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# In a Relationship? It's Complicated:

## Achieving Harmony and Avoiding the Frustrations and Ethical Pitfalls of the National/ Local Counsel Relationship

Moderator: Trent Spurlock, Dinsmore & Shohl LLP

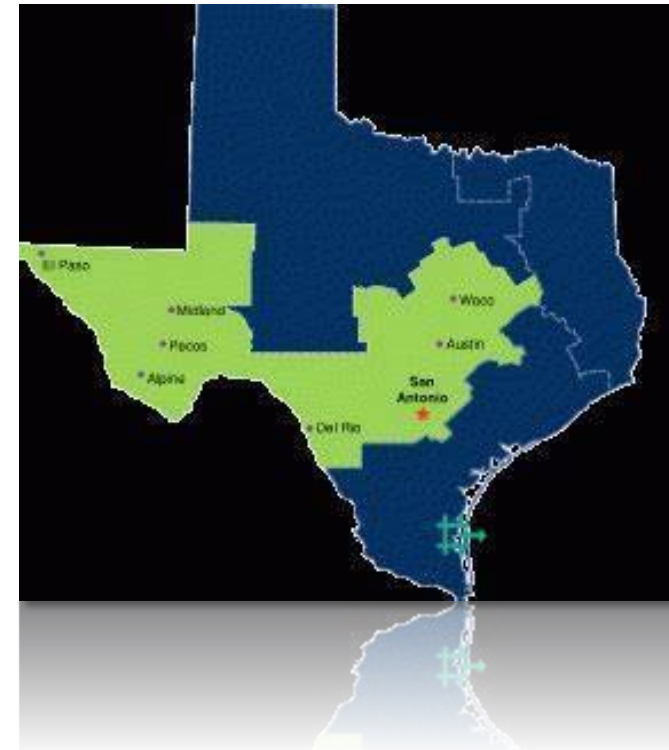
Panelists:

Lisa M. Floro, Coloplast Corp.

Wendy West Feinstein, Morgan Lewis

Lana K. Varney, King & Spalding, LLP

# Teamwork: National + Local Counsel Roles



# Choosing Roles and Role Players

- **National Counsel**

- Communicate strategy/directions
- Coordinate with all local counsel to ensure consistency
- Manage expectations of all – client, local counsel, Courts

- **Local Counsel**

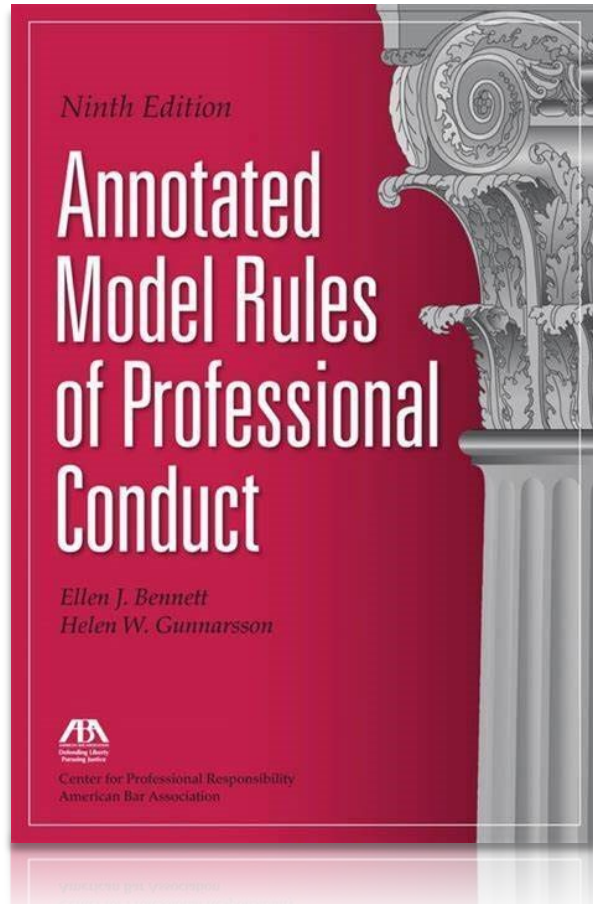
- Role?
  - Insure adherence to local rules
  - Active participant in case work-up and trial vs. post office/mail drop
  - Part of VLF
- How choose?
  - Influence with judge, venue, jury
  - Representing co-defendants
  - Recommended or IADC member!



# Frustrations?



# Teamwork: Ethical Considerations



- **Limited Scope of Representation:**
  - Rule 1.2 Scope of Representation
  - Rule 1.1 Competence
  - Rule 2.1 Advisor
  - Rule 5.4 Professional Independence of a Lawyer
- **Communication with Client**
  - Rule 1.4 Communications
  - Rule 2.1 Advisor
- **Practice in Other Jurisdictions**
  - Rule 5.5 Unauthorized Practice of Law
- **Conflicts**
  - Rule 1.7 Conflict of Interest
  - Rule 1.9 Duties to former clients
  - Rule 1.10 Imputation of conflicts of interest

# Limited Scope or Representation

## **Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, **as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued....**

**(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.**

# Limited Scope of Representation: Potential Concerns

- **Rule 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- **Rule 2.1 Advisor**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice....

- **Rule 5.4 Professional Independence of a Lawyer**

(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.



# Communications with Client

## **Rule 1.4 Communication**

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter....

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

## **Rule 2.1 Advisor**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice....

# Practice in Other Jurisdictions

## **Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. . . .

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

# Conflicts

- **Rule 1.7 Conflict of Interest: Current Clients**
  - When a lawyer jointly represents multiple defendants in the same case who become adverse during the course of the case
- **Rule 1.9: Duties to Former Clients**
  - When a lawyer represents a defendant who becomes adverse with another defendant who the lawyer previously represented
- **Rule 1.10: Imputation of Conflicts of Interest – General Rule**
  - Generally, conflicts not imputed to co-counsel, but can occur if there has been a sharing of confidential information between counsel related to the client or former client who is now adverse.

# Am I in a Joint Defense Agreement?

- Created by writing
- Oral agreement
- Implied by conduct
- Common interest doctrine?
- Scope? (contract principles apply)



# *United States v. Gonzales*, 669 F.3d 974 (9th Cir. 2012)



- JDA created by context
- One party cannot unilaterally waive the privilege for others



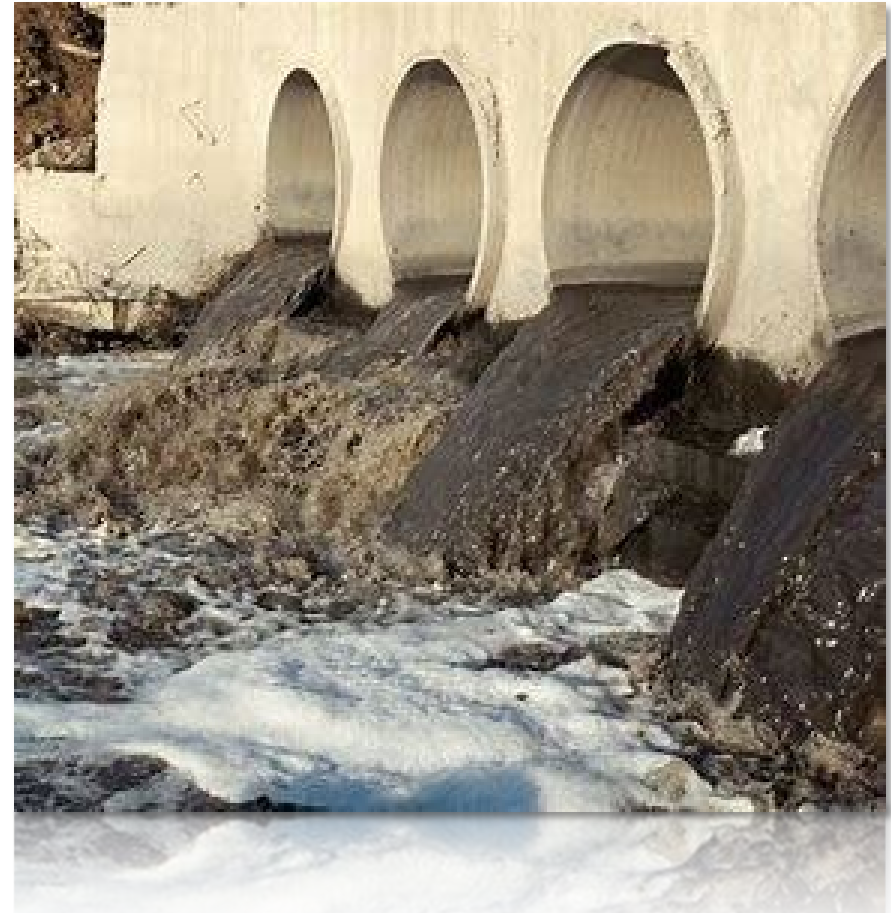
# JDAs = New Ethical Duties



- **Protect privileged communications**
- **Avoid conflicts of interest**
- **Beware of disqualification, changed circumstances**

# *Roosevelt Irrigation Dist. v. Salt River Project Agricultural Improvement and Power Dist., 810 F. Supp. 2d 929 (D. Ariz. 2011)*

- JDA established implied attorney-client privilege with co-defendant
- Counsel in JDA owed duties of confidentiality and fiduciary obligations of former co-defendants
- Determined by actual exchange of confidential information



# Summary

- Make sure various roles in VLF are appropriately defined in writing
- Establish systems to allow all attorneys in VLF to fulfill ethical obligations of communication
- Know all of the rules in all jurisdictions where you may be “practicing law”
- Beware the conflicts that can arise in representation of multiple parties and from JDAs

# Harmony



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