-64 (9th Cir. 1984). The employee could also be called as a witness for the government, and in that way could also find himself opposing his employer or other employees. See *Theodore v. New Hampshire*, 614 F.2d 817 (1st Cir. 1980). The issue can also be raised by the government prosecutor who feels there is a conflict because corporate counsel is now or has once represented employees who are co-defendants, see *United States v. Agosto*, 675 F.2d 965, 976-77 (8th Cir.), *cert. denied*, 459 U.S. 834 (1982), or who will be called as prosecution witnesses, see *United States v. Linton*, 502 F. Supp. 871, 873 (D. Nev. 1980); *United States v. FMC Corp.*, 495 F. Supp. 172, 174 (E.D. Pa. 1980).

108. See *United States v. James*, 708 F.2d 40 (2d Cir. 1983) (disqualifying defendant's counsel on motion of government and a witness where counsel had formerly represented the witness on issues substantially related to present case); *E.F. Hutton & Co.*, 305 F. Supp. at 395 (disqualifying counsel for a corporation where an employee had been earlier represented by the same law firm at grand jury and administrative hearings on the subject at issue in the lawsuit). Model Rule 1.7 requires the consent of the employee as a present client where representation of another client might work to the employee's disadvantage. See MODEL RULES, *supra* note 13, Rule 1.7; *infra* notes 139-55 and accompanying text (discussing the consent required by Model Rule 1.7 when there is simultaneous representation). Model Rule 1.9 requires the consent of an employee as a former client where the attorney seeks to represent another in a substantially related matter in which the

his communications with the attorney and thus seek to prevent use of his information, such as in a judicial or administrative proceeding.¹⁰⁹

However, since it is not easy for an employee to demonstrate later to a court's satisfaction that he had a reasonable belief that an attorney-client relationship existed with a corporation's attorney,¹¹⁰ the possibility that an employee might be successful may not motivate a corporate attorney to give him early warning concerning the ramifications of communication with her. For these reasons, if an attorney representing only the corporation gives the applicable Model Rules a narrow interpretation, the employee will be in a legally vulnerable position.¹¹¹

2. *Situation 2: The Corporate Attorney Enters into a Client Relationship with the Employee.*—Since the Model Rules do permit a corporation's attorney to also represent an employee of her client under certain conditions,¹¹² an employee may agree to be represented by an

employee's interests are adverse. See MODEL RULES, *supra* note 13, Rule 1.9; *infra* notes 163-68 and accompanying text (discussing the consent required by Model Rule 1.9 when there is successive representation); *infra* note 217 (discussing the courts' approach when motions to disqualify are made).

109. See *Odmark*, 636 F. Supp. at 554 (corporate officers and directors opposed receiver's planned interviews with counsel for bankrupt corporation on the basis of attorney-client privilege); *E.F. Hutton & Co.*, 305 F. Supp. at 400 (corporate officer sought injunction on the basis of attorney-client privilege against former counsel who now represented corporation to prevent counsel's disclosure to the corporation of information obtained from the officer).

Even when there has been joint representation of more than one person by the same attorney concerning the same subject and thus certain information has been shared between the parties, there can still be confidentiality on matters of individual interest occurring only between one party and the joint attorney. See *Western Continental Operating Co. v. Natural Gas Corp.*, 212 Cal. App. 3d 752, 762, 261 Cal. Rptr. 100, 104-05 (1989); 24 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5505, at 554 (1986). Furthermore, the joint-client exception to the attorney-client privilege does not apply where the joint representation was undertaken without the proper disclosure and consent. See *Industrial Indem. Co. v. Great Amer. Ins. Co.*, 73 Cal. App. 3d 529, 536 & n.4, 140 Cal. Rptr. 806, 810 & n.4 (1977).

110. See *supra* notes 104-06 and accompanying text.

111. Even though an attorney may avoid being disqualified by a court because the employee cannot satisfy a court that he should be viewed as a client, the attorney's behavior in receiving and exploiting the employee's confidences may still be viewed as an ethical violation. See *Los Angeles County Bar Ass'n Formal Op. 366* (1977), reprinted in 2 CAL. COMPENDIUM ON PROF. RESP. 65 (1988) (where attorney had been consulted confidentially by individual who was to become a prosecution witness in a murder case, the attorney could not accept as a client a defendant in the same matter because consulting individual was "former client" and was owed duty of confidentiality). This difference in result by a bar association and a court could occur because the bar association would focus on the ethical, not the legal, rule and because a court may not fully consider an attorney's duty to a former client-witness. See *id.*

112. See MODEL RULES, *supra* note 13, Rules 1.7, 1.13(e); *infra* notes 117-24 and

attorney who is also counsel to the corporation in connection with government allegations of an alleged corporate illegality.¹¹³ This Subpart will discuss the conditions under which such simultaneous representation of the entity and an employee can occur and the ways in which an employee might receive less than the full independent professional judgment of a joint attorney. As in the previous Subpart, this discussion will demonstrate that attorney behavior which is condoned by the Model Rules could nevertheless have an adverse effect on an employee's interests.

There are various rationales for attorneys and clients undertaking such simultaneous representation. Some of the reasons are appropriate; some are inappropriate. Examples of appropriate reasons may include the belief that it is in the interest of all concerned to have unified representation, and the fact that representation by a single attorney can save attorney's fees because there is an efficiency in only one attorney or team of attorneys having to learn the background story of the representational subject.¹¹⁴ Examples of inappropriate reasons can be the desire by the corporate client or its attorney to keep control of the representation of its employees¹¹⁵ and the attorney's desire to earn more fees.¹¹⁶

accompanying text. As will be discussed, a key condition to such joint representation is that there be no impairment of the attorney's loyalty or independent professional judgment as to either client. *See id.* Rule 1.7 & comment.

113. Representation of more than one client at the same time concerning the same issue is referred to by several terms, the most common of which are "joint representation" or "simultaneous representation." The United States Court of Appeals for the First Circuit has further sub-defined multiple representation into categories concerning whether the representation involves co-defendants or a defendant and a witness. The First Circuit labels the former type of multiple representation "joint representation," while the latter is labelled "dual representation." *See United States v. DiCarlo*, 575 F.2d 952, 957 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978). This Article will not use these sub-definitions but will use the terms joint representation and simultaneous representation interchangeably, along with the more general "multiple representation." The generalized term "multiple representation" can have a broader meaning than just simultaneous representation of multiple clients. This term can also refer to representation of clients successively, or non-simultaneously. The successive, multiple representation situation can arise when the corporate attorney has represented both the corporation and an employee for a time, but then withdraws from representation of the employee. *See infra* notes 160-63 and accompanying text.

114. *See United States v. Turkish*, 470 F. Supp. 903, 907 (S.D.N.Y. 1978) (recognizing cost economies can be a factor in joint representation decisions). *See generally* Birdzell, *supra* note 69, § 2.03[2][c], at 2-16; Miller, *The Problems of Multiple Representation in the Investigation and Prosecution of Corporate Crime*, 29 FED. BAR NEWS & J. 217, 217 (1982).

115. *See Wood v. Georgia*, 450 U.S. 261, 269 (1981) (observing that there can be a risk that an attorney paid by an employer to represent an employee will prevent the employee from testifying against his employer); *United States v. Linton*, 502 F. Supp. 871, 873-74, 877 (D. Nev. 1980) (noting that dual representation of a corporation and

Model Rule 1.7 is the primary ethical requirement concerning simultaneous multiple representation of a corporation and an employee with which an attorney must comply.¹¹⁷ Under certain conditions, Rule 1.7 permits representation of such multiple clients even when the interests of one client will be directly adverse to those of another,¹¹⁸ or even when the representation of one client might be materially limited by a lawyer's responsibilities to another client or by his own interests.¹¹⁹ In

employees who were to be prosecution witnesses creates a potential conflict of interest especially where the joint attorney refused to allow prosecutor to have pre-trial interviews with the employees); *United States v. RMI Co.*, 467 F. Supp. 915, 922-23 (W.D. Pa. 1979) (disqualifying corporate counsel from representing employees before a grand jury, in part because counsel's loyalties toward the corporation could suggest that the attorney was influencing witnesses to protect the entity's interests); Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. REV. 1, 8-10 (1979) (noting that multiple representation of corporate employees can impede a grand jury investigation, especially when only some of the clients are really culpable); Miller, *supra* note 114, at 217 (identifying as an advantage of multiple representation that corporate defendants are less susceptible to government pressure to cooperate, but recognizing that multiple representation makes it impossible for an attorney to recommend one client cooperate in exchange for immunity or leniency if his disclosure would disadvantage another client); Cole, *Time for a Change: Multiple Representation Should Be Stopped*, 2 J. CRIM. DEFENSE 149, 154 (1976) (observing that while multiple representation can save attorneys' fees, the principal motivation is "the desire to keep certain persons in 'friendly' hands").

116. See G. HAZARD, *supra* note 48, at 71 (observing that an attorney's decision to take on multiple clients involves a conflict between her interest in realizing the economies of multiple representation and her clients' interests); Leary, *Is There a Conflict in Representing a Corporation and its Individual Employees*, 36 BUS. LAW. 591, 591 (1981) (observing that an individual can be "at the mercy of a [corporation's] lawyer who is seeking to aggrandize himself because he wants to earn a double or triple fee").

117. See MODEL RULES, *supra* note 13, Rule 1.7. Model Rule 1.13(e) refers to Model Rule 1.7 in providing that a corporate attorney may also represent her client's employees so long as she complies with Rule 1.7 concerning conflicts of interest. Surprisingly, the comment to Model Rule 1.7 makes no reference to joint representation of a corporation and its employees nor any cross-reference to Model Rule 1.13(e). See *id.* Rule 1.7 comment.

118. See *id.* Rule 1.7(a), which provides:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

119. See *id.* Rule 1.7(b), which provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple

both instances, however, the attorney must reasonably believe¹²⁰ that her relationship with or representation of each client will not be adversely affected by any conflict of interest.¹²¹ In other words, the attorney must be convinced that she will be able to provide competent, independent professional judgment on behalf of both the corporation and an employee despite there being an actual or potential conflict.¹²² The attorney must also secure each client's consent¹²³ after discussing the situation with

clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

120. See Maryland Comm. on Ethics, Ethics Dkt 87-39 (1987), *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Md:Op:32, 34 (1988) (observing that Model Rule 1.7(b) "puts the onus upon the lawyer to reach [her] own determination as to whether the representation would or would not be adversely affected"). For a discussion of how the Model Rules define the term "reasonably believes," see *supra* note 90.

Some commentators have observed that Model Rule 1.7 sets a less strict standard for allowing conflicting representations than did the Model Code. See C. WOLFRAM, *supra* note 58, § 7.2.3, at 341; Birdzell, *supra* note 69, at 1-2. *But see* 1 HAZARD & HODES, *supra* note 38, at 122 (observing that no change in the analysis was contemplated by the Model Rules). The Code prohibited such representation if "it would be likely to involve [the lawyer] in representing differing interests" and it was not "obvious that [the lawyer] can adequately represent the interest of each." See MODEL CODE, *supra* note 21, DR 5-105(B),(C) (1981). See also Commentary, *Wheat v. United States*, in I Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) COM:97, 100 (Luban ed. 1988) (noting that while the objective test in the Model Rules may be less rigid, "the distance between an 'obviousness' standard and a 'reasonable belief' standard is relatively slight").

121. Under Model Rule 1.7(a) (1983), the attorney must be convinced that the representation of one client would not detrimentally affect the *relationship* with the other client. However, under Model Rule 1.7(b), the attorney need only believe that there would be no adverse affect on the *representation* itself. Compare MODEL RULES, *supra* note 13, Rules 1.7(a) with *id.* 1.7(b). In requiring that there be no harm to the attorney-client relationship, Rule 1.7(a) sets a stricter standard than Rule 1.7(b) which only considers whether the quality of the representation will be affected. See 1 HAZARD & HODES, *supra* note 38, at 140.2. This difference in standard can be justified by the fact that "Rule 1.7(a) applies to conflicts that *will* occur and will be *direct*, whereas Rule 1.7(b) applies to conflicts that *may* arise, even if only *indirectly*." *Id.* (emphasis in original). In any case, the reasonableness of an attorney's belief that a conflict will not cause the respective adverse effects will be reviewed objectively on a case by case basis. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 84-1508 (1984) (where lawyer's own interests were the source of conflict with the client).

122. See MODEL RULES, *supra* note 13, Rule 1.7 comment, para. 4 ("The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."); 1 HAZARD & HODES, *supra* note 38, at 123.

123. See *United States v. Turkish*, 470 F. Supp. 903, 908 (S.D.N.Y. 1978) (even if multiple representation would not be inappropriate, counsel must raise the issue of a possible conflict with clients and get their consent); MODEL RULES, *supra* note 13, Rules 1.7(a)(2), (b)(2) (same).

them individually and providing sufficient information for them to reach an informed decision.¹²⁴

In reaching a conclusion as to whether her representation of either the corporation or an employee could be adversely affected by the multiple representation,¹²⁵ the attorney must consider the effect on the representation of each client's interests. In making this mandated consideration, she must recognize that during the investigation she is the only person in a position to evaluate effectively and advise the corporation and the employee of their need for vigorous, independent representation.¹²⁶ If the investigation later results in the indictment of some but not all of those an attorney has jointly represented, it is possible that those indicted may have received less than vigorous, independent representation.¹²⁷ Such a conclusion about the quality of an attorney's representation of an indicted employee-client may be drawn if, for example, the attorney's concern for the corporation had constrained her from urging the employee to seek immunity or plea bargain to a lesser offense in return for cooperation with the prosecutor because that cooperation would have harmed the corporate client.¹²⁸

124. See MODEL RULES, *supra* note 13, Rules 1.7(a), (b) (1983) (both subsections requiring consultation prior to a client's giving of consent); *id.* Terminology, para. 2 (defining consultation as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."); *infra* notes 139-55 and accompanying text.

125. Each time another employee is added to a corporate attorney's client roster, this analysis must be repeated although it gets increasingly complex. In other words, consideration of representation of the first employee client requires the attorney to examine the conflicts issue as between the corporation and that employee. However, when the second employee determination is made, the attorney must reexamine the conflicts issue as to all three clients, the corporation, the first employee and the second employee.

126. While the prosecutor may also be in a position to recognize potential conflicts, see *Turkish*, 470 F. Supp. at 908, the prosecutor's efforts to cause the disqualification of counsel because of such conflicts will often be thwarted by a court's finding that the existence of a mere potential conflict is insufficient absent strong indications that such a conflict will cause prejudice. See *United States v. Linton*, 502 F. Supp. 871, 877 (D. Nev. 1980); *In re Special Grand Jury*, 480 F. Supp. 174, 178-79 (E.D. Wis. 1979).

127. See *Turkish*, 470 F. Supp. at 908.

128. See *In re Investigation Before the February, 1977, Lynchburg Grand Jury*, 563 F.2d 652, 657 (4th Cir. 1977) (observing that an attorney's responsibility toward one client can prevent her from fulfilling her responsibility to another who could benefit from immunity, and that that conflict between clients would mean the attorney would fail to advise the second client about the possibility of immunity and fail to seek immunity for that client from the prosecutor); Tague, *Multiple Representation of Targets and Witnesses During a Grand Jury Investigation*, 17 AMER. CRIM. L. REV. 301, 306-07 (1980); cf. Maryland Comm. on Ethics, Ethics Dkt 87-39 (1987), reprinted in II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Md:Op:32, 34 (1988) (concluding that where one client has a claim against another client, representation of the claimant client would be materially limited by the attorney's responsibilities toward the other client).

If the attorney already knows that an employee has participated in the alleged illegality and thus has personal exposure, she must assess whether that employee and the corporation have defensive interests in common, or whether either could benefit by pointing a finger at the other.¹²⁹ If the position of either the employee or the corporation is not yet fully known, the attorney must still assess the likelihood of their interests becoming divergent.¹³⁰ As part of her appraisal, the attorney must appreciate that in a criminal case an employee might choose to use defensive tactics that could be incompatible with the interests of the

129. If she determines there is an actual conflict, Rule 1.7(a) applies a fairly strict standard to protect the attorney-client relationship from harm: a reasonable belief by the attorney that the attorney-client relationship with neither client will be impaired by her representation of the other is required. *See* MODEL RULES, *supra* note 13, Rule 1.7(a)(1), *quoted supra* note 118; *supra* note 121 and accompanying text. While an attorney might believe that a relationship with a large organization would not be affected, the feelings of an individual employee client might become an issue, especially if he had any concerns about getting less than full attention and protection from his attorney. *See* 1 HAZARD & HODES, *supra* note 38, at 132-33. Moreover, it would be highly unlikely that an attorney could believe that she could competently represent two clients having an actual conflict in the same matter. Doing a good job for one would necessarily mean she could not do as well for the other. *See id.* at 123. In such a situation, the attorney cannot even ask for client consent. *See* MODEL RULES, *supra* note 13, Rule 1.7 comment, paras. 4-5; *infra* notes 156-57 and accompanying text. The attorney should only advise the employee that he get independent counsel. *See* ABA Comm. on Ethics & Professional Responsibility, Informal Op. 83-1498 n.1 (1983) (where corporate counsel believed a management employee's interests had "a reasonable possibility of being in conflict with" the corporation's interests, the lawyer's duty was to give no advice except to get separate counsel); MODEL RULES, *supra* note 13, Rule 1.13 comment, para. 8; *id.* Rule 4.3 & comment.

130. *See* MODEL RULES, *supra* note 13, Rule 1.7 comment, para. 4, *quoted supra* note 122. On the question of the likelihood of conflicts developing, the discussion by the AMERICAN BAR ASS'N, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standard 4-3.5(b) (1979) [hereinafter ABA DEFENSE FUNCTION], is instructive:

The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear that:

(i) no conflict is likely to develop;
(ii) the several defendants give an informed consent to such multiple representation; and

(iii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that an attorney sometimes encounters in defending multiple clients.

In some instances, accepting or continuing employment by more than one defendant in the same criminal case is unprofessional conduct.

corporation, and vice versa.¹³¹ Such tactics for the employee could include assertion of the fifth amendment, securing of immunity from prosecution, and plea bargaining.¹³² The corporation, however, could not use the fifth amendment,¹³³ and an offer of immunity to the entity might be less likely. However, the corporation could negotiate its own plea bargain.¹³⁴ Therefore, unless the corporate attorney believes that she will be able to keep all the employee's options open without disadvantaging the corporation, she cannot represent them both.

Besides considering whether the interests of one client could affect her relationship with or representation of the other, the attorney must also determine whether her own interests could detrimentally limit her ability to be loyal to either the corporation or the employee.¹³⁵ For

131. See *Wood v. Georgia*, 450 U.S. 261, 269 (1981) (noting that an employee might obtain leniency by offering testimony against his employer or "taking other actions contrary to the employer's interests"); *United States v. Agosto*, 675 F.2d 965, 977 (8th Cir.), *cert. denied*, 459 U.S. 834 (1982) (noting that an employee might have defenses in conflict with the ones the employer might assert); HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS, *supra* note 71, at 89-90 (identifying common types of conflicts of interest between an employer and an employee based on actions each might desire to take in a criminal investigation).

132. See *State v. Hilton*, 217 Kan. 694, 538 P.2d 977, 981 (1975) (observing in disciplinary case against attorney who represented co-defendants: "The most serious conflict that might arise [in representing co-defendants] is that which occurred in this case—i.e., one defendant takes a plea and becomes a state's witness while the other goes on to trial on a plea of not guilty to the same charge."); HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS, *supra* note 71, at 89-90. See also Birdzell, *supra* note 69, at § 2.03[2][c], at 2-14 to -15; Campion & Jacobson, *Representing the Corporate Client Before the Grand Jury*, 4 LITIGATION 14, 16 (Summer 1978).

133. See *supra* note 43 and accompanying text.

134. See Cohen, *With Signed Checks, Formal Guilty Plea, Drexel Ends Ordeal*, Wall St. J., Sept. 12, 1989, § A, at 3, col. 4 (reporting that Drexel Burnham Lambert pled guilty to lesser charges to avoid an indictment on racketeering offenses). In the context of seeking a plea bargain the corporation may try to show that the employee acted outside his authority and offer to cooperate with the government's efforts to prosecute that individual. See Nat'l L.J., Sept. 25, 1989, at 6, cols. 1-2 (noting that even after Drexel Burnham Lambert's guilty plea to reduced charges, "[t]he company is continuing to cooperate with the government in the pending case against [Michael] Milken"). Since such a showing and offer would obviously be in conflict with the employee's interests, a lawyer representing both the entity and the employee would have a problem adequately representing both parties in such a situation. See G. HAZARD, *supra* note 48, at 71.

135. See *United States v. Hurt*, 543 F.2d 162, 166 (D.C. Cir. 1976) (acknowledging that competition between an attorney's interests and those of the client can corrupt the relationship); *In re Brown*, 277 Or. 121, 559 P.2d 884, 888 (1977) ("An attorney must avoid placing [herself] in a position where legal advice to [her] client might have an adverse affect upon [her own interests]."); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 84-1508 (1984) (noting that under Model Rule 1.7(b), where there are factors present in the situation that suggest representation of a client might be

example, the lawyer must examine the fact that she may be inclined to favor the corporation as the larger fee-generating client.¹³⁶ She must realize that such an inclination could be influenced both by the fees anticipated from the representation provided to the corporation in the current investigation, as well as fees she might hope to receive from future matters if the corporation were satisfied with her services. Another factor relating to fees which the attorney must recognize could influence both her decision to take on such joint representation and her ability to adequately provide such representation is the simple fact that adding the employee as a client will generate more fees for her firm.¹³⁷ Although such fee issues are insidious and therefore should be seriously considered by an attorney, too often their gravity goes unrecognized. An attorney must realize that any competition between her own interests and the client's interests may diminish the caliber of the legal representation.¹³⁸

significantly limited by the attorney's interests, she cannot reasonably believe there would be no adverse affect); Maryland Comm. on Ethics, Ethics Dkt 87-42 (1987), *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Md:Op:35, 37 (1988) (noting that the concept behind Model Rule 1.7 "is that loyalty to a client is an essential element of the lawyer-client relationship"); MODEL RULES, *supra* note 13, Rule 1.7(b)(1).

136. See *United States v. Agosto*, 675 F.2d 965, 976-77 (8th Cir. 1982) (affirming the disqualification of an attorney, who had previously represented both an employee and her employer prior to their indictment, from representation of the employee on the basis that the attorney's pecuniary interests lay with her employer), *cert. denied*, 459 U.S. 834 (1982); *In re Hochberg*, 2 Cal. 3d 870, 878-79, 471 P.2d 1, 7, 87 Cal. Rptr 681, 687 (1970) (verdict set aside where counsel's interests were primarily concerned with client who hired him and interests of co-defendant-client were ignored). If the attorney is in-house counsel, the loyalty to the employer client might also be compounded because the attorney is an employee and will have the same feelings of commitment and apprehension as any other employee. See *supra* notes 49-52 and accompanying text. The corporate attorney may try to resolve the dilemma of feeling more loyal to the corporation, as well as protect her continuous relationship with the entity, by attempting to limit the representation offered to the employee. See *infra* notes 169-78 and accompanying text.

137. See *Cole*, *supra* note 115, at 149 (noting that multiple representation in a single criminal proceeding is "the answer to a defense lawyer's dream" because she will get a larger fee, often paid by an entity). Indeed, the corporation will often pay for the employee's fees. See, e.g., CAL. LABOR CODE § 2802 (West 1971) (requiring indemnification to any employee of all expenses necessarily incurred as a direct consequence of his performance of his duties, regardless of an employee's knowledge of his acts being illegal); DEL. CODE ANN. tit. 8, § 145(b) (1988 Cum. Supp.) (permitting employee indemnification for reasonable expenses incurred where an employee acted in good faith). Where the corporation pays the employee's attorney's fees, the attorney must be doubly careful that his independent judgment is not influenced by the corporation. See *Wood v. Georgia*, 450 U.S. 261, 269-70 (1981); MODEL RULES, *supra* note 13, Rules 1.8(f), 5.4; *infra* notes 196-99 and accompanying text. If the attorney is in-house counsel, the saving of fees for the client-employer is simply another version of the same issue.

138. See *United States v. Hurt*, 543 F.2d 162, 166 (D.C. Cir. 1976) (recognizing that competition between a client's and attorney's respective interests can dilute the quality

Even assuming the attorney can validly satisfy herself that she can adequately represent both the corporation and the employee, securing both the corporation's and the employee's consent to the dual representation, as required by Model Rule 1.7, will not be easy. The consent of each client must be informed, and therefore, the attorney will need to have a fullblown discussion with each client so that they can understand the situation facing them.¹³⁹ In the case of the employee's need for information,¹⁴⁰ simply telling him that the corporation will also be a client or about the existence of the lawyer's own interests is insufficient. The attorney must recognize that while the employee would know what he did and did not do, it is unlikely that he will appreciate the legal significance of his conduct and the value of separate representation. Therefore, it is the attorney who will have to forewarn the employee of the advantages and disadvantages of multiple versus individual representation.¹⁴¹

of representation given the client); District of Columbia Bar Op. 159 (1985), *reprinted in* I Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) DC:Op:9, 10 (1987) (if attorney for an entity were to represent a constituent against an influential member of the entity's board, attorney would have to consider the potential for retaliation by the board or entity and its effect on her representation).

139. See MODEL RULES, *supra* note 13, Rules 1.7(a)(2), (b)(2). Both sections of Model Rule 1.7 use the phrase, "the client consents after consultation." See *id.* The provision of information in the required consultation must be tailored so that the individual client can appreciate the issue's significance. See *id.* Terminology, para. 2 (defining consultation). This means that the consultation content is tested on a subjective or personal standard vis a vis each client, and not merely judged on the amount or type of information provided. See Andersen, *Informed Decisionmaking in an Office Practice*, 28 B.C.L. REV. 225, 230-31 (1987). Moreover, when the lawyer considers taking on multiple clients in the same matter, as would be the case in the scenario under examination, subsection (b)(2) of Model Rule 1.7 also provides that "the consultation shall include the explanation of the implications of the common representation and the advantages and risks involved." MODEL RULES, *supra* note 13, Rule 1.7(b)(2). See also *id.* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); ABA DEFENSE FUNCTION, *supra* note 130, Standard 4-3.5(a) ("At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him or her.").

140. The corporation will also need adequate information in order to reach an informed decision. In the case of the corporation, appropriate officials must give the consent. See *Financial General Bankshares, Inc. v. Metzger*, 523 F. Supp. 744, 771 (D.D.C. 1981), *vacated on other grounds*, 680 F.2d 768 (D.C. Cir. 1982); MODEL RULES, *supra* note 13, Rule 1.13(e). The corporation's board of directors, in the exercise of their management functions could provide such consent, but the board may also delegate some of its powers to senior management. See generally H. HENN & J. ALEXANDER, *supra* note 24, at §§ 207, 212.

141. See *United States v. Alvarez*, 580 F.2d 1251, 1260 (5th Cir. 1978) (refusing to find that a layperson would be aware of the potential conflicts present in a joint

In this regard, the attorney must individually discuss with the employee all the facts, legal implications,¹⁴² possible effects and all other relevant circumstances that might relate to the proposed representation.¹⁴³ The attorney will also have to recognize that in order to provide sufficient information about the nature of the conflicts that exist or could exist between the corporation and an employee, she may have to initially secure the consent of the corporation to reveal certain confidential information to the employee.¹⁴⁴ If the corporation is unwilling to consent to such preliminary disclosure, then it will be impossible to provide adequate information to the employee about the limitations on joint representation.¹⁴⁵

representation situation); *United States v. Turkish*, 470 F. Supp. 903, 908 (S.D.N.Y. 1978) (observing that since no court is involved during the investigative stage, the only ones able to alert potential defendants to their need for individualized, independent representation is an attorney retained to provide multiple representation and the prosecutor); Model Rules, *supra* note 13, Rule 1.7 comment, para. 15 ("Resolving questions of conflict is primarily the responsibility of the lawyer undertaking the representation."); G. HAZARD, *supra* note 48, at 83 (noting that a client will not concern himself with whether there is a conflict, and that if the client actually discovers a conflict, "it represents a mistake by the [law] firm, for the firm should have seen it before the client did.").

142. One such legal implication is that the usual rules concerning attorney-client privilege may not apply for clients who use the same attorney in the same matter. Thus, under some rules of evidence, where two clients have employed the same attorney on a matter of common interest, neither will be able to assert the privilege against the other on that matter. *See* FED. R. EVID. 503(d)(5) (Proposed Draft); C. WRIGHT & K. GRAHAM, *supra* note 109, § 5505, at 548-50. However, the joint-client exception to the attorney-client privilege does not apply as to the clients' separate interests for which they desire confidentiality. *See* discussion *supra* note 109. Moreover, the joint-client exception is not applicable where the multiple representation was undertaken without an explanation of the possible conflicts and the clients' consent. *See* *Industrial Indem. Co. v. Great Am. Ins. Co.*, 73 Cal. App. 3d 529, 536 & n.4, 140 Cal. Rptr. 806, 810 & n.4 (1977).

143. *See* *Financial General Bankshares, Inc. v. Metzger*, 523 F. Supp. 744, 771 (D.D.C. 1981) (requiring full disclosure "of all the facts, legal implications, possible effects, and other circumstances relating to the proposed representation"), *vacated on other grounds*, 680 F.2d 768 (D.C. Cir. 1982); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 526 & n.3, 50 Cal. Rptr. 592, 596 & n.3 (1966) (observing that full disclosure of the facts "should include a revelation of the detriment to which the dual representation exposes the client and the possible need of representation by independent counsel").

144. *See* MODEL RULES, *supra* note 13, Rules 1.6(a), 1.7 comment, para. 5; Birdzell, *supra* note 69, at § 2.03[2][c], at 2-15.

145. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1476 (1981) (if to secure one client's consent an attorney might reveal confidences of another client, that other client's confidences cannot be divulged without his consent after telling him the possible consequences of the revelation); MODEL RULES, *supra* note 13, Rule 1.7 comment, para. 5 ("[W]hen the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.").

If there is only a possibility that the two clients' interests might become adverse,¹⁴⁶ the ability of both clients to give informed consent becomes more remote. In that situation the attorney might not be able to accurately forecast what conflicts might arise and to provide sufficient information about the potential risks¹⁴⁷ and consequences of the joint representation so that each client can knowledgeably determine if such representation will adequately protect his or its interests.¹⁴⁸ The attorney

146. Where the corporation is the subject of a government investigation for possible illegal conduct, an attorney must recognize that the likelihood of conflicting interests between the corporation and its employees is definitely present. *See United States v. Turkish*, 470 F. Supp. 903, 907 (S.D.N.Y. 1978) ("Before indictment the potential for conflict is always there although identification of the areas of potential conflict may be considerably more difficult since precise charges are not available to pinpoint those areas."); Bennett, Rach & Kriegel, *supra* note 8, at 80 (noting that "where the company is the subject or target of an investigation, there is often serious potential for the existence of a conflict between it and its employees"). However, in the beginning of the attorney's representation of the corporation, the attorney will no doubt be unable to specify who among her client's many employees will be those with adverse interests.

147. In a case where the potential conflicts involved three defendants, two of whom had pled under a plea bargain and might be called as witnesses against the third, the Supreme Court noted:

The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

Wheat v. United States, 486 U.S. 153, 170 (1988).

148. For examples of inadequate written descriptions of potential conflicts, *see United States v. Allen*, 831 F.2d 1487, 1500-01 & nn.14, 15 (9th Cir. 1987) (letter explaining conflict and waiver form found inadequate), *cert. denied*, 108 S. Ct. 2907 (1988); *United States v. Occidental Chemical Corp.*, 606 F. Supp. 1470, 1472-73 n.3 (W.D.N.Y. 1985) (letter to former employee merely contained attorney's conclusion that no present conflict existed to prevent representation of individual and the corporation and noted that employee would be dropped as a client "[s]hould a conflict arise", but did not include any explanation concerning what such a conflict could be); Lester, *supra* note 63, at 328-29 (Appendix C—sample letter to individual client where an employer has requested its attorney to represent one or more employees mentioning as the only possible conflict that the employer might assert, that the employee was acting outside the scope of his employment); U.S. Dep't of Justice, Form-DOJ-399 (1985) (Acknowledgment of Conditions of Department Representation) (form requiring federal government employees' execution and acceptance of conditions of representation where the discussion concerning conflicts between the

might be unable to provide sufficient information because she may not yet have completed her investigation, and further, she would not be fully aware of the evidence a prosecutor may have gathered against the corporation and its employees.¹⁴⁹ Nevertheless, as to the employee, the attorney would at minimum need to explain the manner in which conflicts could arise, as well as the possible strategies and defenses available to him individually which might be asserted more vigorously if he was separately represented.¹⁵⁰

The corporation is typically in a position of having its decisions made by numerous sophisticated advisors who can readily assimilate the information an attorney would provide. The corporation also may well have previously undergone the same or similar situations, and thus have already experienced how actual conflicts can arise. Thus, provision by the corporation of its informed consent for multiple representation may present no particular difficulty beyond whatever internal bureaucratic process must be satisfied. The employee, by contrast, may well be quite inexperienced in such matters and have no access to sophisticated ad-

employee and his employer is confined to the statement: "If there is a legal argument which should be made in your defense, but which conflicts with a legal position taken by the United States, or any of its agencies, in this or another case, your Department of Justice attorney will not make the argument. You will be advised of this fact so that you may assess available options."').

A lawyer's failure to give adequate information about a potential conflict has caused some courts to find ineffective waivers on the part of individual defendants whose attorneys were handling conflicted multiple representations. *See, e.g., Allen*, 831 F.2d at 1500-02 (finding that for a defendant to be adequately informed for a valid waiver, defendant must know all the risks likely to develop or at least know that risks impossible to foretell may arise); *United States v. Agosto*, 675 F.2d 965, 976-77 (8th Cir.) (ruling waiver ineffective where defendant was informed that a conflict might arise because attorney had confidential information as a result of prior representation of a co-defendant who was her employer, but was not told that conflict might arise from attorney's continued loyalty to that co-defendant), *cert. denied*, 459 U.S. 834 (1982); *United States v. Partin*, 601 F.2d 1000, 1008 (9th Cir. 1979) (noting that court would be reluctant to find waiver of conflict-free representation if the conflict issue raised on appeal had been a completely unknown contingency prior to defendant's trial), *cert. denied*, 446 U.S. 964 (1980); *United States v. Dolan*, 570 F.2d 1177, 1181-82 (3d Cir. 1978) (noting that a defendant may be unable to give informed consent where extent of prejudice is unpredictable); *United States v. Dickson*, 508 F. Supp. 732, 734 (S.D.N.Y. 1981) (same).

149. *See United States v. Flanagan*, 527 F. Supp. 902, 908-09 (E.D. Pa. 1981) (disqualifying counsel in part on basis that advice to clients about possible conflicts could not be complete in view of their ignorance of government strategy regarding the individual defendants), *aff'd*, 679 F.2d 1072, 1076 (3d Cir. 1982), *rev'd on other grounds*, 465 U.S. 259 (1984); *United States v. Carrigan*, 543 F.2d 1053, 1058 (2d Cir. 1976) (where defense counsel is uninformed as to the evidence against his clients, he may not be able to judge whether a conflict may develop between them).

150. *See supra* notes 131-34 and accompanying text.

visors.¹⁵¹ He will also feel under extreme pressure to cooperate¹⁵² and will no doubt view the discussion with the corporate attorney in which his consent is sought as a corporate request that he do so.¹⁵³ The corporate attorney must therefore take great care not to pressure the employee even inadvertently into a consent that is not knowledgeable or is inherently unfair to the employee's interests.¹⁵⁴ In this regard, an attorney must realize that providing her opinion to the employee that no conflict exists or that she can adequately represent both the corporation and the employee will influence the employee's decision.¹⁵⁵

Of course, if the attorney is already aware that the interests of the corporation and the employee are directly adverse, asking for the consent of the two parties might well be inappropriate. Even though Model Rule

151. See *Alcocer v. Superior Court*, 206 Cal App. 3d 951, 959, 254 Cal. Rptr. 72, 76 (1988); Geer, *Representation of Multiple Criminal Defendants: Conflict of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 140-41 (1978).

152. This pressure will be related both to a concern that the employee may lose his job if he fails to cooperate, see *supra* notes 50-52 and accompanying text, as well as to a concern about how he could alone find and pay for a qualified attorney. See *Commentary, supra* n.120, at 100 n.2 (noting that some defendants may accept representation provided by their "crime boss" in part because they cannot pay for a good attorney on their own); Cole, *supra* note 115, at 153 (noting that in *SEC v. Csapo*, 533 F.2d 7, 11-12 (D.C. Cir. 1976), there was some evidence that witnesses at an administrative hearing accepted multiple representation in part because of a promise that "counsel fees would be taken care of"). See also *United States v. Bernstein*, 533 F.2d 775, 788 & n.10 (2d Cir.) (disqualification of employee's counsel who was paid for by employer where consent was not knowing), *cert. denied*, 429 U.S. 998 (1976).

153. See *In re Grand Jury Investigation*, 436 F. Supp. 818, 821 (W.D. Pa. 1977) (finding that where individual being asked for consent is employee and employer is prospective defendant, "[m]erely informing [employee] of the existence of a potential conflict and seeking a waiver from [the employee] does not adequately deal with the problem of multiple representation in this situation. [The employee's] 'waiver' is likely a function in large part of one's natural hesitancy to alienate the employer rather than a product of a free and unrestrained will."); *United States v. Garafola*, 428 F. Supp. 620, 624 (D.N.J. 1977) (questioning the validity of an individual's consent to joint representation where a stronger party thrust his own attorney upon that individual), *aff'd sub nom.*, *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978).

154. In this regard, the attorney must be careful not to seek the employee's consent to representation which is limited in scope in ways that are not in the employee's best interests. See *infra* notes 169-78 and accompanying text.

155. See *In re Grand Jury Investigation*, 436 F. Supp. at 821-22 (finding waiver of conflicted representation illusory and criticizing the manner in which an attorney told his client that there might be potential conflicts while at the same time reassuring her that no conflict existed); *Garafola*, 428 F. Supp. at 624 (same); D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 147-53 (1977) (advocating that the client be permitted to make an informed decision); Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. REV. 315 (1987) (same).

1.7 seems to permit such representation when its criteria are met,¹⁵⁶ the Rule's comment observes that an attorney should not seek a client's consent to multiple representation if independent counsel would not advise an individual to make such an agreement.¹⁵⁷ Thus, if it appears impossible for one attorney to represent both the corporation and an employee without disadvantaging one or the other, neither of the criteria of Model Rule 1.7, not the attorney's reasonable belief nor the clients' informed consent, could be met. Even if no actual conflict exists at the beginning of the simultaneous representation, an attorney must continue to monitor the situation because if the two clients' interests later diverge, she may no longer be able to represent both adequately. In such a case, withdrawal may be the only appropriate option,¹⁵⁸ but at minimum the disclosure and consent steps must be repeated in order for the dual representation to continue.

Assuming Model Rule 1.7 is complied with and simultaneous representation does go forward, it is more likely that the employee will suffer than the corporation, were disadvantage to a client to occur because of the joint representation. Such disadvantage can occur if the

156. See MODEL RULES, *supra* note 13, Rule 1.7; *supra* notes 118-24 and accompanying text.

157. See MODEL RULES, *supra* note 13, Rule 1.7 comment, para. 5 ("[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."). See also Los Angeles County Bar Ass'n, Formal Op. 395 (1982), *reprinted in* 2 CAL. COMPENDIUM ON PROF. RESP. 97, 100 (1988) ("[W]here . . . there is an *actual, present, existing conflict* between the parties, any consent to dual adverse representation by an attorney will be held invalid As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed." (emphasis in original) (quoting *Valley Title Co. v. Superior Court*, 124 Cal. App. 3d 867, 882-63, 177 Cal. Rptr. 643, 652 (1981))).

158. Withdrawal from both clients may be required. See Virginia Legal Ethics Comm. Op. No. 986 (1987), *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Va:Op:29, 29-30 (1988) (concluding that where one client was offered a plea bargain in exchange for testimony against another client, the attorney must withdraw from representation of both clients). This dual withdrawal is necessary because, except in rare situations, the attorney cannot disclose or use any confidences learned from either client without their consent, especially if such disclosure would harm them. See G. HAZARD, *supra* note 48, at 81; MODEL RULES, *supra* note 13, Rules 1.6(a), 1.8(b), 1.9(b). However, an attorney would also be expected to use everything she knows and learns about a situation in representing a client. See G. HAZARD, *supra* note 48, at 81. Thus, where she has learned information from one client that could assist her representation of another, the temptation to use that information will be great; indeed the nonuse of that information may be virtually impossible. See Moore, *supra* note 115, at 64 & n.307. Withdrawal from both clients is the only real antidote to this dilemma, absent getting the consent of one client to the attorney's continued representation of the other and to the attorney's use of the information of the client whose relationship is being ended.

attorney's stronger loyalties do lie with the corporation and she thus provides the employee with less zealous representation. This outcome is particularly likely if the attorney has been representing the corporation for some time, and therefore has the corporation's interests uppermost in mind. Her consideration of the employee's interests may not be so automatic, however, and in any case may be overshadowed by the attorney's greater familiarity with the corporation's needs.¹⁵⁹

The employee may also be disadvantaged during simultaneous representation if what was a potential conflict becomes an actual divergence of the two clients' interests.¹⁶⁰ This could occur if the government prosecutor offers the employee immunity or a favorable plea bargain in exchange for his testimony against the corporation. In that instance, the corporate attorney would no doubt need to revise her perception that she is able to represent both clients without any adverse effect on her loyalty to each.¹⁶¹ If the corporate attorney withdraws from representing the employee because of the conflict, the employee will have to establish another attorney-client relationship, perhaps at a crucial stage.¹⁶²

159. See *Wood v. Georgia*, 450 U.S. 261, 266-68 & nn.11, 13 & 14 (1981) (attorney representing employees but paid by employer seemed influenced in his strategic decisions by interests of employer, not employees); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 526, 50 Cal Rptr. 592, 596 (1966) ("The loyalty [the attorney] owes to one client cannot consume that owed to the other."); Bloom, *Ethical Dilemmas in Corporate Representation*, 10 L.A. LAW., Mar. 1987, 18, 22 (noting that long-term loyalty to one client can overshadow the loyalty owed to a new client).

160. See *supra* notes 146-49 and accompanying text.

161. For example, when the attorney learns information from one client (client A) harmful to the interests of another (client B),

The attorney [will] be torn between advising B of the information learned from A, thereby breaching his confidential relationship with client A, or trying to advise client B as if the attorney did not know what client A had told him, when he knows very well that client A's revelations should have a material impact on the attorney's recommendation to B and B's decisions and courses of action.

See *In re Investigation Before the April 1975 Grand Jury*, 531 F.2d 600, 603 n.4 (D.C. Cir. 1976) (quoting with approval an amicus brief by the Public Defender Service).

162. Such a critical stage could be in the middle of a client's appearance before a grand jury. See Cohen, *Issue of Lawyer's Loyalty Is Raised by Drexel Employee's Conviction*, Wall St. J., Mar. 24, 1989, § B, at 3, cols. 1-3 (reporting the opinion of Roy Black, a criminal defense lawyer, that corporate counsel's representation of Lisa Jones, a Drexel Burnham Lambert trading assistant convicted of perjury, should have ended and separate counsel been provided for Jones at the point during the grand jury investigation when prosecutors said Jones' testimony was false, because her interests and Drexel's were then divergent, with her interest being to prevent being charged with perjury and the company's interest to continue to have her exculpate it).

The corporation could also lose the services of the attorney if the attorney's ethical

If withdrawal does occur because the two clients' interests have diverged, the corporate attorney will still owe certain duties to the employee as a former client.¹⁶³ Most importantly, according to Model Rule 1.9, she still must maintain the employee's confidences and not use them to his disadvantage absent his consent.¹⁶⁴ Conflicts of interest

duties require her to withdraw from representation of both clients. *See* Virginia Legal Ethics Comm. Op. No. 986 (1987), *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Va:Op:29, 29-30 (1988) (concluding pursuant to Model Code DR 4-101, 5-105 that where one client has been offered a plea bargain in return for testimony against another client, the attorney must withdraw from representation of both); discussion *supra* note 158. However, the corporation and its attorney may try to avoid the need to withdraw from representation of the entity by securing the employee's consent to the corporation's continued representation by the attorney. *See infra* notes 169-78 and accompanying text.

163. Arguably the attorney's withdrawal from representation of the employee converts any future conflict issue between the corporation and the employee into a conflict concerning successive or non-simultaneous representation, rather than involving a simultaneous representation situation. In considering whether an attorney's representation of multiple clients adversely affected the representation of one of them, a court may set lower standards for assessing the existence of conflicts in successive representation situations than in judging simultaneous ones. *See* *United States v. DiCarlo*, 575 F.2d 952, 957 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978); C. WOLFRAM, *supra* note 58, § 7.4.1, at 358-59. *But see* *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, 1344-45 & n.4 (9th Cir. 1981) (applying standards governing simultaneous representation even though representation had ceased prior to disqualification motion being filed so that an attorney could not convert a present client into a former client simply "by choosing when to cease to represent the disfavored client"); C. WOLFRAM, *supra* note 58, § 7.4.1, at 358-59 (same); Dee, *Sexual Harrassment Litigation: An Employer's Perspective* in *EMPLOYMENT LITIGATION 1988: A DEFENSE AND PLAINTIFF'S PERSPECTIVE* 51, 71 (Prac. L. Inst. Litigation and Admin. Prac. Series, Course Handbook Series No. 346, 1988) (same).

164. *See* *United States v. Zolp*, 659 F. Supp. 692, 722-23 (D.N.J. 1987) (defining that lawyer's duties include not revealing a client's confidences and secrets); *United States v. Standard Oil Co.*, 136 F. Supp. 345, 355 (S.D.N.Y. 1955) ("The confidences communicated by a client to his attorney must remain inviolate for all time"); *Cooke v. Laidlaw, Adams & Peck, Inc.*, 126 A.D.2d 453, 510 N.Y.S.2d 597, 600 (N.Y. Sup. Ct. 1987) (stating that ethical duties "impose a continuing obligation upon a lawyer to preserve the confidences and secrets of [the] client even after the termination of [the attorney's] employment"); MODEL RULES, *supra* note 13, Rule 1.9(b), which provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

. . . .

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 [on confidentiality] or Rule 3.3 [on candor toward a tribunal] would permit or require with respect to a client or when the information has become generally known.

The incorporation in Model Rule 1.9 of the requirements of Rule 1.6 means that an attorney may not reveal a client's confidences absent his informed consent unless otherwise authorized by the referenced Rule. *See id.* Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation,

between the attorney's former representation of the employee and her continued representation of the corporation can arise because of the duties still owed to the employee by the corporate attorney. For example, the corporation's need for zealous representation could tempt her to reveal or exploit the employee's confidential information during her representation of the corporation.¹⁶⁵ On the other hand, loyalty to the employee's interests could prevent her from representing the corporation as diligently as she might absent her duties to the employee.¹⁶⁶ In addition, the corporate attorney would be precluded from continuing to represent

except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).'').

165. See Maryland Comm. on Ethics, Ethics Dkt 87-22 (1987), *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Md:Op:15, 18 (1988) (where attorney had learned during prior representation of a wife about conduct that could be relevant in representing a husband in a divorce proceeding, continued representation of him absent her consent would violate Model Rule 1.9).

Disadvantage to the employee through the use, but not the revelation, of his confidences could occur simply because the corporate attorney is familiar with his affairs and the manner in which the employee handles himself. See *Western Continental Operating Co. v. Natural Gas Corp.*, 212 Cal. App. 3d 752, 261 Cal. Rptr. 100 (1989) (in the course of entity's previous representation by opponent's counsel, that attorney learned crucial knowledge of its internal operating procedures, as well as information concerning a key issue in the present litigation); Michigan State Bar Comm. on Professional and Judicial Ethics Op. RI-35 (1989) (digested in 5 Law. Man. on Prof. Conduct (ABA/BNA) 443 (1990)) (finding representation of a new client improper where the new client has constant and sometimes adverse contact with attorney's former client and attorney has extensive knowledge of and insight into former client's affairs); Connecticut Comm. on Professional Ethics, Informal Op. 88-4 (1988), *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Ct:Op:29, 30, 31 (1988) (corporation argued its former attorney had an impermissible level of information about its operations and thus should not be permitted to represent one of its contractors in a claim for payment). As to why there would be great temptation to use a former client's information, see discussion *supra* note 158.

166. See *United States v. Wheat*, 813 F.2d 1399, 1402 (9th Cir. 1987) (noting that an attorney's division of loyalties between former and present clients can incapacitate diligent representation of the present client), *aff'd*, 486 U.S. 153 (1988). If the corporate attorney has learned confidential information from the employee that would be helpful to the corporation, Model Rule 1.9(b) proscribes its use, and thus, because the attorney cannot use what she knows, she may be unable to give the corporation proper advice. See Virginia Legal Ethics Comm. Op. No. 1002 (1987), *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Va:Op:38 (1988) (even when former client consented to attorney's representation of hospital in a collection case against the former client, attorney could not reveal or attempt to collect against personal injury settlement of former client because that information was learned during his representation). If the attorney's representation of the corporation is significantly compromised by the attorney's mandated continued loyalty to the employee, she may have to withdraw as the corporation's counsel, unless the corporation is willing and able to give informed consent to the attorney's conflicted representation.

the corporation at all, absent the employee's consent,¹⁶⁷ since the attorney withdrew because the employee's interests had become adverse to those of the corporation concerning the very matter for which she had been representing them both.¹⁶⁸

The attorney may try to avoid being ethically constrained from continued representation of the corporation¹⁶⁹ by securing, as a precondition to her agreement to represent the employee, his consent that if she ceases being his attorney at some future point, she can continue as the corporation's counsel.¹⁷⁰ Model Rule 1.2(c) would seem to permit

167. See MODEL RULES, *supra* note 13, Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter . . . represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."). Consent by a former employee-client to the continued representation of the corporation is separate and distinct from his consent to use of his confidences. Thus, his agreement to the continued representation does not imply consent to harmful use of his confidences. See *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 229 (7th Cir. 1978) ("[C]onsent to the mere representation of a client with adverse interests does not amount to either consent to breach of confidential disclosure or to use of that information against the consenting party in litigation."); New Mexico Advisory Op. 1988-5, *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) NM:Op:52 (1988) (noting that even if a husband who was a former client consents to an attorney's representation of his wife in a divorce action, the attorney must be careful not to use any confidential information provided by the husband); Virginia Legal Ethics Comm. Op. No. 1002 (1987), *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Va:Op:38 (1988) (concluding that even when former client consented to attorney's representation of hospital in a collection case against the former client, attorney could not reveal or attempt to collect against personal injury settlement of former client because that information was learned during his representation).

168. See MODEL RULES, *supra* note 13, Rule 1.9(a), *quoted supra* note 167 (former client's consent required when representation of another client with adverse interests concerns the same or a substantially related matter).

169. Besides the ethical constraint, the attorney should realize that the government prosecutor or the employee as a co-defendant or adverse witness could move to disqualify the attorney in any judicial proceeding on the basis of the divided loyalties owed to her present client, the corporation, and her former client, the employee. See *United States v. James*, 708 F.2d 40, 45 (2d Cir. 1983) (disqualifying defendant's attorney in part because the prosecution witness who had previously been represented by that attorney joined in the prosecutor's motion to disqualify); *United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978) (disqualifying one defendant's counsel on government's motion where that counsel also had represented a co-defendant who became a prosecution witness); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 401 (S.D. Tex. 1969) (disqualifying corporate counsel on motion of employee where law firm had previously represented employee in related matter).

170. See Birdzell, *supra* note 69, § 2.02, at 2-8 (recommending that where corporate counsel is representing both the entity and constituents, there be a clear understanding that in case of future conflict, the attorney will represent the entity even if advice had been given the constituent on the conflict issue); *cf.* U.S. Dep't of Justice, Form-DOJ-399 (*quoted in part supra* note 148).

an attorney to limit the scope of her representation in this manner.¹⁷¹ However, the explanatory comment to this Rule notes that "the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [on competence]."¹⁷² Asking an employee to agree at the onset of representation by the corporate attorney to terms which include both an agreement to the termination of his own representation whenever his interests diverge from the corporation's, and also consent to the attorney's continuing representation of the corporation, might result in the representation being too limited. As in the situation of Model Rule 1.7 conflicts, the standard to be applied should be whether independent counsel would advise an employee to accept representation from someone who so obviously had primary loyalties to another person or who would be willing to end the representation precipitously, notwithstanding the employee's need for continued legal advice.¹⁷³

Seeking an employee's prior consent to the attorney's use of any and all information relating to the representation both during the attorney-client relationship and after its termination¹⁷⁴ would be an even more unacceptable practice.¹⁷⁵ While an employee could secure repre-

171. See MODEL RULES, *supra* note 13, Rule 1.2(c) ("A lawyer may limit the objectives of the representation if the client consents after consultation."). See also *id.* comment, para. 4 ("The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.").

172. *Id.* comment, para. 5.

173. *Id.* Rule 1.7 comment, para. 5, *quoted supra* note 157. See also Vermont Ethics Op. 87-18, *reprinted in* II Nat'l Rep. on Legal Ethics and Prof. Resp. (U. Pub. of Am.) Vt:Op:20 (1988) (noting that consent of a former client is inappropriate where an attorney could not be loyal to both the former and present clients).

174. One commentator recommends that whenever corporate counsel will serve as the attorney for both the entity and constituents there be an agreement that communications to counsel are not confidential in relation to the entity, and that the entity has the right to make the information available to third persons if that is in its interests. See Birdzell, *supra* note 69, § 2.02, at 2-8. With such an agreement, counsel's continued representation of the corporation would commit no violation of confidentiality as to the information received from employees he once represented, since the information was always available to the entity. *Id.* at 2-9.

175. Securing such an agreement from an employee would give corporate counsel more than she would usually have if an attorney was jointly representing two parties in the same matter. Under normal circumstances, two persons who jointly consult an attorney waive their privilege as to each other on matters of mutual concern, but not as to third persons. See *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980) ("[Joint clients'] confidential communications with the attorney, although known to each other, will of course be privileged in a controversy of either or both of the clients with the outside world." (quoting C. McCORMICK, *LAW OF EVIDENCE* § 95 at 192 (1954 ed.)); FED. R. EVID. 503(d)(5) (Proposed Draft) (providing that there is no attorney-client privilege concerning communications made by joint clients "in an action *between* any of the clients")

sentation from another attorney, he could be irreparably harmed by the use of his confidences.¹⁷⁶ Nevertheless, Model Rule 1.2(c) by its terms

(emphasis added); C. WRIGHT & K. GRAHAM, *supra* note 109, § 5505, at 557-79 (noting that a joint client may assert the attorney-client privilege against third persons and that any exception to the privilege may be limited to civil actions between the joint clients). Such an employee agreement would also give corporate counsel more than she could expect to receive if an employee had separate counsel and the two attorneys entered into a joint defense agreement on behalf of their respective clients. See *infra* notes 186-87 and accompanying text. Under such agreements, counsel agree to share information of mutual interest in the defense of their clients. See Sullivan & Africk, *supra* note 74, at 50-51; *Joint Defense Effort in Criminal Investigation: Sample Agreement*, 2 INSIDE LITIGATION, Aug. 1988, at 19. However, they also agree that such information cannot be used for any purpose other than the preparation of a joint defense, and in particular, they agree that the information is protected from disclosure to third parties. See Sullivan & Africk, *supra* note 74, at 50-51; *accord*, *In re LTV Securities Litigation*, 89 F.R.D. 595, 604 (N.D. Tex. 1981); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 391 (S.D.N.Y. 1975).

Even if the securing of such an employee agreement were not objectionable because of the conflict implicit in the gain to the corporation, counsel must still be careful about the use of a client's or former client's confidences which could operate to his disadvantage. An employee might be willing to agree that his information be shared with the corporation, without being willing to have the information used by the corporation against him and without understanding that an agreement on information sharing includes such use. Absent the consent for the latter, the attorney would be in violation of the ethical rules. See MODEL RULES, *supra* note 13, Rule 1.8(b) (providing that attorney cannot use the client's confidences to his disadvantage without his consent); *id.* Rule 1.9(b) (same as to former client); *cf.* *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 229 (7th Cir. 1978) (providing that a client's general consent that an attorney can represent an adverse party does not mean there has been agreement that the client's confidences can be used against it).

176. For example, if the employee is called as a prosecution witness in a criminal case involving allegations against the corporation and/or its upper management officials, he may find himself facing his former counsel on cross-examination. Possession of a former client's confidences allows an attorney to misuse that information in cross-examination. See *United States v. Wheat*, 813 F.2d 1399, 1402-03 (9th Cir. 1987), *aff'd*, 486 U.S. 153 (1988). Thus, the attorney may be able to ask questions eliciting facts that she learned only in the attorney-client relationship, see *United States v. James*, 708 F.2d 40, 44 n.3 (2d Cir. 1983); *Stephens v. United States*, 453 F. Supp. 1202, 1211 (M.D. Fla. 1978), *rev'd on other grounds*, 595 F.2d 1066 (5th Cir. 1979), or may be able to impeach the employee-witness using confidential information. See *United States v. DeLuna*, 584 F. Supp. 139, 144 (W.D. Mo. 1984); *Alcocer v. Superior Court*, 206 Cal. App. 3d 951, 958, 254 Cal. Rptr. 72, 75 (1988). Should his former counsel feel it necessary to take such actions in defending the corporation, the risks for the employee are that his responses may expose him to prosecution either because he is not immunized or because the matters elicited are outside the scope of his immunity. There could also be exposure to prosecution if the responses of the employee-witness are inconsistent with earlier testimony and such inconsistencies suggest he is committing or has committed perjury. See *United States v. RMI Co.* 467 F. Supp. 915, 919 (W.D. Pa. 1979) (noting that a witness' trial counsel needs to be fully familiar with the grand jury transcripts in order to assist the

does not proscribe such representational limitations.¹⁷⁷ In addition, Rule 1.8(b) contemplates that an attorney could seek a client's consent to use of his confidences even when that use would operate to his disadvantage.¹⁷⁸ The obvious question, however, is why an employee would so consent, especially if he had access to independent legal advice.

In sum, an employee may be greatly disadvantaged if an attorney seeks his consent to simultaneous representation of both himself and his corporate employer. The employee is likely to agree to such representation, but is unlikely to fully appreciate its risks. It is also unlikely that the attorney can provide an adequate explanation to the employee of the nature and extent of those risks at the outset of such representation. If the attorney presses for consent to simultaneous representation which includes an agreement giving the attorney permission to use his confidences and to terminate their relationship but continue representing the corporation, the employee could be losing his opportunity to have competent, independent representation aimed at fully protecting his interests.¹⁷⁹

witness to testify consistently with statements made to the grand jury). Finally, since corporate counsel knows her former client's personality, she may be able to conduct cross-examination in a particularly embarrassing or negative way so as to intimidate or confuse the employee-witness. Any such confusion, which is not cleared up, could also lead to charges of perjury.

177. See MODEL RULES, *supra* note 13, Rule 1.2(c), *quoted supra* note 171. In this regard it should be re-emphasized that the discussion in the Rule's comment, *see supra* note 172 and accompanying text, was not intended by the drafters of the Model Rules "to add obligations to the Rules" but only to provide guidance to them. *See id.* Scope, paras. 1, 9. Indeed, some states in adopting the Model Rules have not adopted the comments. *See, e.g.,* RULES OF PROFESSIONAL CONDUCT, N.J.L.J., July 19, 1984 (showing that the only comments published and adopted by the New Jersey Supreme Court were those stating the differences in New Jersey rules from the Model Rules). *See generally* 2 HAZARD & HODES, *supra* note 38, at App. 4 (appendix which provides state variations of the Model Rules begins with caveat stating: "Adopting states have taken different views with respect to the authoritativeness of the Official Comments").

178. See MODEL RULES, *supra* note 13, Rule 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted by Rule 1.6 [on confidentiality] or Rule 3.3 [on candor toward a tribunal].").

179. *See United States v. Turkish*, 470 F. Supp. 903, 910 (S.D.N.Y. 1978) (refusing to dismiss indictment against an employee despite allegations that his attorney had also represented employer because an implied waiver of any conflicts was found). However, even though a court might refuse to protect an employee from an ill-advised consent to conflicted representation, *see id.*, the attorney who secured the consent could still be subject to discipline for entering into a seriously conflicted representation in violation of the Model Rules. *See C. WOLFRAM, supra* note 58, § 8.2.4, at 417.

B. The Client Relationship and Attorney Duties When an Employee Has Separate Counsel

While an employee may communicate with or even be represented for a time by corporate counsel, the employee may also have contact with another attorney who has no obvious ties to the corporation—so-called separate counsel. Where the alleged illegality presents a high probability of conflict or an actual conflict exists between the interests of an employee and the corporation, the employee will no doubt have separate counsel. Separate representation can occur immediately or at some later point during the investigative stage. Because the effectiveness of the employee's representation by separate counsel can be affected by the actions of both corporate counsel and separate counsel, both attorneys must be aware of their responsibilities to ensure that the employee's representation is not compromised. This Part will therefore explore the respective duties of corporate and separate counsel toward an employee in this situation, especially where corporate counsel has referred the employee to particular separate counsel and/or the corporation will be paying that other counsel's attorney's fees.

1. *Corporate Counsel's Duties Toward the Employee.*—If corporate counsel knows before she communicates with a particular employee that his interests and those of the entity are adverse, corporate counsel cannot represent that employee personally, absent her compliance with the criteria of Model Rule 1.7.¹⁸⁰ Since such compliance is unlikely, the better course of action under those circumstances would be that she make clear to the employee that her client is the corporation and that she cannot be his attorney.¹⁸¹ This course of action would also be appropriate if the attorney had reason to believe the employee's interests were potentially

180. See MODEL RULES, *supra* note 13, Rules 1.7(a), 1.13(e); *supra* notes 118-24 and accompanying text.

181. See Oregon State Bar Op. 461 (1981), *reprinted in* Law. Man. on Prof. Conduct (ABA/BNA) Ethics Ops at 801:7107 (1980-85) (noting that a corporate attorney's loyalty to the entity would be compromised by representation of an employee if there is a conflict of interest); MODEL RULES, *supra* note 13, Rule 1.13(d) & comment (where there are adverse interests between an entity and its constituents, corporate attorney cannot represent the individual). Of course, if the corporate attorney believed she could ably represent both the employee and the corporation and fully disclosed to each of them the nature of the conflict and the risks entailed in her being the attorney for them both, and each consented to such conflicted representation, then arguably she could represent both the corporation and the employee. See *id.* Rule 1.7; *supra* notes 118-24 and accompanying text. However, the attorney would have to reasonably believe the representation of neither client would be disadvantaged by the joint representation, and this belief might not be possible if an actual conflict already existed. See MODEL RULES, *supra* note 13, Rule 1.7 comment, para. 5; *supra* notes 156-57 and accompanying text.

adverse,¹⁸² or she learned at a later point during the investigation that the employee's interests were actually adverse.¹⁸³

In such situations corporate counsel will typically provide the employee with a list of names of recommended separate counsel.¹⁸⁴ Whether or not the corporation pays for such representation,¹⁸⁵ the corporate counsel will be inclined to refer the employee to attorneys she believes will be willing to have a cooperative relationship with her as the corporation's attorney. Specifically, corporate counsel will be interested whenever possible in entering into a joint defense agreement with an employee's separate counsel. Such agreements are based on the joint defense rule which recognizes that open communication between co-defendants' attorneys on matters of common concern can assist in protecting each defendant's interests, and therefore, refuses to infer any waiver of an individual co-defendant's attorney-client privilege as to other persons from such disclosures.¹⁸⁶ A joint defense agreement between corporate counsel and an employee's separate counsel will enable corporate counsel, for example, to keep abreast of such developments as the employee's contacts with government prosecutors, his testimony before an administrative agency or a grand jury, and his defense strategies.¹⁸⁷

182. See MODEL RULES, *supra* note 13, Rule 1.7(b). *But see supra* notes 72-76 and accompanying text (discussing that Model Rule 1.13(d) only requires a corporate attorney to explain that her loyalties run solely to the entity when it is apparent the employee's interests are divergent from those of her client).

183. See MODEL RULES, *supra* note 13, Rule 1.13(d).

184. See Bennett, Rach & Kriegel, *supra* note 8, at 75, 81-82; Birrell, *supra* note 8, at 55; Sullivan & Africk, *supra* note 74, at 49. Even without corporate counsel's requiring that the employee choose a lawyer from the referral list, the chances are high that an employee will make such a choice. See Bennett, Rach & Kriegel, *supra* note 8, at 82; *infra* note 188 and accompanying text.

185. Where permitted by the corporate charter, the employee's attorney's fees may be paid by the corporation. See Bennett, Rach & Kriegel, *supra* note 8, at 82. Certain statutes also require or permit payment of an employee's attorney's fees. See *supra* note 137.

186. See *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 388 (S.D.N.Y. 1975); Raleigh, *Attorney-Client Privileges: Implementing Safeguards to Protect Them*, 24 TRIAL, May 1988, at 45, 47. For an example of a joint defense agreement, see *Joint Defense Effort in Criminal Investigation: Sample Agreement*, *supra* note 175, at 19. See also Sullivan & Africk, *supra* note 74, at 50 (discussing what statements should be included in a joint defense agreement).

187. See *Hunydee v. United States*, 355 F.2d 183, 184-85 (9th Cir. 1966) (protecting under joint defense rule one defendant's statement that he would plead guilty); *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964) (protecting under joint defense rule attorneys' exchange of memoranda concerning information relating to their clients' appearances before a grand jury); *In re Grand Jury Subpoena Duces Tecum*, 406 F. Supp. at 384-85 (protecting under the joint defense rule memoranda concerning interviews and discussions related to a Securities Exchange Commission investigation and lawsuit). See *generally Privileged Communications*, *supra* note 15, at 1648-49.

Since the employee will be inclined to accept as his attorney a referral made by corporate counsel, rather than trying to find an attorney on his own,¹⁸⁸ corporate counsel must be careful that those attorneys she selects for the employee to consider will not compromise the effectiveness of the representation the employee will receive. Model Rule 4.4 could be applicable in this situation, in cautioning the corporate attorney not to use means that disadvantage the employee.¹⁸⁹ Once again, however, the attorney might be able to avoid discipline under this Rule if she argued that the substantial purpose of referring employees to cooperative lawyers was not to harm them, but rather was to advance her representation of her client, the corporation.¹⁹⁰

Once the employee has secured separate counsel, he can still be harmed by corporate counsel unless she insures that her relationship with his attorney is not structured in a way that allows her to control or otherwise influence the attorney-client relationship that the separate counsel has with the employee. For example, if the corporation will pay for the employee's attorney's fees and corporate counsel is the corporate agent who authorizes such payment, she might be tempted to use her authority improperly, such as causing the timeliness of fee payments to be implicitly linked to particular instances of cooperation or non-cooperation by the employee's separate counsel.¹⁹¹ Any such misuse of

188. The reasons for such acceptance is at least two-fold. First, the employee probably has little experience or confidence in finding an attorney on his own. See Bennett, Rach & Kriegel, *supra* note 8, at 82 (noting that employees often seek suggestions concerning attorneys). Second, the employee will continue to be concerned about his image in the eyes of his employer, and will want to avoid looking non-cooperative, since he may perceive he is already "in trouble." See *supra* note 52 and accompanying text.

189. See MODEL RULES, *supra* note 13, Rule 4.4, *quoted supra* text accompanying note 99.

190. By indicating that an attorney "shall not use means that have no substantial purpose other than to embarrass, delay, or burden" another, Model Rule 4.4 seems to permit such an argument. See *id.*; *supra* note 100 and accompanying text.

191. Such an abuse of power by the corporate attorney could not only occur in the manner and speed with which fee payments are made to the employee's separate counsel, but also through the setting of fee levels. See *United States v. Aiello*, 814 F.2d 109, 112-14 (2d Cir. 1987) (observing that if the facts on remand demonstrated that one defendant's attorney was in a position to determine the level of attorney's fees for other defendants' counsel as well as whether such fees were paid, that attorney would have an impermissible conflict because of the control he would have over the other attorneys). Even if the corporation is not the payment source for the employee, the corporate attorney could make his willingness to provide information needed by separate counsel in representing the employee dependent on separate counsel's own cooperation. Another source of harm could occur if corporate counsel states or implies that any future referrals of other employees to the employee's separate counsel will depend on the amount of cooperation between separate counsel and corporate counsel concerning this employee's representation. See *infra* notes 200-02 and accompanying text.

power by the corporate attorney could directly or indirectly influence separate counsel's independent professional judgment on behalf of the employee. Since separate counsel cannot ethically permit such interference by one who pays or recommends her, such as a corporation,¹⁹² the corporate attorney would commit professional misconduct if she induced separate counsel to allow the representation of the employee to be influenced by the corporation's interests.¹⁹³ Even if she could escape the charge of inducing separate counsel's violation,¹⁹⁴ arguably the corporate attorney who attempted to interfere with an employee's attorney-client relationship with other counsel could also be charged with conduct prejudicial to the administration of justice.¹⁹⁵

Because corporate counsel's primary loyalties will lie with the corporation, an employee's vulnerability to corporate counsel's actions can continue unabated even after he secures independent representation. Absent corporate counsel's awareness of these issues, she can cause prejudice to the employee, as well as problems for both herself and the other attorney.

2. *Separate Counsel's Duties Toward the Employee.*—The employee embroiled in corporate illegalities will not enjoy the needed, fully independent representation from the attorney who is retained to provide him individual representation unless that attorney realizes that too close

192. See MODEL RULES, *supra* note 13, Rule 1.8(f)(2) ("A lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"); *id.* Rule 5.4(c) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services").

193. See *id.* Rule 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another . . ."). Such inducement could also be charged if the corporate attorney was found to be the cause of separate counsel's providing payment for the future referrals. See discussion *infra* note 202 and accompanying text.

194. Since any such inducement must be done "knowingly", see MODEL RULES, *supra* note 13, Rule 8.4(c), it is possible that the corporate attorney could avoid a charge of professional misconduct if she made no overt statement concerning the criteria for future referrals to the separate counsel. However, the Model Rules define the term "knowingly" as "actual knowledge of the fact in question" including that "[a] person's knowledge may be inferred from circumstances," see *id.* Terminology, para. 5, and therefore the entire circumstances of an attorney's conduct would be examined in any such instance.

195. See *id.* Rule 8.4(d) ("It is professional misconduct to . . . engage in conduct that is prejudicial to the administration of justice."). While the scope of Rule 8.4(d) is not clear on its face and has been criticized as too vague, see 1 HAZARD & HODES, *supra* note 38, at 566-67, one court has held otherwise. See *Howell v. State Bar*, 843 F.2d 205, 208 (5th Cir.) (holding that the phrase "prejudicial to administration of justice" was neither overbroad nor vague on its face as case law, court rules, and "lore of profession" provide sufficient guidance), *cert. denied*, 109 S. Ct. 531 (1988).

a relationship between corporate counsel and herself can corrupt her professional judgment. Model Rules 1.8(f) and 5.4(c) warn separate counsel to guard against influence when the corporation has referred the employee¹⁹⁶ and/or is paying the employee's attorney's fees.¹⁹⁷ In addition, Rule 1.8(f) requires that an attorney who is being paid by another for her representation of a client must insure that her client is informed about the payment arrangement and consents to it.¹⁹⁸

Assuming the employee's consent is secured, separate counsel must still be aware of the ways in which her representation of an employee might be influenced. For example, to protect against one form of influence when the corporation is to pay her fees, she should insist on a payment agreement that makes clear the level of her fees and the billing and payment circumstances in order to minimize any temptation by the corporation to control either her employee-client or her representation of the employee through the delay or withholding of fee payment.¹⁹⁹

Besides guarding against any form of direct influence, the employee's attorney must also consider the effect on her loyalty to her client that

196. See MODEL RULES, *supra* note 13, Rule 5.4(c), *quoted supra* note 192.

197. See *id.* Rules 1.8(f), 5.4(c) (both rules *quoted supra* note 192, requiring that an attorney not allow his independent judgment to be influenced by one who pays the attorney's fees of a client). Arguably the standard in Model Rule 1.8(f) for assessing the impact on the attorney's representation of influence by the one paying the fees is stricter than that in Model Rule 1.7(b) for assessing the effect of the lawyer's responsibilities to a third party. Rule 1.8(f) prohibits representation unless "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship," *see id.* Rule 1.8(f), while Rule 1.7(b) only prescribes representation if it "may be materially limited by the lawyer's [other] responsibilities." *See id.* Rule 1.7(b). *But see* 1 HAZARD & HODES, *supra* note 38, at 166-67 (arguing that no different standard was intended).

198. See MODEL RULES, *supra* note 13, Rule 1.8(f). *See also* United States v. Bernstein, 533 F.2d 775, 787-88 (2d Cir.) (affirming trial court's disqualification of employee's counsel who was paid by employer because consent was not knowing), *cert. denied*, 429 U.S. 998 (1976).

199. *Cf.* Cohen, *Drexel Puts Its Milken Defense Team on Strict Budget: \$1,250,000*, Wall St. J., Oct. 4, 1989, § A, at 3, cols. 2-3 (reporting on Drexel Burnham Lambert's attempts to cut legal costs by imposing budgets on the law firms representing Drexel employees and by keeping "close tabs on consultants the lawyers hire, documents they copy and overtime they pay to secretaries and paralegals"). Separate counsel must also be aware that under many corporate statutes, indemnification of an employee is discretionary and contingent upon a determination that the employee acted in good faith and with a reasonable belief that his actions were in the best interests of the corporation. *See* DEL. CODE. ANN. tit. 8, § 145(b) (Supp. 1988). Separate counsel may therefore need to give specialized advice to the employee if the corporation is only willing to pay the employee's attorney's fees contingent on the employee's promise to repay such advance if it is subsequently determined that he does not meet the statutory criteria. *See id.* § 145(e); Birrell, *supra* note 8, at 57-58.

her interest in securing more employee referrals may have.²⁰⁰ The temptation to respond to corporate counsel with inappropriate cooperation concerning separate counsel's representation of the employee²⁰¹ might be great because it is unlikely separate counsel would remain on the corporation's referral list if she was perceived as obstreperous. There is, however, a fine line between having a professional attitude of not being unnecessarily uncooperative and being overly cooperative so that corporate counsel will look favorably upon the manner in which separate counsel is representing the employee. If separate counsel were to provide inappropriate cooperation to the corporate attorney in response to the direct or indirect promise of more referrals, that cooperation could be viewed as an advance payment for the corporate attorney's recommendation of separate counsel in violation of Model Rule 7.2(c).²⁰²

This possibility that the loyalty of the employee's own attorney might be diminished by her desire to have other employee referrals also falls within the scope of Model Rule 1.7(b). That Rule prohibits a lawyer from representing a client if that representation would be materially limited "by the lawyer's own interests," unless the Rule's criteria are met.²⁰³ It bears repeating that the critical criteria of Rule 1.7(b) are the determination by the attorney that the conflict will not adversely affect the representation and the securing of the client's consent, after full disclosure concerning the implications of the conflicted representation.²⁰⁴ All of the issues concerning whether an employee can truly consent to such a conflict are also present in this situation.²⁰⁵

200. See New York State Bar Ass'n Comm. on Prof. Ethics, Op. 584 (1987) (digested in 4 Law. Man. on Prof. Conduct (ABA/BNA) 27, 28 (1988) (observing that an attorney who accepts repeated referrals from one source might be tempted in her ethical duties and must therefore be particularly careful about influences on her professional loyalty and independence). Model Rule 1.7 requires the attorney to consider whether his own interests may materially limit his representation of a client. See MODEL RULES, *supra* note 13, Rule 1.7(b), *quoted supra* note 119; see also *infra* note 210. In situations where a criminal defendant has alleged on appeal that his representation was affected by conflicts associated with a lawyer's pecuniary interests, some courts have concluded that where those pecuniary interests are merely speculative, they will presume that the attorney has not subordinated his professional obligations to such personal financial interests. See *Nance v. Benson*, 794 F.2d 1325, 1328 (8th Cir. 1986); *United States v. DiCarlo*, 575 F.2d 952, 957 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978).

201. An example of inappropriate cooperation would be entering into or remaining in a joint defense agreement, see *supra* notes 186-87 and accompanying text, when that agreement is not in the employee's best interests.

202. Such inappropriate cooperation would violate Model Rule 7.2(c) because the Rule provides that, except for limited exceptions not here relevant, "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services . . ." See MODEL RULES, *supra* note 13, Rule 7.2(c).

203. See *id.* Rule 1.7(b), *quoted supra* note 119.

204. *Id.* See also discussion *supra* notes 118-24 and accompanying text.

205. See *supra* notes 139-57 and accompanying text.

Concerning the nature of the lawyer's own interests that are contemplated within Rule 1.7(b)'s coverage, the Rule's comment emphasizes that it applies to situations where an attorney's other responsibilities or interests could affect her ability to "consider, recommend or carry out an appropriate course of action for the client."²⁰⁶ Unfortunately the comment provides little guidance as to those attorney interests that can cause conflict with her client(s), resulting in detrimental limitation of the lawyer's representation.²⁰⁷ There is a single paragraph under the heading "Lawyer's Interests" that begins by making the general statement: "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."²⁰⁸ Neither of the two specific examples described in this comment paragraph alert an employee's attorney to the type of conflict that can involve an attorney's self-interest in the client-referral situation,²⁰⁹ nor is there discussion in that section concerning the conflicts issue associated with the payment of a client's fees by another.²¹⁰

Notwithstanding this lack of emphasis in the Model Rules as to ways in which separate counsel's zealous representation of an employee-client might be compromised, she must consider carefully whether a conflict does exist between her own interests and those of her client. If

206. See MODEL RULES, *supra* note 13, Rule 1.7 comment, para. 4.

207. See *id.* at paras. 1-15.

208. *Id.* at para. 6.

209. The first example provides that "a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee." *Id.* (citing to Model Rule 1.1, 1.5). The second example concerns conflicts that can arise because of the attorney's business interests. *Id.*

210. In another section of the Model Rule 1.7's comment and without highlighting how the situation epitomizes an attorney's self-interest, it is observed: "A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client." *Id.* para. 10 (citing Rule 1.8(f)). As an example of such payment from another source, the comment recognizes that a corporation may pay for separate representation of its employees in a controversy where the entity and the constituents have differing interests. *Id.*

Notwithstanding this lack of focus within the explanatory discussion of Model Rule 1.7(b) for what can be a most insidious self-interest, some commentators believe that Model Rule 1.8(f) "is largely superfluous, for its treatment of situations in which one party pays a lawyer to provide services for another adds little to Rule 1.7(b)." 1 HAZARD & HODES, *supra* note 38, at 166. This Article cannot agree with that opinion unless the official comment to Model Rule 1.7 is amended to include the pointed observation made by those commentators in their discussion of Rule 1.7(b): "In each [case in which a third party pays for a lawyer's service to a client] a danger exists that the lawyer will tailor . . . her representation to please the third party rather than the client. The distraction can become acute if the lawyer hopes to be rehired on behalf of other clients, and so curries favor with the payor of [her] fee." *Id.* at 141.

she determines any such conflict exists, she must also consider carefully whether she will be able to make decisions concerning the employee's representation in an impartial manner which is truly in his best interests and not in her own.

Given that conflicts could arise in this situation, under Model Rule 1.7 separate counsel must not only reasonably believe that her representation of the employee will not be adversely affected, but also must secure his consent after consultation.²¹¹ As part of that consultation, not only would she have to inform the employee that she does hope more referrals would be made to her, but also she would have to explain how that desire could potentially affect her decisions concerning his representation.²¹² Additionally, if separate counsel does receive additional referrals from the corporation on the same matter, there might be a need to discuss with both the original employee-client and the new referral how their individual interests are or could become in conflict and what the effect would be on their individual representations, as well as to secure their informed consents.²¹³

Regardless of whether an employee was referred to separate counsel or found the attorney on his own, separate counsel must consider carefully the interests of the employee. One situation requiring such special consideration could occur if the employee was represented for a while by corporate counsel, with the decision to secure separate counsel having been made when a conflict with the corporation became apparent. Since the reason the employee secured separate counsel was the divergence of his and the corporation's interests, the need to protect the employee's interests may be acute given that corporate counsel had a confidential relationship with him.²¹⁴ For example, where the employee had a former

211. See MODEL RULES, *supra* note 13, Rules 1.7(b)(1), (2); *supra* note 139 and accompanying text.

212. A lawyer's duty to inform the client about a potential conflict arising from the lawyer's own self-interest is more exacting than her duty to explain other forms of conflict. See *Stanley v. Board of Professional Responsibility*, 640 S.W.2d 210, 211-12 (Tenn. 1982); Law. Man. on Prof. Conduct (ABA/BNA) at 31:507 (1984). While the author is doubtful that lawyers are having such consultations with their clients, an attorney in such a representation situation needs to be more aware that her interest in additional referrals does create conflicts, as well as to realize that Model Rule 1.7(b) requires her to consider the effect of that type of personal interest on her representation. See MODEL RULES, *supra* note 13, Rule 1.7(b)(1). The Rule also intends by its requirement of client consent after consultation to give the client a certain level of choice and control concerning his own representation. See *id.* Rule 1.7(b)(2). See also *id.* Rule 1.2(a) & comment, para. 1 (requiring that the lawyer allow the client to make decisions concerning the representation).

213. See MODEL RULES, *supra* note 13, Rule 1.7(b).

214. Where there has been an attorney-client relationship, many courts presume confidential information has been provided by the client to the attorney, absent a showing

representation relationship with corporate counsel, his new attorney will want to determine whether the employee should agree or disagree to the corporate attorney's continued representation of the corporation.²¹⁵ Separate counsel should also monitor whether the employee will need to waive or enforce corporate counsel's duty to maintain his confidences and not use them to his disadvantage in the course of her continued representation of the corporate client.²¹⁶ This monitoring will be especially necessary if the employee is either a witness against or a co-defendant with the corporation in a criminal case. If necessary, the employee can assert these interests in the form of a pre-trial motion to disqualify corporate counsel.²¹⁷

that no confidences were given. See *United States v. Shepard*, 675 F.2d 977, 980 (8th Cir. 1982); *United States v. Provenzano*, 620 F.2d 985, 1005 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); *United States v. Standard Oil Co.*, 136 F. Supp. 345, 354-55 (S.D.N.Y. 1955).

215. Under Model Rule 1.7, corporate counsel should have secured the employee's consent for the original simultaneous representation of both the corporation and the employee. See *supra* notes 123-24 and accompanying text. Arguably, however, once the employee became a former client, his consent was also needed for the attorney to continue to represent the corporation if the corporation's interests were materially adverse to those of the employee. See MODEL RULES, *supra* note 13, Rule 1.9(a); *supra* notes 167-68 and accompanying text; *but see* discussion *supra* note 163. Even if such consent(s) were secured, the employee's separate counsel must consider whether an argument should be made concerning the informedness and voluntariness of that consent. See *supra* notes 169-78 and accompanying text.

216. For examples of when such protection could be needed, see discussion *supra* note 176. See also MODEL RULES, *supra* note 13, Rule 1.9 (forbidding an attorney's use of representational information without the consent of a former client). The former client's consent refusal can result in disqualification of the corporate counsel. See *United States ex rel. Stewart v. Kelly*, 870 F.2d 854, 858 (2d Cir. 1989) (lack of consent from witness for his former attorney to cross-examine him as part of representation of defendant was part of basis of attorney's disqualification); *United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978) (same).

217. Courts may take seriously the objection of a former client to the representation of one with adverse interests. See *United States v. James*, 708 F.2d 40, 45 (2d Cir. 1983) (considering as an important factor in its decision to disqualify defendants' attorney that the prosecution witness who had previously been represented by that attorney joined in the prosecutor's motion to disqualify). However, some courts have to be convinced that the attorney did in fact represent the individual alleging the conflict and that confidences were provided in the course of the representation. Compare *id.* at 42 (disqualifying defendant's counsel who had also been attorney for prosecution witness over a period of 7 years), with *United States v. FMC Corp.*, 495 F. Supp. 172, 174-75 (E.D. Pa. 1980) (refusing to disqualify corporate defendant's counsel where law firm had also represented employee-witnesses before grand jury but where those former clients stated they had given no confidential information to the firm's lawyer). *But see* *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 395 (S.D. Tex. 1969) (concluding that an attorney may not defend a motion to disqualify by showing she received no confidences because not only confidences but also the attorney-client relationship itself deserves protection); *Western Continental*

An employee may also need his separate counsel to move to disqualify corporate counsel from continued representation of the entity and to maintain the confidentiality of his conversations even where no formalized attorney-client relationship ever existed between the corporate attorney and the employee. If the employee had reason to believe he had an attorney-client relationship with the corporate attorney, his interests may be protectible.²¹⁸ However, such protection for the employee is less likely where there was no formal relationship.²¹⁹ In either case, whether there was an express or implied relationship between corporate counsel and the employee, the employee needs impartial, zealous representation by separate counsel who will not lightly advise the employee to ignore or waive his interests.

IV. PROPOSALS TO STRENGTHEN THE DUTIES OF ATTORNEYS WHO DEAL WITH EMPLOYEES

An employee is very vulnerable in a relationship with an attorney who represents his corporate employer. Even if she decides to provide the employee with individual representation while representing the corporation, his interests may not be fully protected because of the serious conflicts which can impact on such multiple representation. Moreover, retaining separate counsel for the employee will not necessarily result in fully loyal representation because that separate attorney may also be subject to conflicts, both personal in nature and arising out of her representation of other employees. Because these conflicts can exist, no attorney may be zealously protecting the employee's interests, and the lower-echelon employee may be poorly prepared to protect himself.

This Article has demonstrated that the Model Rules do not provide sufficient guidance to attorneys concerning the special risks faced by a corporate employee. It is vital for the employee that the Rules provide such guidance because during a corporation's initial, internal investigation the Rules are the only constraint on the manner in which an individual attorney conducts the representation of her client or clients and on whether that representation harms non-clients.²²⁰ This Part therefore proposes several changes to these Rules in an effort to provide more protection for the employee. The purpose of the proposed changes is

Operating Co. v. Natural Gas Corp., 212 Cal. App. 3d 752, 761-62, 261 Cal. Rptr. 100, 104-05 (1989) (same); MODEL RULES, *supra* note 13, Rule 1.9 (making the securing of a former client's consent to an attorney's representation of another having adverse interests in the same or a similar matter a separate requirement from the protection of the former client's confidences).

218. See *supra* notes 104-09 and accompanying text.

219. See *id.*

220. See *supra* note 22 and accompanying text; *infra* note 221.

to minimize the abuse of employees by making the Rules state more clearly that both corporate and separate counsel must treat any employee in a manner that recognizes his special interests.²²¹

A. *The Unrepresented Employee and Corporate Counsel—Model Rules 1.13(d), 3.4(f) and 4.3*

Model Rule 1.13(d) does not require a corporate attorney to immediately clarify her role when she approaches an unrepresented employee for an interview during the course of an investigation,²²² notwithstanding that an employee's misunderstanding of the attorney's role can cause him grave disadvantage. The Rule therefore fails to adequately recognize the risks for the employee and gives a corporate attorney the impression that she can conduct an intensive investigative interview of an unrepresented employee without first fully clarifying that the information the employee gives can be used in the corporation's interest, even if that interest is adverse to the employee's interest.²²³ Additionally Model Rule 3.4(f) permits the corporate attorney to ask an employee to refrain from talking to a government prosecutor without providing the employee with information sufficient for him to evaluate whether complying with that

221. Making such changes should provide an employee with increased protection but might not totally resolve his dilemma. The employee could still be vulnerable because, while the Model Rules contemplate that attorneys who do not live up to those standards will be disciplined, *see* MODEL RULES, *supra* note 13, Scope, para. 5, Rule 8.4(a); *Standards for Imposing Lawyer Sanctions* (ABA Center for Prof. Resp. 1986), *reprinted in* Law. Man. on Prof. Conduct (ABA/BNA) at 01:801-51 (1986), the Rules offer no direct assistance to an employee who has been harmed because an attorney has failed to consider his interests appropriately. *See* MODEL RULES, *supra* note 13, Scope, para. 6 ("Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached."). Thus, even if an employee could demonstrate that an attorney should be disciplined for violation of a Model Rule, discipline might be an inadequate remedy for the individual and no other might be available, especially if no attorney-client relationship existed between the employee and the attorney who committed the Rule violation. *See* *Hackett v. Village Court Assoc.*, 602 F. Supp. 856, 858 (E.D. Wis. 1985) (in the absence of special circumstances, an attorney cannot be held liable for the manner in which she conducts her representation to anyone other than her client); *McGlone v. Lacey*, 288 F. Supp. 662, 665-66 (D.S.D. 1968) (same). As to ways in which the employee can be injured by the corporation's attorney, *see supra* notes 10-16, 38-40, 56, 169-79, 191 and accompanying text. *See also* *DeLuca v. Whatley*, 42 Cal. App. 3d 574, 117 Cal Rptr. 63 (1974) (affirming dismissal of complaint against a defense attorney brought by individual claiming injury because he was called as a witness at a preliminary criminal hearing by the defendant's attorney without the attorney advising him of the possibility of criminal prosecution if he incriminated himself, and because his testimony caused him to be charged with crimes, although he was acquitted).

222. *See* MODEL RULES, *supra* note 13, Rule 1.13(d); *supra* notes 72-83 and accompanying text.

223. *See supra* notes 10-16, 28-29, 69-71 and accompanying text.

request best serves his personal interests.²²⁴ The Rules thus set different standards for an attorney's conduct with an unrepresented employee than with other unrepresented individuals, and give virtually no recognition to the fact that the employee personally may be greatly disadvantaged if the attorney is permitted to consider only the corporation's interests.

The Rules which govern a corporate attorney's ethical conduct toward the unrepresented employee must provide more consideration of the personal risks for that individual by requiring more protection of the employee's interests in this common situation. Such greater protection can best be achieved by requiring more candor on the part of the corporate attorney so that the employee can fully comprehend the situation. Thus, a logical amendment would be to conform Model Rule 1.13(d) to Rule 4.3's requirement that any misunderstanding about the lawyer's role be corrected.²²⁵ While such an amendment would eliminate any perception that unrepresented employees could be treated any differently than other unrepresented persons, this change does not go far enough because it still requires the attorney to decide whether or not the individual has a misunderstanding of her role. A better approach would strengthen the language of Model Rule 4.3 to emphasize the underlying purpose of requiring disclosure about the attorney's role, which would include her client's position.²²⁶ Model Rule 4.3 should therefore be modified to mandate that any attorney who contacts any unrepresented person must immediately explain exactly where her loyalties lie in the situation, as well as her client's interests. Model Rule 1.13(d) should then be modified to require conduct in conformance with Rule 4.3, if the employee is unrepresented, and Rule 4.2, if he has separate counsel.²²⁷

For these reasons, Model Rules 4.3 and 1.13(d) should be amended as follows:

*MODEL RULE 4.3*²²⁸

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall [not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding] *assume that the unre-*

224. See *supra* notes 84-91 and accompanying text.

225. See MODEL RULES, *supra* note 13, Rule 4.3; *supra* notes 77-80 and accompanying text.

226. See *supra* notes 78-80 and accompanying text.

227. See MODEL RULES, *supra* note 13, Rule 4.2, *quoted supra* note 92.

228. In these proposed amendments, additions are in italics, and deletions are bracketed.

*presented person does not understand the lawyer's role in the matter, and the lawyer shall immediately and carefully explain to the unrepresented person the lawyer's role and the client's interest in the matter.*²²⁹

MODEL RULE 1.13

. . . .

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall [explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing] *immediately ascertain whether the constituent is personally represented or unrepresented, and the lawyer shall thereafter conform any dealings with the constituent to rule 4.2 or 4.3, whichever is applicable.*

Besides these changes to these Rules, the comment for Model Rule 4.3 should be expanded to make clear that the mandated explanation of the attorney's role must be tailored to the type of misunderstanding an unrepresented individual could have. For example, if it is unlikely that a lower-echelon employee would appreciate how his interests could differ from those of his corporate employer, the attorney's explanation of her role and her corporate client's interest in the matter must be sufficient to provide such an employee with that understanding. Moreover, in order that attorneys will better recognize that such a situation is within the scope of Rule 4.3, the Rule's comment should use a meeting by corporate counsel with an unrepresented employee as one of its descriptive examples.²³⁰ The comment for Rule 1.13(d) should also be

229. This language is similar to that of Louisiana's version of Model Rule 4.3. See Louisiana State Bar Rule 4.3, *quoted in* 2 HAZARD & HODES, *supra* note 38, App. 4, at LA:4. The state bar committee which proposed this variation adopted by Louisiana believed that a lawyer must assume an unrepresented person would not understand the situation. Telephone interview with Wood Brown III, immediate past president of Louisiana State Bar and member of rule revision committee (July 28, 1989). Indeed, some were of the opinion that the warning should go even farther and that the unrepresented individual should be told in so many words, "Look I'm the enemy. Don't assume I'm your friend. If possible, I'll use what you tell me against you." *Id.*

230. Such an example was part of the draft comment to Rule 1.13(d). See Model Rules of Professional Conduct, Rule 1.13 (Final Draft) comment "Clarifying the Lawyer's Role," *reprinted in* 68 A.B.A.J. 1411 (1982). This draft comment stated in pertinent part: The fact that the organization is the client may be quite unclear to the organization's officials and employees. . . . The result of such a misunderstanding can be embarrassing or prejudicial to the individual if, for example, the situation is such that the attorney-client privilege will not protect the individual's communications to the lawyer. . . . [I]f the lawyer is conducting an inquiry involving

rewritten to emphasize that the employee's interests and rights cannot be ignored by the corporate attorney, and the comment should cross-reference Rule 4.3.²³¹

Changes to Model Rule 3.4(f) are also needed in order to further ensure that the employee has sufficient information to protect himself. Thus, this Rule should also incorporate a requirement that an attorney explain her role and the client's situation to an employee before requesting that employee to refrain from talking to the other party. Such a requirement would lessen the chance that the employee would not understand that the basis for the request was grounded in protecting the corporation's interests and not his own.

MODEL RULE 3.4

A lawyer shall not:

. . . .

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; [and]

(2) *the lawyer has fully explained to the person the lawyer's role and the client's interest in the matter; and*

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Each of these changes in Model Rules 1.13(d), 3.4(f) and 4.3 require a corporate attorney to provide an unrepresented employee with information that permits the individual to better protect his own interests. Given that there is no other protection within our justice system for the employee at that time, these requirements are not too much to ask of the corporate attorney when balanced against the risks for the employee who, because he was given no such forewarnings, misunderstands that the attorney is not going to protect him.

B. The Employee as a Client of Corporate Counsel—Model Rules 1.2(c), 1.8(b), 1.7 and 1.9

An employee may be willing to consent to representation by corporate counsel because he sees his interests as aligned with his employer, the

possible illegal activity, a warning might be essential to prevent unfairness to a corporate employee. See also Rule 4.3.

Id. See also MICHIGAN RULES OF PROFESSIONAL CONDUCT, Rule 1.13(d) & comment (1988) (adopting the originally proposed version of Model Rule 1.13(d) and comment).

231. See *supra* note 230 for quotation of draft comment to Model Rule 1.13(d). See also MICHIGAN RULES OF PROFESSIONAL CONDUCT, Rule 1.13(d) & comment (1988) (adopting the originally proposed version of Model Rule 1.13(d) and comment).

corporation. However, it is unlikely that the employee's view is a fully informed one, in part because of the employee's legal inexperience and in part because even a lawyer would find it difficult to know whether potential conflicts will ever become actual.²³² Because there is a strong possibility for overbearing in the situation where a corporation's counsel asks for an employee's consent in connection with joint representation of him and the entity,²³³ Model Rules 1.2(c), 1.7, 1.8(b) and 1.9 should be amended to ensure that any consent secured from an employee is as voluntary and as well informed as is possible under the circumstances.

Each of these Model Rules permits certain conduct by an attorney if the client consents after consultation. Rule 1.2(c) permits limits on the scope of representation;²³⁴ Rule 1.7 allows representation of one or more clients despite the existence of a conflict between the clients or with the attorney;²³⁵ Rule 1.8(b) permits the attorney to seek the client's consent to the disadvantageous use of his confidences;²³⁶ and Rule 1.9 permits both subsequent representation of a client with interests adverse to a former client and use of that former client's information to his disadvantage.²³⁷ Given that the employee's consent to one or more of these situations could work to his detriment, each of these rules needs to be amended to ensure adequate safeguards of employee interests. Appropriate safeguards would include a recommendation and an opportunity for the employee to consult other, independent counsel²³⁸ and

232. See *supra* notes 146-55 and accompanying text.

233. Some commentators argue that an attorney should not enter into multiple representation in a criminal case where one client can dominate the other. See 1 HAZARD & HODES, *supra* note 38, at 134-35 (Illustrative Case (b)).

234. See MODEL RULES, *supra* note 13, Rule 1.2(c); *supra* notes 169-71 and accompanying text.

235. See MODEL RULES, *supra* note 13, Rule 1.7; *supra* notes 117-19 and accompanying text.

236. See MODEL RULES, *supra* note 13, Rule 1.8(b); *supra* note 178 and accompanying text.

237. See MODEL RULES, *supra* note 13, Rule 1.9; *supra* notes 163-68 and accompanying text.

238. Use of independent counsel would comply with the concern of the appellate court in *United States v. Wheat*, 813 F.2d 1399, 1403 (9th Cir. 1987) (" 'Because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver' " (quoting *United States v. Lawriw*, 568 F.2d 98, 104 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978))), *aff'd*, 486 U.S. 153 (1988). See also *United States v. Friedman*, 854 F.2d 535, 572-74 (2d Cir.) (finding defendant's waiver to conflict-free representation sufficient in part because he had had time to consult with independent counsel), *cert. denied*, 109 S. Ct. 1637 (1988); *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986) (finding defendant's waiver to conflict-free representation to be invalid in part because the defendant was not given time to consider the issue or consult with independent counsel);

a requirement that the consent be in writing.²³⁹ Thus, the proposed amendments would be similar to requirements which the Model Rules already provide in another situation where the potential for domination is significant, that of an attorney entering into business relations with his client.²⁴⁰ The additional language that should be appended would be as follows, using Model Rule 1.7 as an example:

MODEL RULE 1.7

. . . .

(c) When representation is undertaken of multiple clients in a single matter who are already in a relationship with each other in which one client could overbear the other, such as could occur between employer and employee, the consultation and consent required by this rule shall include:

(1) full disclosure and explanation of any actual or potential conflict of interest, the implications of the common representation, and the advantages and risks involved;

Alcocer v. Superior Court, 206 Cal. App. 3d 951, 955, 254 Cal. Rptr 72, 73 (1988) (on suggestion of the court, independent counsel retained to advise the defendant of risks of being represented by an attorney who had divided loyalties).

Of course, requiring that an employee be told he can consult other, independent counsel and be given an opportunity to do so raises the issue of who will pay for that independent consultation. If the independent counsel is paid by the corporation, then the same conflicts are arguably present that are present when any attorney for an employee is paid by the corporation. See *supra* notes 191, 197-99 and accompanying text. However, since the scope of representation by the consulting attorney would be quite limited, both in duration and scope, the temptation to favor the corporation over the employee would be less pronounced. Thus the independent counsel should be able to provide the necessary advice without having the corporation's payment of her fee adversely affect the representation. If the employee has to pay for consultation with independent counsel, he might decide not to avail himself of that opportunity. However, if he declines the opportunity after hearing that a conflict exists and that independent counsel could provide unbiased guidance on whether his representation by conflicted counsel would be detrimentally limited, the employee's choice should be respected. The point of this Article's proposals are to empower the employee to the greatest extent possible by requiring that he be provided with adequate information on which to base his decisions.

239. Requiring that the consent be in writing would protect not only the client, but the attorney as well. See Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 346-47, 350-51 (1980) (within a proposed statute codifying a cause of action for an attorney's failure to adequately inform her client, a client's consent in writing which included a statement of legal and practical consequences would create a presumption of disclosure).

240. See MODEL RULES, *supra* note 13, Rule 1.8(a) (requiring, in situations where an attorney enters into a business transaction with her client, that the terms be fair for the client, provision to the client of an understandable and complete written statement of those terms, opportunity for the client to consult independent counsel, and written consent by the client).

(2) *advice to each client in writing that the client may seek the advice of an independent lawyer of the client's own choice, and a reasonable opportunity for each client to do so; and*

(3) *consent in writing by each client to the multiple representation.*

The amendment to Model Rule 1.9 would track the Rule 1.7 proposal by requiring that the consent of a non-dominant member of an existing relationship concerning a conflict of interest be secured in a more careful manner.²⁴¹ There would also need to be appropriate changes to the explanatory comments for both Model Rules 1.7 and 1.9. In particular, there should be a more coherent discussion in the comment to Rule 1.7²⁴² and some mention in Rule 1.9's comment of the conflicts that perennially exist between the corporation and its employees. There should also be much more emphasis in the comment to Rule 1.7 about the manner in which both corporate and separate counsel can have personal conflicts that impact on their ability to loyally represent an employee.²⁴³

Changes to Model Rules 1.2(c) and 1.8(b) to achieve conformity with the proposed specialized consent requirement might best be handled by an amendment by which each cross-references to the other Rules. The need to comply with the specialized consent format would depend on whether conflict of interest issues were involved. The proposal for Rule 1.2(c) is set out in the text and the similar change for Rule 1.8(b) is in an accompanying footnote:²⁴⁴

241. For Model Rule 1.9, the following language should be added as a new final subsection:

(c) If the lawyer seeks to represent a person who is already in a relationship with a former client in which that other person could overbear the former client, such as could occur between employer and employee, the consultation and consent of the former client required by this rule shall include:

(1) full disclosure and explanation of any actual or potential conflict of interest between the former client and the other person, the implications of the contemplated representation and/or the use of the former client's representational information, and the advantages and risks for the former client;

(2) advice to the former client in writing that the former client may seek the advice of an independent lawyer of the former client's choice, and a reasonable opportunity for the former client to do so; and

(3) consent in writing by the former client to the representation of the other person and/or the use of the former client's representational information.

242. In this regard the Model Rule 1.7 comment should at minimum better interrelate its section dealing with the lawyer's own interests and the section discussing the conflict arising from another paying for a client's attorney's fees. See *supra* notes 203-10 and accompanying text (discussing the present weaknesses in these sections). A cross-cite to Rule 1.8(f) would also be appropriate.

243. See *supra* notes 135-38, 200-02 and accompanying text.

244. Model Rule 1.8(b) should be amended as follows:

MODEL RULE 1.2

. . . .

(c) A lawyer may limit the objectives of the representation if the client consents after consultation. *If the limits on the representation are related to any actual or potential conflict of interest under rules 1.7, 1.8 or 1.9, the required consultation and consent shall comply with the consent and consultation defined in that relevant applicable rule.*

Appropriate changes to these Rules' explanatory comments should also be made. For example, the comment for Model Rule 1.2(c) would benefit from an incorporation of the statement in the comment to Rule 1.7 that a lawyer should not ask for consent when an independent attorney would conclude the individual should not agree to representation under those circumstances.²⁴⁵

These changes in Model Rules 1.2(c), 1.7, 1.8(b) and 1.9 are each designed to provide an employee with more information as well as to ensure that a recommendation is made and an opportunity given to get independent advice. While the amendments will not guarantee that an employer will not still try to dominate an employee, they do provide a format that should assist in diminishing that control. They also alert lawyers to the issue and require them to take steps to better protect employees. Following this format will also protect the lawyer and his client should there be later challenges to the validity of an employee's consent.

C. *The Employee as a Referral Client—Model Rules 1.7, 1.8(f) and 1.9*

An employee who is referred by corporate counsel to separate counsel would obviously benefit from ethical rules which conspicuously remind both corporate counsel and his own attorney of the more subtle conflicts underlying the representation relationship, especially when the separate counsel is being paid by the corporation.²⁴⁶ In this regard and as already

A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by rule 1.6 or rule 3.3. *If the consent for use of confidential client information is sought in connection with any actual or potential conflict of interest under rules 1.7, 1.8 or 1.9, the required consultation and consent shall comply with the consent and consultation defined in that relevant applicable rule.*

245. See MODEL RULES, *supra* note 13, Rule 1.7 comment, para. 5, *quoted supra* note 157.

246. See *supra* notes 191-202 and accompanying text.

suggested, Model Rule 1.7 should more clearly highlight in its explanatory comment the inherent personal conflicts for an attorney that can exist in this situation.

Model Rule 1.8(f) does allow a corporation's payment of an employee's attorney's fees if the client consents after consultation and the lawyer's professional independence is ensured.²⁴⁷ As with the other rules involving a client's consent, Rule 1.8(f) would better protect the employee's individual interests if its consent feature was strengthened to also require that the individual's agreement be in writing as well as that there be an opportunity to consult independent counsel. With those changes the Rule would read as follows:

MODEL RULE 1.8

. . . .

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:²⁴⁸

(1) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; [and]

(2) information relating to representation of [a] *the* client is protected as required by rule 1.6;²⁴⁹ *and*

(3) the client consents after consultation. *If the client and the person who is providing compensation are already in a relationship with each other in which that other person could overbear the client, such as could occur between an employer and employee, or if the client was referred to the lawyer by the person who is providing the compensation (or by that person's agent) and the lawyer could receive referrals of other clients in the same matter, the consultation and consent required by this rule shall include:*

(i) *full disclosure and explanation of every actual or potential conflict of interest the client may have with either the lawyer or the person providing the compensation, the implications of any such conflict, and the advantages and risks of the contemplated representation;*

(ii) *advice to the client in writing that the client may seek the advice of an independent lawyer of the client's own choice,*

247. See *supra* notes 197-98 and accompanying text.

248. For purposes of clarity, the order of the subsections has been altered in the proposal concerning Model Rule 1.8(f). In the present version the subsection concerning the client's consent is first. In the proposed amendment, the consent subsection has been placed last. Except for the change in order, no other changes have been made to the Rule's other two subsections.

249. Model Rule 1.6 concerns confidentiality of client information.

*and a reasonable opportunity for the client to do so; and
(iii) consent in writing by the client to the representation
and the payment by the other person.*

As with the similar changes proposed for the earlier discussed Model Rules, this amendment of Rule 1.8(f) will start off the relationship with separate counsel on the right foot. If counsel follows the recommended consent format, the employee will be fully informed about any possible conflict of interest that might adversely affect the representation. Besides these changes to the Rule itself, additional discussion in the Rule's comment concerning the issues underlying subsection (f) would be useful in helping attorneys become aware of this very common issue.

Finally, an employee who is referred by corporate counsel to separate counsel after having already received representation by corporate counsel will obviously benefit from the already discussed proposal concerning Model Rule 1.9 which requires more formalities in order to secure consent to the new or continued representation of a person with adverse interests or for the use of a former client's confidences. These added consent requirements will assist the employee's separate counsel in protecting the client's interests, especially the use by corporate counsel of the employee's confidences.

V. CONCLUSION

Corporate employees clearly have important personal interests at stake when their corporation's activities come under criminal investigation by government officials. Whenever an employee communicates with corporate counsel concerning his participation in any alleged illegalities, the employee may jeopardize his personal constitutional rights not to incriminate himself and to have effective, independent representation. Unfortunately the lower-echelon employee is often unaware of these risks and is unlikely to appreciate that the corporate attorney has no loyalty to him or that he may need the aid of independent counsel.

Given the great likelihood that conflicts of interest will exist between the corporation and its employees in criminal cases, this Article has explored the extent of the ethical duties of both the corporate attorney and separate counsel in various types of relationships with the lower level employee. The Article has also considered the more insidious personal conflicts experienced by lawyers that can adversely affect the representation provided an employee by either the corporate attorney in a multiple representation situation or by separate counsel to whom the employee was referred and who is being paid by the corporation.

Because attorneys are the only protection an employee has for his interests during the investigative stage, the Article concludes that the Model Rules of Professional Conduct should provide more guidance to

attorneys in both representation and non-representation situations involving corporate employees. Proposed amendments to the Model Rules make two key suggestions: (1) that in any dealings with an unrepresented person, an attorney must immediately explain her role as a lawyer and the interest of her client in order to avoid any misunderstanding by such a person; and (2) that more formalized consent procedures must be used whenever there is both a likelihood of a conflict and a situation where one party, like a corporation, has the power to unduly influence the decisionmaking of another, such as an employee. Lawyers' recognition of the need for these principles, as well as their implementation, will help ensure that an employee will not be subject to abuse by his employer or its attorney.

