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CASE STUDY 4: LAWYER FOR A COALITION OF ORGANIZATIONS WITH AN INFORMAL LEADER

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I. CASE FACTS

Organization A ("A-Org") is a statewide section 501(c)(4) advocacy group with five offices, including a local office in B Town, a low-income community of color.[1] It is the biggest and most sophisticated advocacy group in B Town due to the experienced leadership at its central office and because it is one of very few organizations in the community with a full-time staff.

When a housing developer came to B Town, making promises about jobs and affordable housing, while advancing zoning changes through local government agencies that would permit luxury condos and cause rampant displacement, A-Org decided to launch a major campaign to either stop the project or fight for a Community Benefits Agreement ("CBA")—a written contract that would specify benefits the development would provide to the community and remedies for failing to meet benchmarks. A-Org called every potential ally it could find: local elected officials, small business owners, local labor groups, churches and faith groups, and every community-based organization in the area. Few of these groups were sophisticated about real estate development, and some even accepted the developer's spin, but A-Org

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1. The definition of a section 501(c)(4) organization is stated in the Internal Revenue Code as follows:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

I.R.C. § 501(c)(4) (2012).

believed that assembling a broad coalition of stakeholders would be the best way to mount a meaningful challenge.

While reaching out to local organizations, A-Org also called the nearby law school's Community Economic Development ("CED") Clinic. A-Org asked the CED Clinic to help it draft a survey for groups that might ultimately form a coalition with A-Org. The survey aimed to identify aspects of the proposed development that might have community support, points of shared concern about the proposal, and potential advocacy partners who might join A-Org in a fight to make the project work better for the community. A-Org and the CED Clinic agreed that they would discuss whether there would be any legal work after the survey results were in and after A-Org had a clearer sense of the views of other groups in the area.

After reviewing the survey results, A-Org decided to invite all the groups that filled out the survey to join with them to discuss forming a coalition (the "Coalition"). Over the course of a series of meetings, the groups that in fact decided to join the Coalition agreed to support a statement of broad principles, including: the developer should tell the public how many units of affordable housing would be built and how affordability would be measured; the developer should provide an estimate of how many jobs the project would likely create and whether or not those jobs would be short-term or permanent; and the developer should provide some basic protections for renters and small business owners who would otherwise be displaced.

The CED Clinic and the Coalition then agreed that the Clinic would represent the Coalition—and not A-Org as an individual member. The Clinic therefore entered into a written retainer agreement with the Coalition signed by the appropriate representatives of all of its thirty-five members: twenty non-profit organizations and fifteen small businesses. The CED Clinic agreed that it would help the Coalition with transactional legal matters related to the development of a CBA, including: counseling on possible advocacy strategies and researching potential provisions; advising the Coalition on how best to utilize the public comment period offered by the state land use process; and negotiating the terms of any CBA with the developer and local government.

Initially, there was some division between non-profit members of the Coalition, which were primarily concerned about employment and housing issues, and small business members, which were primarily concerned with maintaining their commercial tenancies in local buildings. Specifically, the small business owners worried that their

buildings would be sold to the developer, who would then force the small businesses out.

At the Coalition's request, the CED Clinic helped the Coalition's members to draft a brief Memorandum of Understanding ("MOU") that outlined basic rules for the group's operations based on the processes that had developed over the course of the Coalition's first few meetings. In keeping with the general consensus of the Coalition members, the MOU was brief, principally stating that most decisions would require majority approval based on a one-member, one-vote rule. Pursuant to the MOU, non-profit members could vote on all issues, but small business owners were only allowed to vote on issues directly connected to protections for their businesses.

From the very start of the representation, the CED Clinic's legal work and the Coalition's organizing took place in a context of extreme time pressure. The developer and local government leaders were pushing to approve zoning changes and sell government-owned properties to the developer within weeks after the Coalition's launch.

As one of the most sophisticated members of the Coalition—the founding organization and one of the few members with full-time staff who could devote their time to this project—A-Org became the Coalition's central coordinator. As a result, A-Org and the CED Clinic came to develop a direct line of communication, although A-Org's role as the Coalition's leader remained informal.

While A-Org and the Coalition generally followed the one-member, one-vote rule laid out in the MOU, some of A-Org's staff made requests directly to CED Clinic students. For instance, it became clear that A-Org wanted to make the interests of the small business owners a focus of the Coalition's advocacy, likely because A-Org believed the businesses would have more influence with local elected officials than churches or tenant groups. In order to encourage the small business owners to be more vocal about the risks they faced in the Coalition's meetings with local elected officials, at public hearings, and in meetings with the powerful Chamber of Commerce, A-Org sometimes pressed the Clinic to do things for small business members that the Clinic would not have the resources to do for other members—like make a presentation to three small business members on how the developer's plans were likely to impact the specific block where their storefronts were located. Although all Coalition members were invited to this presentation, it was targeted to the small business owners and came about because of A-Org's focus on small business issues. The broader Coalition never made a decision to prioritize small business concerns. Although not appearing to be in violation of the terms of the MOU, which did not address how

information could be shared or discussed outside of twice-weekly all-member meetings, CED Clinic students felt that this focus on business owners may have been unfair to other members of the Coalition.

Given these case facts, consider the following questions:

1. What should have been done to clarify the role of the CED Clinic at the outset? Did the Clinic lawyer have an ethical duty to encourage the Coalition to vote to formalize A-Org's role, even if the time-sensitivity of the effort meant that further discussions around internal procedures had the potential to distract from the Coalition's important advocacy efforts?
2. Were there any conflicts of interest that arose from the Clinic's representation of the Coalition while dealing with A-Org as informal leader? What, if anything, might the Clinic have done to avoid or minimize any conflicts?

II. ANALYSIS

A. Organizational Representation Issues

Questions one and two are related in that it is the Clinic's failure to clarify A-Org's role that gives rise to the concern about conflicts of interest. The issue is who has authority to speak on behalf of the Coalition as client and what responsibilities, if any, the Clinic has in helping to create a clear decision-making structure for the Coalition.

Rule 1.13 of the Model Rules of Professional Conduct states only that a lawyer for an organization has a duty to represent the entity through its "duly authorized constituents."[2] The rule, however, gives no guidance on how to structure decision-making bodies and processes, permitting the lawyer to make her own determination about whether to take a more or less interventionist approach. This issue is particularly thorny in the context of coalition representation, in which larger, more powerful groups may hold sway. A lawyer representing a coalition may instruct the group on basic principles for good group decision making and allow the group to decide how it wants to move forward. Alternatively, the lawyer may direct the group more firmly, encouraging it, for example, to set up its structure in a way that protects the voices of less powerful constituents within the coalition.[3]

2. MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 2018).

3. Stephen Ellmann has done a detailed analysis of these options. *See* Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1120-22 (1992).

In the case facts presented above, when the Coalition is formed, the member groups and the Clinic lawyer establish some rules governing how the group will function and make important decisions. To codify those rules, Coalition members sign a brief MOU, which establishes a basic procedure for voting on proposals before the Coalition and limits small businesses' voting rights. While these provisions are crucial, they turn out to be insufficient as a tool for making thoughtful decisions regarding routine matters where important de facto organizational practices emerge over time, without any formal vote.

We see two important ethical issues in this scenario. The first relates to the formal limitation of the small business owner members' voting rights. The second is A-Org's emergent role as the leader of the Coalition's work and the principal point of contact with the Coalition's legal counsel.

With respect to the small business owner members, they are in the minority of the Coalition (fifteen of thirty-five members), and the lawyer therefore might be concerned that their interests are not adequately represented in Coalition decision making. Indeed, precisely because of their minority status, one might be concerned that the limitation on their Coalition voting rights is a product of their structural lack of power. The Clinic could ethically treat this as an internal Coalition decision about a fundamental aspect of group structure and thus defer; or the Clinic lawyer could raise questions about whether this structure adequately served the Coalition's broader goals, what the underlying rationale was, whether everyone agreed with it, and whether the small business owners understood and accepted what it meant. Particularly since A-Org later emphasizes small business interests in its advocacy efforts, after the MOU was created to limit the influence of small business members in the Coalition, it seems that there are different views about the role of small businesses in the CBA campaign that should have been more fully aired and discussed at the outset.

With respect to A-Org's emerging leadership role, the lawyer might be concerned that by permitting A-Org to coordinate the Coalition's work, A-Org could come to exercise a degree of power over the group that would be in tension with the egalitarian principles laid out in the MOU. Although the case facts state that A-Org generally complied with the one-member, one-vote principles of the Coalition, the facts also indicate that A-Org was back channeling with Clinic students to advance the interests of the small business owners. This, as we explore below, is a situation rife with the potential for conflicts of interest.

In terms of designing the Coalition structure, it is always good organizational practice for all members to approve, through their chosen

decision-making process, a single member's leadership role. Our question has to do with legal ethics: To what degree is it an ethical obligation of the lawyer to cause the Coalition client to formally approve A-Org's coordinating role?

A lawyer may be tempted to let leadership roles develop organically among coalition members—either out of a client-centered deference to the internal governance choices of the coalition or out of a desire to see the most sophisticated, competent, or assertive members take the lead in order to maximize effectiveness. This might especially be the case in a context in which groups have committed to some measure of organizational democracy and where external time pressures mean that any delay in undertaking the substantive advocacy work threatens to derail the entire effort.[4]

But there are good reasons for a lawyer to encourage the client to pay attention to how the day-to-day work of a coalition is coordinated and how coalition leaders communicate with counsel. Advocacy coalitions, especially when they are relatively new, small, or informal, can be easily influenced by a de facto coordinator, even one seeking in good faith to advance the goals of the coalition as best as it can—which appears to be true in these case facts.[5] The de facto coordinator, even when well-intentioned, threatens the integrity of the approved governance processes of the coalition and the lawyer has an ethical obligation to raise this with the coalition to avoid problems of authorization and communication.[6]

There are a few potential problems in the case facts. First, is the Clinic lawyer taking direction from someone who is not a "duly authorized" constituent, either because A-Org is not authorized to make decisions at all or because A-Org is not duly authorized to make the specific decisions in question? Absent express approval by the Coalition's members, the lawyer cannot take direction from a de facto leader. Allowing leadership roles to develop organically does not mean that the leaders are "duly authorized" per Rule 1.13(a), which implies some type of formal authorization from the Coalition itself. Even assuming that A-Org is authorized to make decisions, there is the additional problem of whether its decisions are so self-interested as to

4. Deference to internal organizational rules is likely commonplace in other forms of group representation, even when it means that one party will dominate the group client. For instance, four co-founders of a business might each own twenty-five percent of a firm, but one founder could still dominate the decision-making process through assertiveness, a willingness to take on additional administrative work, or because of different owners' risk tolerance.

5. *See* Ellmann, *supra* note 3, at 1148-53.

6. *See infra* Part II.B; *see also* MODEL RULES OF PROF'L CONDUCT r. 1.3, 1.4.

amount to a breach of fiduciary duty, which could trigger the lawyer's reporting up obligations under Rule 1.13(b),[7] or whether A-Org is making decisions that are simply unwise, triggering the lawyer's duties under Rule 1.1 and Rule 1.4 to make sure A-Org is better informed and to advise against what the lawyer believes to be bad judgments.

In this scenario, the Clinic lawyer encounters the Coalition just as it is forming, but there are significant issues that the lawyer should be careful to explore, including the expectations of the various groups, how they came to join the Coalition, whether any have separate legal counsel, and whether the person claiming to speak on behalf of each group is authorized to do so. It is often the case that individual member groups do not fully understand that the lawyer represents the coalition as a whole and not the individual members, and identifying this clearly in both written and oral communication with members is essential.

Choices regarding how a coalition works with legal counsel may be a quintessential part of client decision making under Rule 1.2. The allocation of decision-making power between client and lawyer depends in part on who is empowered to speak on behalf of a client and on what issues.[8] For a coalition client without a formal hierarchy, clear guidelines should be established early in the attorney-client relationship in order to enable the lawyer to comply with Rule 1.2 without having to rely on assumptions and mere apparent authority. A lawyer, of course, has significant power to shape the priorities and strategy of a coalition client. Therefore, a lawyer working with a coalition should encourage the coalition client to develop a clear, multi-stakeholder process for how to work with legal counsel in order to be certain that the coalition is driving its own agenda—not the lawyer and not the single coalition member tasked with administrative coordination of the legal work.

We conclude that it is a best ethical practice for the lawyer representing a coalition to encourage the coalition to develop clear processes around selecting people or groups responsible for specific day-to-day tasks, including coordination with the coalition's legal counsel. Although there is no need for the specifics of the process to be defined or controlled by the lawyer, the client should be given enough information to appreciate how failing to have a clear policy on

7. MODEL RULES OF PROF'L CONDUCT r. 1.13(b) ("If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, . . . and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization.").

8. *See generally id.* r. 1.2.

communication can lead the lawyer to improperly understand the priorities and perspectives of the full coalition, which has the potential to impact the coalition's overall efforts. In short, a lawyer must have a clear understanding of who the "duly authorized constituents" of the client group are; identifying those representatives clearly at the outset is critical to avoid ambiguity and potential conflicts later on.[9]

B. Conflict of Interest Issues

As discussed above, in representing a coalition of groups, where each group member has its own governance structure and decision-making policies, a lawyer has an ethical duty to ensure: (1) that the representatives of each group member participating in the coalition have the authority to speak or act on behalf of that group, and (2) that the coalition's leadership is duly authorized to act on behalf of the coalition generally. In turn, each coalition member must be clear about whom, exactly, the lawyer represents. We stress that the lawyer has to represent the coalition as an entity and not each member individually. The lawyer should make this clear at the outset, preferably in writing.

This clarity is essential to avoid conflicts of interest and to avoid the risk that a member will misunderstand the lawyer's role representing the entity. As we will discuss, avoiding conflicts in this scenario is important because, should a conflict arise between the Coalition and any one of its members, the Clinic could be required to withdraw from representing the Coalition if it is unable to obtain consent from all affected parties. Under Rule 1.16(a)(1), a lawyer must withdraw from representing a client if such representation "will result in violation of the rules of professional conduct," which of course includes representation in the face of a prohibited conflict of interest.[10]

In the case facts presented, we see two potential conflict issues, each implicating the question of whether the Clinic has followed its duty to represent the Coalition as an entity, rather than the interests of its individual members.

The first conflict issue arises from how the Clinic came to represent the Coalition in the first instance. A-Org spearheaded the initial campaign against the developer and came to the Clinic after already having engaged in preliminary organizing to lay the groundwork for a CBA. A-Org's original request was for the Clinic to help it

9. *Id.* r. 1.13(a).
10. *Id.* r. 1.16(a)(1).

conduct a survey of potential members as a foundation for pulling the Coalition together.

There are a couple of potential problems here. One is that, by undertaking the survey project, the Clinic could be understood to have represented A-Org in a prior matter before the Coalition representation in the CBA campaign. In this situation, A-Org would be considered a past client. Whether this were true would depend on the extent to which the survey project involved the Clinic in providing legal representation to A-Org—as opposed to simply providing non-legal strategic or capacity-building support.[11] It is not clear from the case facts whether the survey support was provided in the context of what A-Org reasonably understood to be the Clinic's broader commitment to help A-Org legally structure the Coalition to mount a CBA campaign.[12]

Assuming the Clinic did represent A-Org in the survey matter, it would be important for A-Org to understand that specific representation had terminated, and the Clinic's full loyalty ran to the Coalition once the Coalition was accepted as a client. The facts state this was the case. Yet it must be stressed that the Clinic would want to avoid any ambiguity that might arise from A-Org's belief that it still had a direct channel to the Clinic stemming from its original engagement with regard to the survey.

To be cautious, the Clinic might evaluate the situation under the former client conflict rules set forth in Rule 1.9. Under this approach, the Clinic would start by treating A-Org as a past client due to its representation of A-Org in drafting the survey. Rule 1.9(a) prohibits lawyers who have previously represented a client in a matter from representing another "person" in the same or a substantially related matter if that person's interests are materially adverse to those of the former client, unless the former client gives informed, written consent.[13] At the outset of the Coalition representation, although the matters are

11. Our position is that a lawyer may provide non-legal and non-law related services to clients that do not implicate the rules of professional conduct. Although there are some things non-lawyers can do (like lobbying) that become legal or law-related when done by a lawyer, there are other actions, perhaps like survey preparation, that do not become law-related just by virtue of being done by a lawyer. Rule 5.7 presumes that the Model Rules of Professional Conduct apply to all law-related services provided "in circumstance that are not distinct from the lawyer's provision of legal services." *Id.* r. 5.7(a)(1). However, there is still a question of whether services like survey support qualify as "law-related"—i.e., those that "might reasonably be performed in conjunction with and in substance are related to the provision of legal services"—in the first instance. *Id.* r. 5.7(b). To clarify that services are not contemplated as legal or law-related, it is advisable to clearly state that at the outset of the work.

12. One way that the Clinic might have addressed this problem would have been to make clear at the beginning that it was representing the Coalition to-be-formed.

13. *See* MODEL RULES OF PROF'L CONDUCT r. 1.9(a).

substantially related, there is nothing to suggest that there is any material adversity since the Coalition's and A-Org's interests are aligned. One could imagine divergence. For instance, the Coalition's other members could vote to support a CBA deal that A-Org opposes. In that event, a conflict could arise between the Coalition (of which A-Org is a part) and A-Org itself. Although it might be preferable to consider such a disagreement as simply one member getting outvoted pursuant to Coalition rules, in the Rule 1.9 framework, this could be considered a past client conflict that would require the informed written consent of A-Org to proceed.

The problem with this past client logic is that it would give A-Org power to block the Clinic's representation of the Coalition if a conflict occurred. To avoid this risk, the Clinic might consider drafting a conflicts waiver at the outset, under which A-Org agreed to waive any conflicts that might arise between it and the Coalition in the CBA negotiation. The *Restatement of the Law Governing Lawyers* takes a cautious view of such waivers, disapproving of open-ended, general agreements to consent to all future conflicts, though acknowledging that clients with "sophistication in the matter" may be able to consent to future conflicts, particularly those "that are familiar to the client."[14] However, as discussed below, this standard generally applies to waivers of conflicts in concurrent representation. Waivers by past clients (as we are treating A-Org here) of future conflicts in the same or substantially related cases are disfavored. As the Seventh Circuit stated in the successive conflict case of *Westinghouse Electric Corp. v. Gulf Oil Corp.*,[15] "it is impossible to conclude that a client could ever have any reasons to desire that information disclosed in confidence should be utilized against him."[16]

Nonetheless, there are reasons to believe that a conflict waiver here could be legitimate. The potential future conflict—that A-Org and the Coalition disagree about the terms of a CBA—does not clearly place the Clinic lawyer in the position of using A-Org's confidential information against it. And it is important to stress that A-Org is the entity motivating the creation of the Coalition in the first instance precisely to give broader voice to other groups in shaping the terms of the CBA. In this context, it seems like A-Org as a sophisticated actor should be able to shift full decision making to the Coalition and full representational power to the Clinic lawyer without the specter of a conflict undercutting

14. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 122 cmt. d (AM. LAW INST. 2000).

15. 588 F.2d 221 (7th Cir. 1978).

16. *Id.* at 229.

the Clinic's work. Under this logic, it would be prudent for the Clinic to obtain a waiver of future conflicts from A-Org, taking care to be specific about the nature of the potential conflicts that could arise and inviting A-Org to seek advice from outside counsel to ensure it understood the waiver. Such a waiver from A-Org would be a good, if imperfect, measure of protection for the Clinic's work for the Coalition in the event that a material divergence in views between the Coalition and A-Org were to arise.

Thus far, we have focused on whether the survey project created a lawyer-client relationship between the Clinic and A-Org. But there is another layer to consider. Specifically, the Clinic would also want to be certain that, in conducting the survey, it did not take on the individual representation of *any other Coalition member groups* by gaining access to their confidential information and taking other actions that might give rise to a reasonable inference of individual member representation. In *Westinghouse Electric Corp. v. Kerr-McGee Corp.*,[17] a law firm purporting to represent a trade group was held to have also represented its members under a quasi-lawyer-client relationship theory when the law firm conducted surveys of member group activities under conditions in which the members reasonably believed they were being represented and conveyed confidential information to the law firm.[18]

During the survey, the Clinic could avoid this problem by: (1) making clear, in writing, that it represented the Coalition-to-be-formed (not A-Org); (2) making clear, in writing, that it did not represent any of the individual member groups being surveyed; and (3) taking care not to convey the impression of member representation in any communications. This would require the Clinic to have a mechanism for ensuring that any identifiable confidential information acquired from the members in the course of the survey would not be handled in such a way as to give rise to an inference of individual member representation. If any member reasonably believed that it was an individual client of the Clinic as a result of the survey project (as was the case in *Kerr-McGee*), then once again the Clinic could confront a conflict situation if the individual member's interests ended up diverging from the Coalition's interests during the course of CBA negotiation. If that occurred, and the individual member refused to consent, the Clinic might have to withdraw from representing the Coalition in the CBA matter. The Clinic could avoid this outcome by making it clear in the retainer that member

17. 580 F.2d 1311 (7th Cir. 1978). This case came out of the same set of facts as the *Gulf Oil Corp.* case discussed *supra*.

18. *Id.* at 1318-21.

information collected in the survey would be for the use of the Coalition, as the Clinic's client; that the Clinic would keep the information confidential because of its duty to the Coalition; and that the Clinic did not represent any of the Coalition members individually despite collecting the information.[19]

Building on this analysis, the second conflicts issue relates directly to the Clinic's relationship with A-Org in the CBA matter. The Clinic's retainer agreement should clearly state that it represents the Coalition and not the individual Coalition members. However, the pre-existing and ongoing relationship with A-Org raises ethical concerns. Earlier, we discussed the consequences of treating A-Org as a *past* client. Here, we want to focus on what would happen if A-Org was considered to be a *current* client. Because of its prior relationship with the CED Clinic, A-Org may reasonably believe that the Clinic continues to represent its individual interests. If the Clinic is representing the Coalition and A-Org reasonably believes, based on its ongoing direct access to the Clinic, that the Clinic also represents A-Org, a current conflict of interest could arise—and maybe already has arisen. Again, while the fact pattern does not seem to show any direct adversity at this stage, as suggested earlier, one could imagine conflicts arising over the final terms of the CBA, with A-Org wanting features that other members reject. Even absent such a direct conflict, Rule 1.7(a)(2) prohibits a lawyer from concurrently representing multiple parties if "there is a significant risk that the representation of one or more clients will be *materially limited* by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[20] In this case, there could be a conflict if the Clinic's advice to the Coalition were materially limited by its strong relationship with A-Org, through which A-Org was able to unduly influence what the Clinic lawyer understood the Coalition's interests in the matter to be (for example, by pushing the focus on small business concerns).

Although it may be possible for a lawyer to represent both the Coalition and A-Org as joint clients, the lawyer should be careful to strictly follow the requirements of Rule 1.7(b) to do so.[21] Rule 1.7(b) states that a lawyer facing a conflict of interest can nonetheless represent

19. If the Clinic does this and a member of the Coalition later withdraws over a disagreement, the Clinic does not have a conflict under Rule 1.9 and can use the withdrawing member's information for the Coalition's benefit. Ideally, the retainer would provide that the lawyer does not represent members and that if a member withdraws the lawyer will continue to represent the Coalition.

20. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (emphasis added).

21. *See id.* r. 1.7(b).

multiple clients if each client gives informed, written consent and if the lawyer reasonably believes that he or she "will be able to provide competent and diligent representation to each affected client."[22] In this context, even if the Clinic were able to obtain informed, written consent from the other members of the Coalition, the Clinic lawyer would still have to determine if she could reasonably provide competent and diligent representation to both A-Org and the Coalition. The possibility for differences of opinion might be too substantial, although we do not have sufficient information to draw firm conclusions. Based on what we do know, because the Coalition and A-Org are working toward the same goal, it is likely that joint representation would be consentable.

In the joint client scenario, it would be legitimate at the outset of the representation for the Clinic to obtain a waiver from A-Org under which A-Org agreed to waive future conflicts between it and the Coalition with respect to the CBA.[23] Such a waiver would state that, in the event of an irresolvable conflict, the Clinic would withdraw from representing A-Org but continue to represent the Coalition. Courts upholding such waivers stress the importance of fairness to the waiving party, paying particular attention to the sophistication of that party to understand the material risk of consenting to the waiver, consistent with Comment 22 to Rule 1.7.[24]

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22. *Id.* r. 1.7(b)(1).

23. These types of waivers are typical in law firm practice, although their enforcement has been uneven. *See* Elena Postnikova, *Conflict Waivers that Do Not Cure Conflicts: Apparent Inconsistency in the Jurisprudence Governing Advance Waivers and How These Waivers Can Become More Effective*, 28 GEO. J. LEGAL ETHICS 839, 840 (2015) (noting that in recent decades, firms' "ability to rely on advance waivers of conflict . . . became essential for supporting continuous growth of legal business across jurisdictions;"); Mary Strother & Dyane O'Leary, *Advance Conflict Waivers: Will They Work for You?*, 54-SUM. B. B.J. 12, 13 (2010) (arguing that in large law firms, advance waivers "will become an even more essential and standard practice"). For cases invalidating waivers because of overbreadth or lack of consent, see generally, *In re* Congoleum Corp., 426 F.3d 675 (3d Cir. 2005) (finding that New Jersey ethics rules require "truly informed consent," which individual clients had not given in the context of complicated bankruptcy proceedings); Western Sugar Coop. v. Archer-Daniels-Midland Co., 98 F. Supp. 3d 1074 (C.D. Cal. 2015) (declining to enforce waiver because it was overly broad, lacking specificity as to who the potentially adverse client might be and the type of potential conflict being waived); Celgene Corp. v. KV Pharm. Co., 2008 WL 2937415 (D.N.J. 2008) (invalidating waiver because it was open-ended, vague, and there was inadequate disclosure of the lawyer's plans and client's options); and Concat LP v. Unilever PLC, 350 F. Supp. 2d 796 (N.D. Cal. 2004) (declining to enforce waiver because it was overly general and unlimited in temporal scope).

24. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 22 (stating that a waiver's effectiveness "is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails"). For an analysis of the effectiveness of waivers, see ABA Formal Opinion 05-436, *Informed Consent to Future Conflicts of Interest* (May 11, 2005). For more on this subject, see Galderma Labs., L.P. v. Actavis Mid Atlantic LLC, 927 F. Supp. 2d 390, 405 (N.D. Tex. Feb. 21, 2013) (stating that, following the update to Comment 22 to Rule 1.7, "the test for informed consent is whether the client understands the material risks involved in waiving the future conflict"

The complications of joint representation argue in favor of avoiding it altogether. As we have suggested, there were two routes for the Clinic to do that here. One was to make clear during the survey project that the Clinic represented the Coalition-to-be-formed, not A-Org. Once the Coalition was in fact formed, the Clinic's duties would have continued to flow to that entity. Absent that (i.e., if the Clinic represented A-Org in the initial survey matter), the best practice would be for the Clinic to draft a clear termination letter after completion of the survey and before undertaking representation of the Coalition in the CBA matter.

As a final point, we believe that it was essential for the Clinic to have communicated with the *entire Coalition* in advance about its planned presentation for small business owners (requested by A-Org) and discussed the implications of the presentation for the CBA process. This was required by Rule 1.4 (on communications with clients) and 1.3 (on diligent representation).[25] If the Coalition supported the presentation as part of the overall campaign, it could have proceeded with client authorization. If the Coalition opposed the presentation, then it should not have occurred irrespective of A-Org's belief that it was important. In the case facts, the Clinic did not receive prior Coalition consent for the presentation, but it appears no member ultimately objected to it. However, it would be wise for the Clinic to avoid the possibility of having to defend the presentation to objecting Coalition members after the fact, which would raise conflict concerns with A-Org and damage overall trust.

In general, when a lawyer finds herself dealing with the unofficial leader of a coalition client, it is best to formalize the leader's position as soon as possible and avoid back-channel communications in the meantime. If the unofficial leader wants to become the coalition's duly appointed representative or legal contact, that role needs to be approved through the coalition's formal decision-making process.

At the outset of the representation, it would be even better for a coalition to establish a committee composed of a diverse range of representatives from the member groups charged with communicating with the lawyer. This would not only facilitate good internal governance

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and that a lawyer "need not inform the client through additional consultation of facts or implications already known to the client"); and Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1106 (N.D. Cal. 2003) (finding that a firm could simultaneously represent adverse parties when an advance waiver had been executed based on an analysis of the breadth of the waiver, whether the waiver attempted to waive a current conflict or all future conflicts, whether the conflicts were fully discussed between lawyer and client, the specificity of the waiver, the nature of the actual conflict and whether it arose in the same or unrelated disputes, the client's sophistication, and the interests of justice).

25. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 4, r. 1.4 cmt. 2.

on the part of the coalition, it would help avoid any potential claims by other coalition members against the lawyer based on the ethical obligations in Rule 1.13 (the lawyer represents the organization through its duly authorized constituents),[26] or based on the ethical duties of competence (Rule 1.1),[27] diligence (Rule 1.3),[28] and communication (Rule 1.4).[29] Overall, to avoid the complications outlined in this analysis, it is crucial for the lawyer to clearly articulate: (1) the nature of the organizational client, (2) the authorized leadership group, and (3) the appropriate means for communication and decision making.

III. KEY TAKEAWAYS

In conclusion, from a best practice standpoint, we underline the following takeaways from the analysis above:

1. In order to avoid future conflicts of interest between the Coalition and the group that spearheads its formation (A-Org), it is advisable to either: (a) not represent A-Org in the initial survey matter (if it is clear that the Clinic will subsequently represent the Coalition); (b) make clear that the Clinic is representing the Coalition to-be-formed, and not A-Org, preferably in writing; or (c) explicitly terminate the A-Org representation after the survey project is completed and have A-Org waive future conflicts with the Coalition.

2. In forming the Coalition, it is advisable to make the terms of the representation explicit in writing. For example, the Clinic should have advised Coalition members that: (a) the Clinic represents the Coalition as an entity and not its members individually; (b) the Clinic may use the members' information for the Coalition's benefit; and (c) if any member withdraws from the Coalition over a disagreement, the Clinic will continue to represent the Coalition.

3. It is advisable for the Clinic to ascertain precisely how different kinds of decisions relating to the representation will be made by the Coalition, including the extent to which one or more members are authorized to make certain decisions on behalf of the Coalition and which decisions they are authorized to make. In every group representation context, the group needs a contact point with authority to make time-sensitive decisions and to consult with the lawyer. In this scenario, the problem was not that A-Org was a poor choice as an

26. *Id.* r. 1.13.
27. *Id.* r. 1.1.
28. *Id.* r. 1.3.
29. *Id.* r. 1.4.

authorized constituent to make decisions for the Coalition and communicate on its behalf. In fact, given its role in the community and starting the Coalition, it may have been a perfect candidate for that role. The point is that designation, along with the Coalition's voting rules, should be clearly set forth in the Coalition's MOU.