

Legal Ethics for Corporate Practice

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January 2022

Introductory Matters

- **Audio Issues** – If you are having audio issues, please try connecting by telephone using the dial-in information, which is:

Dial-in number (US): (701) 801-6121
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- **Watch the Slides** -- <https://join.freeconferencecall.com/downeycle>
- **Technical Problems** – contact Paige Tungate at ptungate@DowneyLawGroup.com
- **Questions** – Please submit questions during the program using the CHAT function, or email Paige Tungate at ptungate@DowneyLawGroup.com
- **Post-Program Survey** – A survey will be emailed to you about 30 minutes after program. Also, there is a link to the survey at the end of these slides
- **Certificate of Completion** – Available through the Post-Program Survey
- **Kansas Credit** – If you are seeking Kansas credit, you will need to enter the **two Attendance Verification Words** and your Kansas information into the Post-Program Survey. Please complete this information in the survey **this week**, so we can ensure you receive proper credit

Topics for Today's Program

- In-house and transactional MJP
- Who is the client?
- Representing – and not representing – corporate constituents (MJP)
- Corporate family conflicts
- Privilege and confidentiality in corporate context

Practice of Law and MJP

What Is the Practice of Law?

- Appearing as counsel in court or depositions
- Preparing and signing any pleading
- Preparing legal documents like contracts or legal instruments
- Giving advice or rendering services that requires legal knowledge and skill

Mo. Rev. Stat. § 484.010; *People ex rel. Illinois State Bar Ass'n v. Schafer*, 87 N.E.2d 773 (1949); *State ex rel. v. Perkins*, 28 P.2d 765, 769 (1934)

Why Does It Matter What Law Practice Is?

- Is a communication privileged?
- Is the person (lawyer) at risk of unauthorized practice?

“Making” Communications Privileged

- Limit recipients to those reasonably necessary (Illinois – control group?)
- Express the need/desire to protect confidentiality
- Reference legal authorities and your role as counsel

In-House MJP Practice – Rule 5.5(d)(1)

A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice . . .

MJP by (Other) Transactional Attorneys – ABA Model Rule 5.5(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 [local counsel exception];
- (2) [*Pro hac vice* exception];
- (3) [*PHV* for arbitration or mediation exception]; 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.**

“Federal Practice” Exception – Model Rule 5.5(d)(2)

A lawyer admitted in another United States jurisdiction . . . and not disbarred or suspended from practice in any jurisdiction . . . may provide legal services through an office or other systematic and continuous presence in this jurisdiction that: . . .

(2) are services that the lawyer is **authorized by federal** or other law or rule to provide in this jurisdiction.

Who Is the Client? (and Corporate Constituents)

Organization as Client – Rule 1.13

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

Recurring Issues

- Corporate family – what affiliates are represented
 - Look to documents (agreed scope?)
 - Look to factual circumstances
- Company, board, or owner?
 - “Alter Ego” doctrine

- Change of control
 - Sale of stock or assets
 - Bankruptcy, etc.
 - Change of company leadership

Government Representations

- The duty defined in this Rule applies to governmental organizations.
- Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18].
- Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.
 - For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule.
- Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.
- Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Representing Constituents – Rule 1.13(g)

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

Warning Unrepresented Constituents – Rule 1.13(f)

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

Tests for Scope of Corporate Representation

- “Upjohn” test – communications reasonably necessary for representation are privileged
- “Control Group” test – only communications with the control group are privileged
 - Followed in Illinois and a few other states

“Upjohn” Warning

- **Identity of client** – “I represent the Company. I am not your attorney.”
- **Explanation of privilege and confidentiality** – “Our communications are privileged and confidential. But the Company controls whether the communications will be disclosed.”
- **Discussion of possible counsel** – “You may want to hire your own counsel” or “I may be able to represent you.” (Consult Rule 4-1.13)

Missouri Informal Opinion 2021-05

Question: Company and Manager have been named as Defendants in a wrongful termination suit filed by Former Employee.

Attorney represents Company in the matter through CEO as the duly authorized constituent of Company.

Former Employee alleges misconduct by Manager, but Company denies such misconduct on the part of Manager.

Company, through CEO, has asked Attorney also to represent Manager, and will pay Attorney's fees for both representations. May Attorney represent both Company and Manager in the matter?

Missouri Informal Opinion 2021-05

Answer: Attorney representing Company may also represent Manager subject to Rule 4-1.7 Conflict of Interest: Current Clients. Rule 4-1.13(e). Given the allegations of misconduct by Manager, a concurrent client conflict of interest exists because there is a significant risk that Attorney's responsibilities to Company will be materially limited by Attorney's responsibilities to Manager. Rule 4-1.7(a)(2). Pursuant to Rule 4-1.7(b)(1), Attorney may only undertake representation of Manager if Attorney has a reasonable belief at the outset of the representation that Attorney will be able to provide competent and diligent representation to both Company and Manager in a common representation. Attorney must resolve consentability as to both Company and Manager. Rule 4-1.7, Comments [14] and [15]. Because Company is paying for the representation of Manager, Attorney must comply with Rule 4-1.8(f), which prohibits Attorney from accepting compensation from someone other than the client, in this case Corporation paying for the representation of Manager, unless Manager gives informed consent to the arrangement, there is no interference with Attorney's independent professional judgment or the client-lawyer relationship, and confidential information is protect by Rule 4-1.6. See also Rule 4-1.8, Comments [11] and [12]; Rule 4-1.7, Comment [13]. . . .

Missouri Informal Opinion 2021-05

Answer: ...To engage in the common representation, Attorney shall seek informed consent, confirmed in writing, from both Company and Manager pursuant to Rule 4-1.7(b)(4). See Rule 4-1.7, Comments [14], [15], and [20]; see also Rule 4-1.0(e) defining “informed consent,” Comments [6] and [7]. In seeking informed consent, Attorney must discuss with Company and Manager the “implications of the common representation including the possible effects on loyalty, confidentiality, the attorney-client privilege and the advantages and risks involved. Rule 4-1.7, Comment [18]; see also Comments [30], [31], and [32].” Attorney should advise Company and Manager that Attorney will share with both clients information relevant to representation, and that Attorney will be required to withdraw if one of the jointly represented clients decides a material matter should be kept from the other. See Rule 4-1.7, Comment [31]. Further, Attorney should advise Company and Manager that, if the common representation fails because potentially adverse interests cannot be reconciled, Attorney will have to withdraw from representing both clients. See Rule 4-1.7, Comment [29]. Since Company’s consent to the dual representation is required by Rule 4-1.7, Rule 4-1.13(e) requires that the consent be given by an appropriate official of Company other than Manager who is seeking representation.

Missouri Informal Opinion 9700050

- **QUESTION:** May Attorney serve as general counsel for a corporation and sit on the Board of Directors and have an ownership interest? What precautions must Attorney take to avoid conflict of interest? .

Missouri Informal Opinion 9700050

ANSWER: This situation would involve a conflict of interest. Rule 4-1.8(a) sets out the steps Attorney must follow to enter into such a business relationship. This situation creates numerous opportunities for conflicts under Rule 4-1.7(b). Attorney should study the last paragraph under the heading "Other Conflict Situations" in the comments to this rule.

Attendee Question

- Lawyer represents company in a matter
- Constituent retains separate counsel for the same matter
- Lawyer believes separate counsel is a bad choice or is doing a bad job. May Lawyer tell constituent?

ABA Model Rule 4.2

In representing a client, a lawyer shall not

- communicate about the subject of the representation
- with a person 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 to do so by law or a court order.

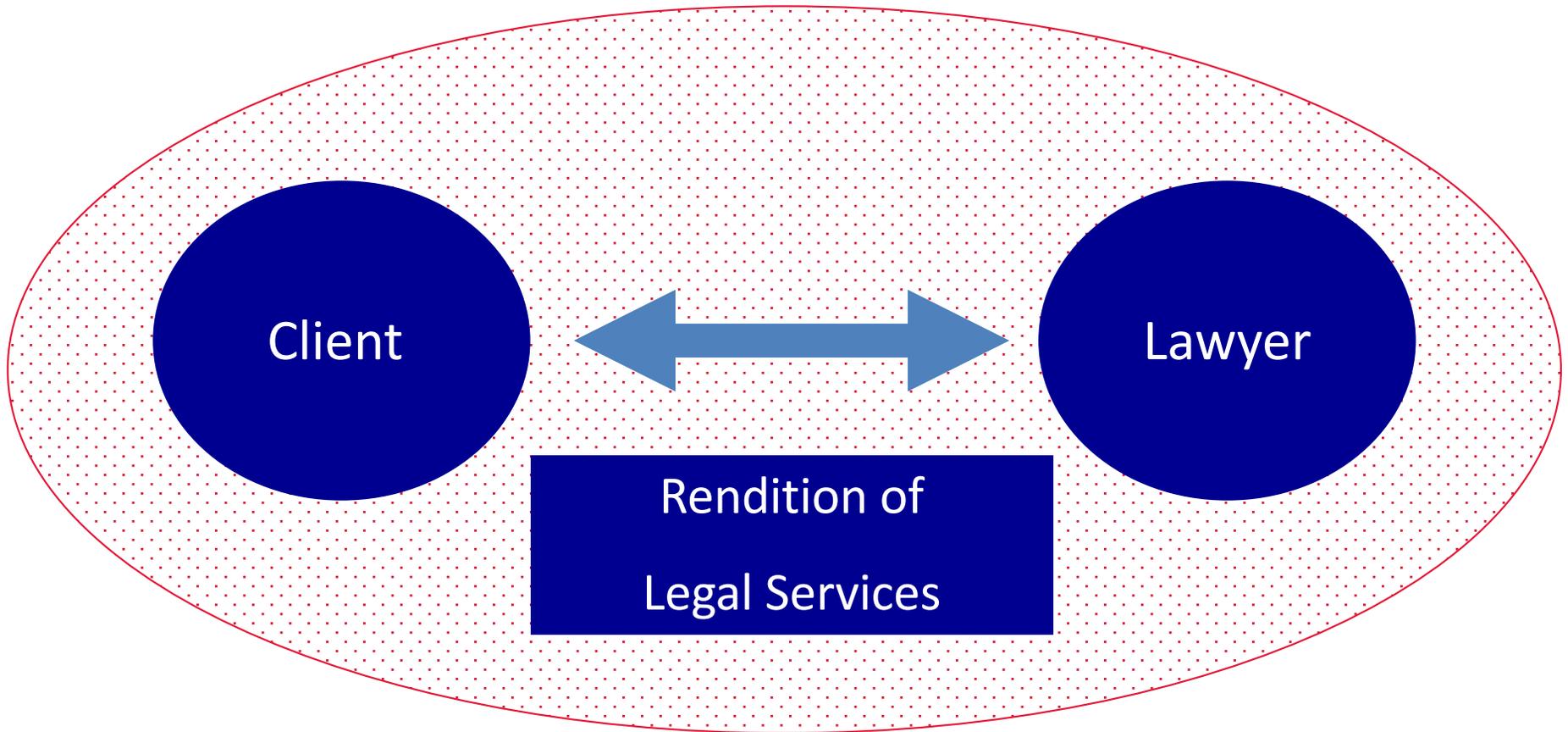
Privilege & Confidentiality Issues

Attorney-Client Privilege

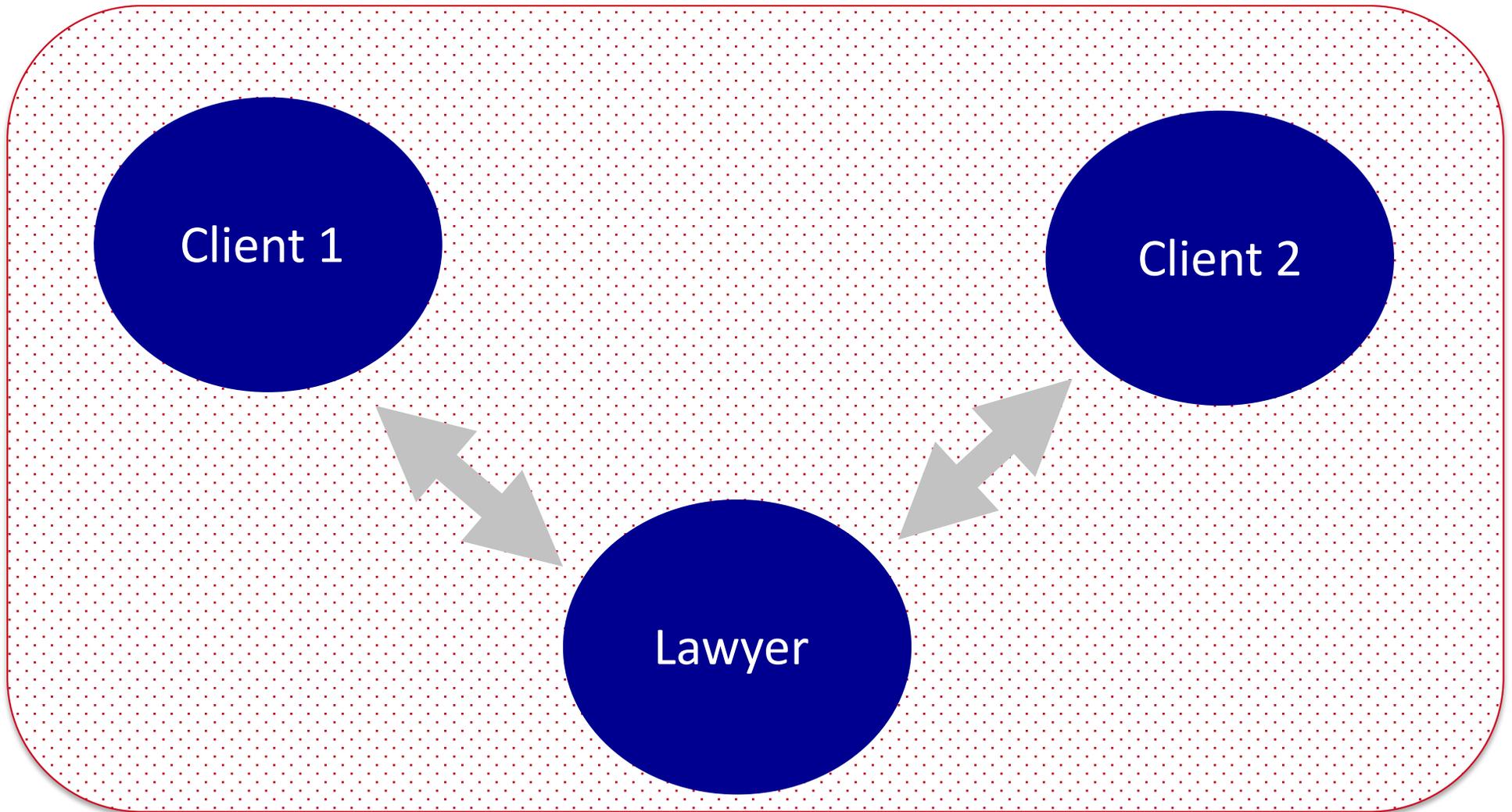
- A *communication*
- *Between a lawyer and client* or prospective client, or other "privileged persons,"
- That the client reasonably believes is *confidential*
- And whose purpose is to seek or to provide *legal advice or legal services*

Restatement (Third) of the Law Governing Lawyers

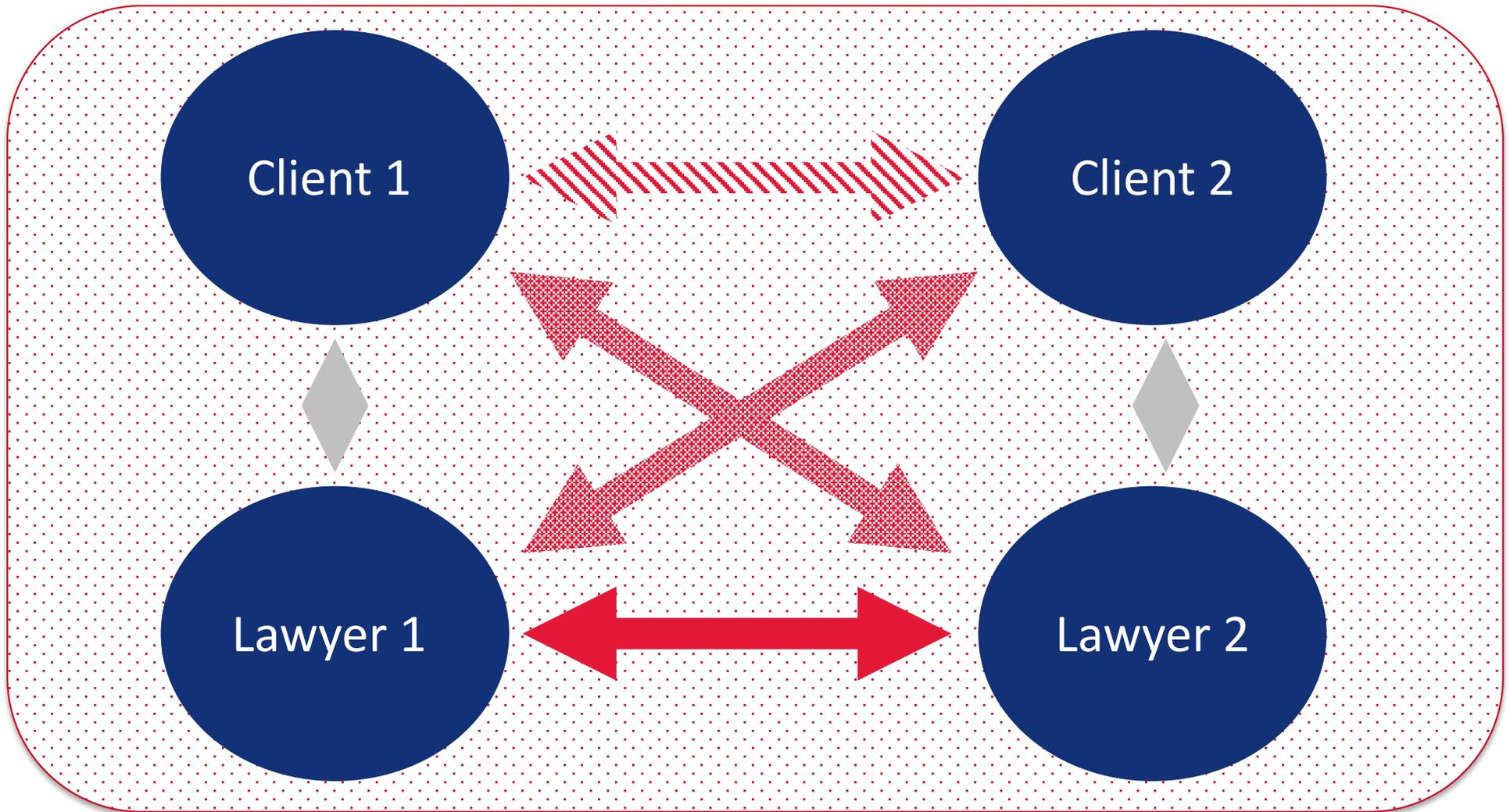
Attorney-Client Privilege



Joint Representation



Joint Defense/Common Interest Privilege



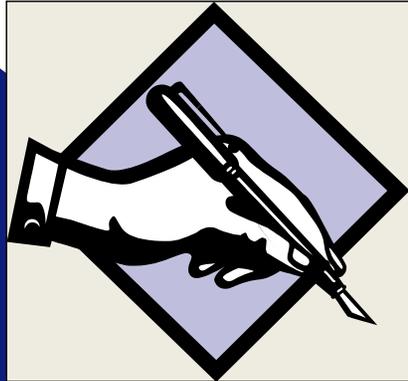
Work Product Protection – Rule 56.01(b)(3) Parsed

- [A] party may obtain discovery of documents and tangible things otherwise discoverable under Rule 56.01(b)(1) and
 - prepared in anticipation of litigation or for trial
 - by or for another party or by or for that other party's representative, including an attorney, consultant, surety, indemnitor, insurer, or agent,
- only upon a showing
 - that the party seeking discovery has substantial need of the materials in the preparation of the case and
 - that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

FRCP Rule 26(b)(3)(A) Parsed

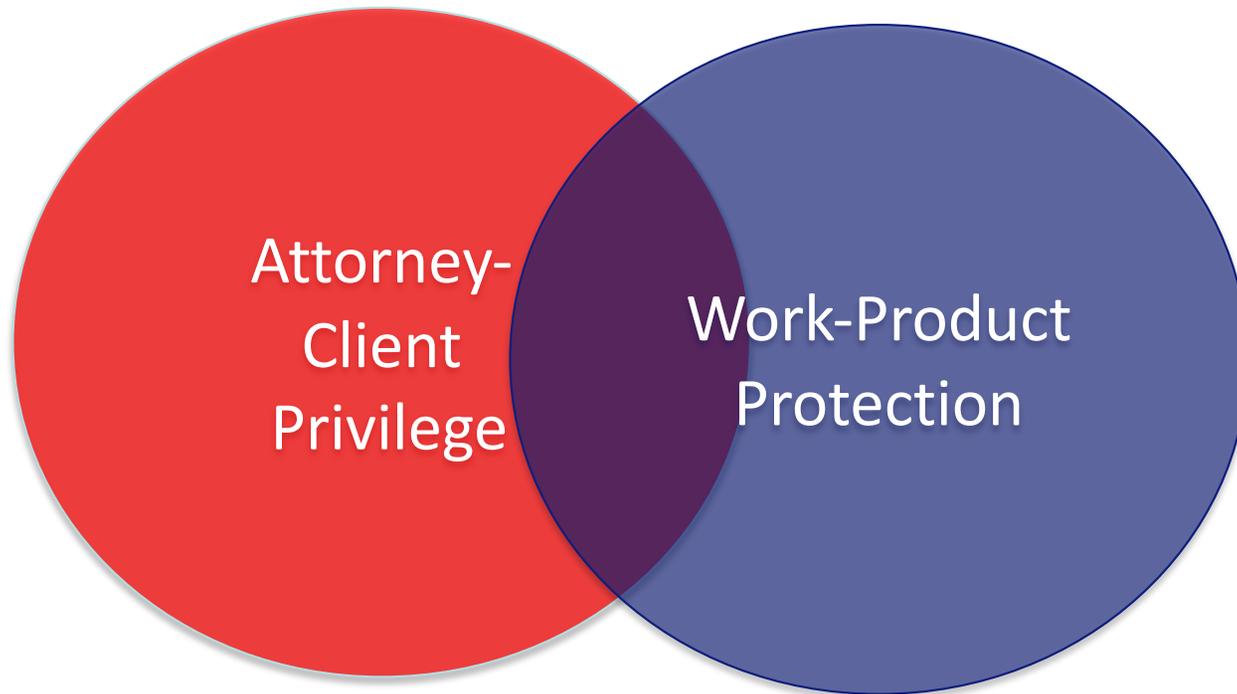
- Documents and Tangible Things.
- Ordinarily, a party may not **discover**
- documents and tangible things that
- **are prepared in anticipation of litigation or for trial**
- **by or for another party or its representative** (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)

Work-Product Protection



A lawyer's involvement is not required





Conclusory Matters

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Future Programs – Free Ethics CLE

January 27 (Thursday) at 12:00 Noon CT - ***Addressing Bias in the Legal System: Cognitive Bias***

February 2 (Thursday) at 12:00 Noon CT - ***Confidentiality and Its Exceptions*** - 1.0 ethics CLE

February 23 (Wednesday) at 12:00 Noon CT - ***Legal Ethics Update*** - 1.0 ethics CLE

March 8 (NEW DATE - Tuesday) at 12:00 Noon CT - ***Taking the Ethical Action - A "Giving Voice to Values" Program*** - 1.0 ethics CLE

March 29 (Tuesday) at 3:00 PM CT - Addressing Bias in the Legal System: Cognitive Bias - 1.0 ethics & 1.0 elimination of bias CLE

And 7 additional programs through June 29, 2021



Sign up at www.DowneyEthicsCLE.com

Thank you



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