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## ARTICLES

# PROFESSIONAL RESPONSIBILITY AND LIABILITY ASPECTS OF VEREINS, THE SWISS ARMY KNIFE OF GLOBAL LAW FIRM COMBINATIONS

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### INTRODUCTION

In an age of increasing globalization, law firms such as Baker & McKenzie, Dentons, DLA Piper, Hogan Lovells, King & Wood Mallesons, Littler Mendelson, Norton Rose, and Squire Patton Boggs have ambitiously expanded on the world stage.<sup>1</sup> To achieve the growth and global reach they desired, these firms organized themselves as *vereins*—a *verein* being a Swiss

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<sup>1</sup> Erin Coe, *Squire Sanders, Patton Boggs Vote To Join Forces*, LAW360 (May 23, 2014, 6:59 PM), <http://www.law360.com/articles/541171/squire-sanders-patton-boggs-vote-to-join-forces>; Debra Cassens Weiss, *Littler Mendelson Combines with Law Firms in Colombia and Costa Rica*, ABA J. (Oct. 1, 2013, 2:20 PM), [http://www.abajournal.com/news/article/littler\\_mendelson\\_combines\\_with\\_law\\_firms\\_in\\_colombia\\_and\\_costa\\_rica](http://www.abajournal.com/news/article/littler_mendelson_combines_with_law_firms_in_colombia_and_costa_rica); *The Innovators: A Tool for Growth*, AM. LAW. (July 29, 2013), <http://www.americanlawyer.com/PubArticleALD.jsp?id=1202611685356> (on file with authors); Chris Johnson, *Inside the Machine*, AM. LAW., Mar. 2013, at 72, 74; Nick Jarrett-Kerr & Ed Wesemann, *Enter the Swiss Verein: 21st-Century Global Platform or Just the Latest Fad?*, EDGE INT'L REV., 2012, at 26, 27–28; Diana Bentley, *Strategic Manoeuvres*, IBA GLOBAL INSIGHT (June 2011), available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=CE80EAE1-8815-49EF-85E1-3808932CABDB>.

corporate holding structure.<sup>2</sup> There is no organizational form equivalent to the Swiss *verein* under U.S. law.<sup>3</sup>

The law firm movement toward organizing as a *verein* as a means of expanding globally, rather than growing through traditional mergers, is thought to be largely attributable to the *verein*'s flexible structure.<sup>4</sup> Basically, organizing as a Swiss *verein* allows globally-oriented firms to combine and promote a unified brand across borders, while still affording the individual firms within the *verein* separate corporate or partnership status with discrete legal liability and financial independence.<sup>5</sup> The *verein* itself does not practice law; rather, the law firms within the *verein* deliver all legal services.<sup>6</sup> Because the individual firms within the *verein* remain separate partnerships or professional corporations, and can retain their own partner or shareholder compensation systems,<sup>7</sup> as well as their own

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<sup>2</sup> Johnson, *supra* note 1, at 72; see also Nate Raymond, "Verein" Model Allows Cross-Border Unions To Limit Liability and Keep Partnerships, Profits Separate, N.Y.L.J., May 28, 2010, at 1 (discussing the recent trend of global law firm expansion under the Swiss *verein* in contrast to traditional mergers).

<sup>3</sup> *In re Project Orange Assocs., LLC*, 431 B.R. 363, 368 n.2 (Bankr. S.D.N.Y. 2010).

<sup>4</sup> Jarrett-Kerr & Wesemann, *supra* note 1, at 26. Law firm mergers certainly are not dead, nor can they in any way be characterized as a thing of the past. Many large law firms still opt to merge. See, e.g., Brian Baxter, *November Flurry Propels 2013 to Law Firm Merger Record*, AM. LAW. (Nov. 22, 2013), <http://www.americanlawyer.com/id=1202629365924/November-Flurry-Propels-2013-to-Law-Firm-Merger-Record> (on file with authors) (stating that 2013 was a record year for the total number of announced mergers involving U.S. law firms, topping the previous high set in 2008). In addition, law firms may expand their global reach through affiliations or associations rather than through combinations. See, e.g., Zack Needles, *Schnader Forms Association with Indonesian Firm*, LEGAL INTELLIGENCER (Oct. 25, 2013), <http://www.thelegalintelligencer.com/id=1202625100971/Schnader-Forms-Association-With-Indonesian-Firm> (on file with authors) (reporting that a Philadelphia law firm had "formed an association" with an Indonesian law firm to which it refers business and from which it receives referrals; the "announcement of an association" between the firms was said to "represent an express commitment to each other").

<sup>5</sup> Jarrett-Kerr & Wesemann, *supra* note 1, at 27; Edwin B. Reeser, *Swiss Verein—the Cassoulet Pot for Global Law Practice*, S.F. DAILY J. (Aug. 18, 2011), <http://www.jdsupra.com/legalnews/swiss-verein-the-cassoulet-pot-of-global-83240>; see also *In re GSC Grp., Inc.*, 502 B.R. 673, 735 n.227 (Bankr. S.D.N.Y. 2013) (observing that "[l]arge multinational firms also employ the Swiss *verein* structure in which many offices of the 'firm' are linked via an association but are separate legal entities with separate revenue pools").

<sup>6</sup> Peter Kalis, *Grand Illusion*, AM. LAW., May 2011, at 49.

<sup>7</sup> Law firms in a *verein* could adopt a single, firm-wide compensation system for partners or shareholders if they chose to do so. See, e.g., Johnson, *supra* note 1, at 75 (reporting on the Hogan Lovells partner compensation system).

accounting practices and tax regimes, serious impediments to traditional mergers are avoided entirely.<sup>8</sup> Organizing as a *verein* also affords the member law firms flexibility for future expansion, with the ready ability to add new members to the group.<sup>9</sup> For these reasons, observers have described the *verein* as “the embodiment of simplicity, yet with infinite variability.”<sup>10</sup>

The *verein* model has not, however, achieved uniform acceptance or acclaim in the legal profession.<sup>11</sup> Critics contend that a collection of law firms presenting themselves as a single global firm by forming a *verein* is an illusion.<sup>12</sup> To detractors, law firm *vereins* are no more than a referral network, trade association, or other affinity group.<sup>13</sup> Skeptics call *vereins* “kaleidoscopic,” dismissively asserting that “[w]ith spin and mirrors, two or more [law firms] can be perceived as one.”<sup>14</sup> Lawyers who dislike the *verein* structure view it as a mere marketing tool that deprives affiliated law firms of “the common culture, shared knowledge and standardi[z]ed practices that single partnerships enjoy.”<sup>15</sup> At best, critics might allow, law firms in a *verein* are akin to sister subsidiaries in a traditional corporate holding structure.

There is no one right approach to global expansion by law firms; both *vereins* and traditional mergers have advantages and drawbacks. For some growth-oriented law firms, mergers and other accretions will be preferable. Other law firms will choose to organize as *vereins*. Law firms seeking to increase their global reach must weigh the administrative, cultural, economic, and professional virtues of practicing within a *verein* as opposed to

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<sup>8</sup> See generally Leigh Jones, *Plunging into a Global Practice*, NAT'L L.J., Oct. 11, 2004, at 1 (asserting that “transcontinental mergers can have super-sized portions of the problems found in domestic mergers”).

<sup>9</sup> Johnson, *supra* note 1, at 74. And, while perhaps unsaid, law firms organized as *vereins* presumably can disassociate member firms that are ultimately judged to be poor fits far more easily than they could unwind mergers or other combinations.

<sup>10</sup> Reeser, *supra* note 5.

<sup>11</sup> Raymond, *supra* note 2.

<sup>12</sup> Kalis, *supra* note 6, at 51.

<sup>13</sup> *Id.* at 50–51.

<sup>14</sup> *Id.* at 51.

<sup>15</sup> Jarrett-Kerr & Wesemann, *supra* note 1, at 29; see also Johnson, *supra* note 1, at 74 (elaborating on this criticism and the bases for it); Kalis, *supra* note 6, at 51 (arguing that “[a]ll law firms are defined by shared values, goals, and standards,” and asserting that a *verein* promotes none of these attributes).

other organizational forms.<sup>16</sup> But organizing as a *verein* raises issues for law firms beyond those that might be broadly characterized as strategic. Here, we address two additional—and unquestionably significant—aspects of Swiss *vereins*: the professional responsibility and liability issues facing lawyers in firms so organized. This is something of an imperfect exercise. Law firms form *vereins* for different reasons and thereafter manage and structure their operations and practices differently, and those differences may have profound effects on the professional responsibility and liability aspects of their affairs. For example, a law firm may organize as a *verein* because the firm's leaders believe that the *verein* structure limits the firm's potential liabilities in ways that other organizational forms do not.<sup>17</sup> A firm that organizes as a *verein* primarily to limit its potential liability will presumably manage its practice in ways intended to support that goal. Another firm, however, may organize as a *verein* because assembling an alliance between different law firms and, in the process, reconciling the different tax regimes, compensation structures, and so on would be too difficult and time-consuming under a traditional merger.<sup>18</sup> The second firm might be willing to reasonably subordinate concerns about potential liability arising out of detours from *verein* protocols to business development or client service ambitions.

In addition, there is much about the *verein* structure in the law firm environment that is unknown. Unlike partnerships and professional corporations, *vereins* are a relatively new form of law firm organization.<sup>19</sup>

Looking ahead, Part II of this Article provides a general overview of the *verein* model and its governing charter. Part III highlights a variety of ethical considerations for lawyers in *verein* member firms that are subject to ethics rules based on the

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<sup>16</sup> See Reeser, *supra* note 5 (analyzing the various social, professional, and economic components of practicing within a *verein*); see also Sean Larkan, *Lead the Way: Leadership, Guiding Principles and Brand Strategy in a Swiss Verein*, EDGE INT'L REV., Fall 2012, at 48 (addressing unique challenges for users of the Swiss *verein* structure).

<sup>17</sup> See, e.g., Steve Hoare & Joanne Harris, *B&M Opts for Swiss Verein Partner Setup*, LAW. (July 5, 2004), <http://www.thelawyer.com/bm-opts-for-swiss-verein-partner-setup/110758.article> (reporting that in choosing to organize as a *verein*, Baker & McKenzie "was purely driven by a desire to protect the firm's potential liability").

<sup>18</sup> Robin Sparkman, *In House*, AM. LAW., Feb. 2011, at 9.

<sup>19</sup> Johnson, *supra* note 1, at 79.

Model Rules of Professional Conduct.<sup>20</sup> These include lawyers' obligation to communicate to clients the relationships between the verein and its member firms, the imputation of conflicts of interest between member firms, and fee-splitting among member firms. Part IV discusses previous efforts to hold vereins and their member firms vicariously liable for the misconduct of another member firm. These cases have involved global accounting firms structured as vereins; vicarious liability among verein member law firms has yet to be tested. Part IV also examines whether the reported push by law firms organized as vereins toward full global integration among their members may perhaps lay the groundwork for collective liability.

### I. VEREIN FUNDAMENTALS

Initially intended for the international affiliation of non-profit organizations,<sup>21</sup> a verein formed under Swiss law<sup>22</sup> allows a collection of different entities to associate while retaining their separate legal status and financial independence.<sup>23</sup> Swiss vereins are formed through articles of association.<sup>24</sup> Although the structure and administration of any given verein depends on the particulars of its articles of association,<sup>25</sup> most articles feature the following standard provisions establishing, controlling, or specifying:

- (1) the name, domicile, and term of the verein, with the verein typically being established for an indefinite term absent

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<sup>20</sup> See generally MODEL RULES OF PROF'L CONDUCT (2014).

<sup>21</sup> Megan E. Vetula, *From the Big Four to Big Law: The Swiss Verein and the Global Law Firm*, 22 GEO. J. LEGAL ETHICS 1177, 1181 (2009).

<sup>22</sup> In Switzerland, Articles 52 through 59 of the Swiss Civil Code generally deal with legal entities, while Articles 60 through 79 of the Swiss Civil Code specifically govern the establishment and functioning of associations. *Id.* Articles 60 through 79 are essentially default rules and apply in the absence of provisions in a verein's articles of association covering the particular issue. *Id.*

<sup>23</sup> Jarrett-Kerr & Wesemann, *supra* note 1, at 27; Reeser, *supra* note 5; Kalis, *supra* note 6, at 49, 51; Edwin B. Reeser & Martin J. Foley, *Are Verein-Style Law Firms Ignoring Fee-Splitting Ethics Rules?*, ABA J. (Oct. 1, 2013, 1:30 PM CDT), [http://www.abajournal.com/legalrebels/article/are\\_verein-style\\_law\\_firms\\_ignoring\\_fee-splitting\\_ethics\\_rules](http://www.abajournal.com/legalrebels/article/are_verein-style_law_firms_ignoring_fee-splitting_ethics_rules).

<sup>24</sup> Kalis, *supra* note 6, at 49; Vetula, *supra* note 21, at 1181.

<sup>25</sup> See, e.g., Julius Melnitzer, *Swiss Vereins and Jellyfish*, FIN. POST (Dec. 3, 2012, 10:58 AM), <http://business.financialpost.com/2012/12/03/swiss-vereins-and-jellyfish/> ("Unfortunately, trying to delve into the vagaries of the arrangements that constitute an individual Swiss Verein, which appears to be an all-encompassing beast, is nothing less than trying to negotiate a labyrinth.")

dissolution in accordance with the relevant provisions in the articles;

(2) the identification of the verein's members;

(3) the objectives or purposes of the verein, such as adherence to professional standards, compliance with the laws of their respective jurisdictions, cohesion and cooperation among member firms, the advancement of the member firms' interests, respect for the independence and integrity of other member firms, and the performance of all other functions incidental to all specifically-stated objectives or purposes;

(4) organization of the verein's governing body, which may consist of an executive committee or board of directors to manage its daily affairs, and an assembly of members who meet at least once a year, or whenever necessary, to vote on important issues, such as budget decisions and the admission and expulsion of members;

(5) sources of financing for the verein's operations, such as membership fees or dues;

(6) the verein's membership conditions, including individual members' rights and obligations;

(7) the admission and withdrawal of members;

(8) processes and procedures for the adoption of by-laws and supplemental regulations to control the internal affairs of the verein and its members;

(9) an express limitation of liability, whereby the verein's liabilities and obligations may only be enforced against its assets and members have no individual responsibility; and

(10) terms of dissolution.<sup>26</sup>

The articles of association are not the sole document governing a verein. A verein may also adopt supplemental regulations governing its operations.<sup>27</sup> These regulations may vary substantially between firms. While vereins organized as for-profit entities must file their articles of association with Switzerland's Federal Commercial Registry Office, such that the

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<sup>26</sup> For articles of association standard templates, see Adrian W. Kammerer & Thomas Sprecher, *Swiss Association*, in 17 NFK SERIES (Niederer Kraft & Frey 2011), available at [http://www.nkf.ch/wAssets-nkf2/docs/publikationen/adrian\\_w\\_kammerer/038715\\_NKF\\_Publikation\\_17.pdf](http://www.nkf.ch/wAssets-nkf2/docs/publikationen/adrian_w_kammerer/038715_NKF_Publikation_17.pdf); *Model Statutes (Law of Association, Example)*, CAGI, <http://www.cagi.ch/en/service-ong/modele-de-statuts.php> (last visited Apr. 18, 2015).

<sup>27</sup> See, e.g., *Statutes, SWISS SOC. FOR MOLECULAR AND CELLULAR BIOSCIENCES*, [http://www.naturalsciences.ch/organisations/swissbiochem/about\\_ssmcb/statutes](http://www.naturalsciences.ch/organisations/swissbiochem/about_ssmcb/statutes) (last visited Apr. 18, 2015) (stating in the Articles of Association that Supplemental Regulations also govern the verein).

articles become publicly available, that is not the case with firms' supplemental regulations. Firms' supplemental regulations remain private documents.

As conceived, the *verein* itself is a holding entity, or a central administrative vehicle, that does not itself provide legal services to clients.<sup>28</sup> The constituent firms within the *verein* deliver all legal services.<sup>29</sup> Lawyers working at a *verein* member firm are subject only to the regulations and tax codes in their particular jurisdictions, rather than those in all countries in which the constituent *verein* firms operate.<sup>30</sup> The individual law firms within the *verein* remain separate partnerships, professional corporations, or other legal entities.<sup>31</sup> They retain their own tax, accounting, and compensation systems.<sup>32</sup> Unlike a traditional merger or consolidation, in which the successor entity assumes its predecessors' liabilities,<sup>33</sup> by design, firms in a *verein* do not assume the liabilities of their constituent firms.<sup>34</sup> In short, the *verein* structure allows two or more law firms to present

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<sup>28</sup> Reeser, *supra* note 5; Kalis, *supra* note 6, at 49; Vetula, *supra* note 21, at 1181; see also Drew Hasselback, *More on the Swiss Verein System*, FIN. POST (Nov. 16, 2010, 2:53 AM), <http://business.financialpost.com/2010/11/16/more-on-the-swiss-verein-system/> ("Basically, the Swiss Verein structure enables people to create a legal person for the global partnership or association without transferring legal responsibility to that new entity.").

<sup>29</sup> Kalis, *supra* note 6, at 49.

<sup>30</sup> Jarrett-Kerr & Wesemann, *supra* note 1, at 28; Johnson, *supra* note 1, at 74; Kit Chellel, *Norton Rose Apes KPMG Again with Swiss Verein*, LAW. (Aug. 3, 2009), <http://www.thelawyer.com/norton-rose-apes-kpmg-again-with-swiss-verein/1001584.article>.

<sup>31</sup> See Johnson, *supra* note 1, at 72–74 (stating that "a *verein* allows participating members to join forces yet retain their existing forms").

<sup>32</sup> *Id.* at 74–75.

<sup>33</sup> *Altman v. Cent. of Ga. Ry. Co.*, 580 F.2d 659, 662 (D.C. Cir. 1978) (reciting "the general rule of law" that a "successor corporation becomes obligated to pay the debts and liabilities of the constituent companies"); *Foster v. Cone-Blanchard Mach. Co.*, 597 N.W.2d 506, 509 (Mich. 1999) (stating that in a merger, "the successor generally assumes all its predecessor's liabilities").

<sup>34</sup> See Mark Brandon, *Verein Today, Gone Tomorrow?*, MOTIVE LEGAL (July 13, 2010), <http://www.motivelegal.com/index.php/2010/07/verein-today-gone-tomorrow> ("The *verein* is useful because it effectively parks the issue of the major profits-gaps between US and UK firms, and also facilitates a degree of autonomous local management, which is helpful in maintaining post-merger integrity. It also—crucially—insulates the stronger partner against aberrant profit dips on the part of the weaker partner.").



themselves to clients and prospective clients as a unified global law firm without having to work through typical complications or complexities of international mergers or other accretions.<sup>35</sup>

Swiss vereins are subject to few structural limitations.<sup>36</sup> One notable exception is the existence of a single profit center among the verein and its members.<sup>37</sup> In short, verein member firms must maintain separate profit pools, and cannot share profits, if they are to retain their status as distinct individual entities and avoid exposing themselves to additional tax liabilities.<sup>38</sup> Verein member law firms that share profits might also risk treatment as a single entity for some liability purposes.<sup>39</sup> To avoid these conceivable consequences of profit-sharing, some vereins reportedly share law firm costs instead.<sup>40</sup> The concept in doing so is that because profits are influenced by costs, allocating costs allows firms to mimic the sharing of profits.<sup>41</sup> This approach is best illustrated by way of a simple example. Assume that in 2014, Law Firm A, which is part of Verein V, has \$100 million in revenue, with costs of \$60 million and profits of \$40 million. In 2014, Law Firm A refers \$5 million in work to Law Firm B, which is also a member of Verein V. Law Firm B also has \$100 million in revenue, with costs of \$60 million and profits of \$40 million. As opposed to sharing profits between Firm A and Firm B to account for Firm A's referrals to Firm B, Firm A shifts \$5 million of its costs to Firm B.<sup>42</sup> As a result, Firm A effectively increases its profits from \$40 million to \$45 million.

In summary, vereins may range between a loose affiliation of independently-run law firms sharing a common brand to a tight-knit organization utilizing a unified brand name with integrated

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<sup>35</sup> Jarrett-Kerr & Wesemann, *supra* note 1, at 28; Johnson, *supra* note 1, at 74; Reeser & Foley, *supra* note 23; Sparkman, *supra* note 18, at 9.

<sup>36</sup> See Johnson, *supra* note 1, at 74 (observing that, other than maintaining separate profit pools and establishing a governing body, "[e]very other aspect of how a verein firm is organized is defined by its own strategic and management decisions—not by any restrictions inherent to the structure").

<sup>37</sup> Jarrett-Kerr & Wesemann, *supra* note 1, at 28; Johnson, *supra* note 1, at 75.

<sup>38</sup> Johnson, *supra* note 1, at 75.

<sup>39</sup> See *infra* Part IV.

<sup>40</sup> Johnson, *supra* note 1, at 75; Reeser & Foley, *supra* note 23.

<sup>41</sup> Johnson, *supra* note 1, at 75 (quoting a law firm consultant).

<sup>42</sup> See *id.* (offering a similar example).

standards and procedures.<sup>43</sup> Where law firms organized as vereins fall on this continuum depends almost entirely on the particular verein's articles of association and related governance or management documents.

## II. PROFESSIONAL RESPONSIBILITY ISSUES AFFECTING VEREINS

The Model Rules of Professional Conduct<sup>44</sup> and state analogs do not directly address lawyers' conduct while practicing under the umbrella of a verein, but law firm leaders must nonetheless recognize the professional responsibility concerns that practice within a verein may implicate. These include: (1) communications with clients and others concerning the relationships between the verein and its member firms, with a particular concern being the potential for such communications to be false or misleading;<sup>45</sup> (2) the imputation of conflicts of interest between member firms<sup>46</sup>; and (3) fee-splitting or fee-sharing among member firms, including firms practicing in jurisdictions that permit fee-sharing with non-lawyers.<sup>47</sup>

### A. *Full Disclosure of the Verein and Its Member Firms' Relationships*

Lawyers cannot mislead current clients, prospective clients, or the public about their firms' associations with other law firms.<sup>48</sup> This prohibition derives from Model Rule 7.1,<sup>49</sup> which

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<sup>43</sup> *Id.* at 79 (explaining that “[a] verein could be anything from a very loosely affiliated group of firms to a tightly run business that is virtually indistinguishable from a traditional partnership”).

<sup>44</sup> MODEL RULES OF PROF'L CONDUCT (2014).

<sup>45</sup> See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 7.1-3, at 1181 (2012-2013) (“If several law firms, by using the same name, hold themselves out to the public as one law firm, but they are not the same firm, that certainly does appear to be misleading . . .”).

<sup>46</sup> See *id.* (“When law firms tout their special relationships with other law firms, those relationships may serve . . . to impute conflicts of interest from one firm to another.” (footnotes omitted)).

<sup>47</sup> See *id.* n.38 (“These relationships may include financial relationships. Different law firms should be aware of the requirement in Rule 1.5(e) regarding the division of fees among lawyers in different law firms.”).

<sup>48</sup> See, e.g., Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, PA Eth. Op. 2004-06, 2004 WL 765235, at \*1-2 (2004) (reasoning that two law firms sharing an office suite could not describe themselves as an “association of professional corporations” because that misleadingly implied the existence of a partnership); Utah State Bar Ethics Advisory Opinion Comm., UT Eth. Op. 95-04,

flatly prohibits "false or misleading communication[s] about the lawyer or the lawyer's services."<sup>50</sup> As Model Rule 7.1 further explains, "[a] communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."<sup>51</sup> Accordingly, lawyers' communications about their law firms' affiliations or associations with other law firms "must be consistent with the actual relationship[s]" and otherwise describe the relationships in ways that recipients of the communications reasonably can be expected to understand.<sup>52</sup> Clients' and prospective clients' need for accurate descriptions of law firms' affiliations or associations, and for information sufficient to gauge the effect or influence of those relationships, if any, on their representations, should be apparent. After all, clients have a right to know who is representing them, whether the lawyers representing them are competent, whether the lawyers have conflicts of interest, whether their confidences will be protected, and how the lawyers will be compensated for their services. Indeed, depending on the circumstances, these factors may influence clients' or prospective clients' decisions to engage a firm in connection with a matter or to select another firm for the representation.

In 1994, the ABA's Standing Committee on Ethics and Professional Responsibility analyzed lawyers' ethical responsibilities arising out of the formation of law firm networks operating under common firm or trade names and other

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1995 WL 283827, at \*3 (1995) (concluding that "a franchise arrangement in which a lawyer or firm is provided with a trade name, marketing and related services . . . is inherently misleading because it implies to potential clients a partnership or professional corporation").

<sup>49</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-388, at 2 (1994) [hereinafter ABA Formal Op. 94-388].

<sup>50</sup> MODEL RULES OF PROF'L CONDUCT R. 7.1 (2014); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 84-351, at 4-5 (1984) [hereinafter ABA Formal Op. 84-351] (concluding that a law firm may designate another law firm as "affiliated" or "associated" provided that "the relationship between the firms is such that the communication is not false or misleading and the law firms adhere to the applicable rules regulating disclosure of confidential information").

<sup>51</sup> MODEL RULES OF PROF'L CONDUCT R. 7.1 (2014).

<sup>52</sup> *See* ABA Formal Op. 84-351, *supra* note 50, at 7 ("Communication that another law firm is 'affiliated' or 'associated' is not misleading if the relationship comports with the plain meaning which persons receiving the communication would normally ascribe to those words or is used only with other information necessary adequately to describe the relationship and avoid confusion.").

relationships in which law firms joined forces or pooled resources.<sup>53</sup> That effort resulted in Formal Opinion 94-388, in which the Committee affirmed lawyers' obligation to provide potential clients to whom a law firm's relationships with other law firms are relevant a meaningful description of those ties:

Lawyers have an obligation not to mislead prospective clients as to what the lawyer is able to bring to bear on the client's matter in terms of the size of the firm, the resources available to the firm or the relationship between the firm and other law firms with which it is associated. Words like "affiliated," [or] "associated," . . . without further explanation, can be misleading and, therefore, use of these terms, without a meaningful description of the nature of the relationship, violates Model Rule 7.1.<sup>54</sup>

Although Formal Opinion 94-388 does not bind courts,<sup>55</sup> many courts consider ABA ethics opinions to be persuasive, and it is therefore fair to assume that courts may interpret Rule 7.1 to require lawyers practicing in vereins to inform clients and prospective clients about the nature of the relationship between the member firms, including the availability of lawyers and other professionals in another firm in the verein to assist them.<sup>56</sup> The omission of any reference to vereins in the Model Rule 7.1 discussion in Formal Opinion 94-388 is no reason to discount the opinion because the scope of relationships considered there certainly encompasses vereins.<sup>57</sup> Besides, Model Rule 7.1 applies to lawyers' communications about their services in all contexts.<sup>58</sup>

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<sup>53</sup> ABA Formal Op. 94-388, *supra* note 49, at 1-2.

<sup>54</sup> *Id.* at 1.

<sup>55</sup> See *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182 "K" (2), 2008 WL 2066999, at \*2 (E.D. La. May 14, 2008) (explaining that ABA ethics opinions provide guidance to courts but are not binding precedent).

<sup>56</sup> See ABA Formal Op. 94-388, *supra* note 49, at 2-3; see also Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, NYC Eth. Op. 1995-8, 1995 WL 875457, at \*6 (1995) [hereinafter NYC Eth. Op. 1995-8] (finding Formal Opinion 94-388 persuasive, and concluding that lawyers advertising themselves as "associated" must "provide clients with disclosure as to the nature of their association when individual client circumstances make that information relevant").

<sup>57</sup> See ABA Formal Op. 94-388, *supra* note 49, at 1 (referring to "a proliferation of new ways of conducting [law] practice," and observing that law firms were "operat[ing] in multiple cities, form[ing] networks of law firms under a common firm name or trade name, and join[ing] forces and pool[ing] resources in any number of business arrangements").

<sup>58</sup> 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 55.3, at 55-4 (3d ed. 2001 & Supp. 2008) [hereinafter HAZARD & HODES].

Considering the broad prohibition on false or misleading communications in Model Rule 7.1 and the guidance provided in Formal Opinion 94-388, the originating firm should provide affected clients and prospective clients the following information about the structure and relationship of the *verein* and its member firms:

- (1) whether any lawyers or other professionals from other member law firm(s) may provide professional services to the client;
- (2) whether any legal fees the client pays will be shared with other member firm(s);
- (3) whether member firms share strategies or expertise; and
- (4) whether the member firms conduct common operations, or, in contrast, whether their relationship is merely a marketing device.<sup>59</sup>

Of course, in many instances a firm's membership in a *verein* will be irrelevant to a client or prospective client beyond potential conflicts of interest. If, for example, a client retains the U.S. law firm in a *verein* that includes British and Canadian firms to handle a matter that will not require the involvement of lawyers from either the British or Canadian firms, it probably is immaterial to the client whether the firms share fees, generally share strategies or expertise, or have common operations. In fact, many clients may not care or even consider how their law firms are organized. It is therefore reasonable for *verein* member law firms to assume that disclaimers and notices on their websites will generally suffice to inform clients and prospective

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<sup>59</sup> See ABA Formal Op. 94-388, *supra* note 49, at 3-4 (discussing the nature of the information a law firm must provide to clients and prospective clients regarding the ways in which law firms relate to one another). In Formal Opinion 94-388, the Standing Committee listed a fifth item of information to be provided to prospective clients: "whether profits of the firm the client originally retained will be shared with the other firm(s)." *Id.* But providing information on profits seems redundant if the originating law firm tells the client about any fee-sharing between firms in the *verein*. Furthermore, because it is impractical and inappropriate to determine the reasonableness of a lawyer's fee based on profit margin, see *Shaffer v. Superior Court*, 39 Cal. Rptr. 2d 506, 513 (Ct. App. 1995), lawyers should have no duty to disclose their profits to clients.

clients about the verein's structure.<sup>60</sup> Appropriate website disclaimers and notices should also satisfy any disclosure duties firms may be held to owe the public.<sup>61</sup>

All that said, the conservative course for law firms within a verein to fulfill their obligations to meaningfully describe for clients their relationships with their sister law firms is to include the information in items (1) through (4) above in their engagement letters or in an addendum to their engagement letters.<sup>62</sup> Among other things, the engagement letter or addendum should identify which firm or firms has the contractual relationship with the client and should state: the engagement is not with any other member firm absent contrary agreement, the lawyers responsible for the matter, the basis on which the firm is to be compensated for its services, and the law governing the relationship.<sup>63</sup> By including this information in its engagement documents, the firm also covers itself in those matters in which a sister firm's involvement is not anticipated at the outset of the representation, but becomes necessary or advisable as the representation develops.

Relatedly, Model Rule 7.5(a) prohibits lawyers' use of a "firm name, letterhead or other professional designation that violates Rule 7.1."<sup>64</sup> A firm's letterhead that reflects only the verein's name, brand, or logo, without also identifying the name of the

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<sup>60</sup> See D.C. Bar, D.C. Ethics Op. 302 (2000), available at <http://www.dcb.org/bar-resources/legal-ethics/opinions/opinion302.cfm> (observing that "because web pages allow multi-layered communications, questions may arise about whether a visitor to a web page may be misled because relevant disclosures are hidden many clicks away from the main pages. . . . The information needed to prevent a web site communication from being false and misleading should be readily available to visitors.").

<sup>61</sup> See *id.*

<sup>62</sup> See ABA Formal Op. 94-388, *supra* note 49, at 4; see also NYC Eth. Op. 1995-8, *supra* note 56 (approving of the ABA's position in Formal Op. 94-388 to require "more detailed disclosure in communications with individual prospective clients (including retention letters), at least when such disclosure could be relevant to the particular client").

<sup>63</sup> See, e.g., Norton Rose Fulbright, Norton Rose Fulbright Standard Terms of Engagement, available at <http://www.nortonrosefulbright.com/files/norton-rose-fulbright-standard-terms-of-engagement-25513.pdf> (last visited Apr. 19, 2015); see also MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2) & cmt. 5 (2014) (explaining that in assessing a lawyer's reasonable belief that the predominant effect of the lawyer's conduct occurred in a specific jurisdiction, a written agreement between the lawyer and client reasonably specifying a particular jurisdiction may be considered if it was obtained with the client's informed consent confirmed in the agreement).

<sup>64</sup> MODEL RULES OF PROF'L CONDUCT R. 7.5(a) (2014).

member law firm and its relationship to the *verein*, may be found to violate a jurisdiction's version of Model Rule 7.5(a).<sup>65</sup> It is also possible that letterhead that does not accurately reflect the law firm's relationship to the *verein* and vice versa might be alleged to implicate Model Rule 7.5(d), which provides that "[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact."<sup>66</sup> Although Model Rule 7.5(d) does not by its terms seem to apply to lawyers practicing in law firms that are members of *vereins*, its application comes into focus when you consider that (1) the rule essentially requires lawyers to "accurately designate [their] firm's form of business organization,"<sup>67</sup> and (2) *vereins* themselves do not practice law.

In addition, state rules of professional conduct may restrict a law firm's ability to adopt the *verein*'s name.<sup>68</sup> This scenario snared the U.S. offices of the global *verein* Norton Rose Fulbright.<sup>69</sup> A Texas ethics rule forced the U.S. member firm to at least temporarily retain its registered Fulbright & Jaworski LLP name rather than assume the *verein*'s global brand name.<sup>70</sup> In a nutshell, because no one named "Norton" or "Rose" had ever been a partner in Fulbright & Jaworski LLP, or in any of the Texas firm's predecessor firms, use of the name "Norton Rose Fulbright" alone was impermissible under Texas Disciplinary Rule of Professional Conduct 7.01.<sup>71</sup> The apparent lesson of the

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<sup>65</sup> *Id.* R. 7.5(d).

<sup>66</sup> MODEL RULES OF PROF'L CONDUCT R. 7.5(d).

<sup>67</sup> HAZARD & HODES, *supra* note 58, § 59.8, at 59-9.

<sup>68</sup> *See, e.g.*, GA. RULES OF PROF'L CONDUCT R. 7.5(e)(1) (2013) (governing the use of lawyers' names in law firm trade names); PA. RULES OF PROF'L CONDUCT R. 7.5(a) (2013) (providing in pertinent part that "[i]f otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession").

<sup>69</sup> Joshua Freedman, *Norton Rose Fulbright Retains Jaworski Name in US Regulatory Twist*, LAW. (June 14, 2013), <http://www.thelawyer.com/news/regions/americas-news/norton-rose-fulbright-retains-jaworski-name-in-us-regulatory-twist/3005972.article> (on file with authors); Pui-Guan Man, *Norton Rose Fulbright Faces US Name Change Conundrum*, LEGAL WEEK (June 14, 2013), <http://www.legalweek.com/legal-week/news/2274694/norton-rose-fulbright-faces-us-name-change-conundrum> (on file with authors).

<sup>70</sup> Freedman, *supra* note 69; Man, *supra* note 69; *see also* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 7.01(a) (2010) (stating that "[a] lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm").

<sup>71</sup> TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 7.01(a) (2010).

Norton Rose Fulbright imbroglia is that law firms intending to develop a global brand by forming a *verein* should consult trade name rules in their jurisdictions before attempting to forge a brand name that cannot be used in all markets absent successful completion of a potentially time-consuming or cumbersome effort to obtain special dispensation from state professional authorities.

Finally, to avoid misleading prospective clients and the public about the *verein* and its member firms' relationships, the *verein's* website should also provide appropriate notices and disclaimers listing the legal name of the *verein* and each member firm, and emphasizing that each member firm is a separate legal entity that belongs to the *verein*.<sup>72</sup> The website should clarify the *verein's* role, such as coordinating member firms' practices, formulating strategy, or maintaining the quality of legal services, and state that the *verein* itself does not provide legal services or practice law. A general reminder about member firms' duties of confidentiality and loyalty, including whether and to what extent member firms may exchange client information, is also advisable.<sup>73</sup>

### B. *Imputing Conflicts of Interest*

A principal concern of lawyers practicing in firms structured as *vereins* is that one member firm's conflicts of interest will be automatically imputed to all other members, thus subjecting the entire global firm to disqualification.<sup>74</sup> "Verein means

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<sup>72</sup> See generally the legal notices and disclaimers for the following *vereins*: *Legal Notices and Disclaimers*, NORTON ROSE FULBRIGHT, <http://www.nortonrosefulbright.com/legal-notices-and-disclaimers> (last visited Apr. 19, 2015); *Legal Notices*, DLA PIPER, <http://www.dlapiper.com/en/europe/footer/legalnoticespage/> (last visited Apr. 19, 2015); *Legal Notice*, SQUIRE PATTON BOGGS, <http://www.squirepattonboggs.com/footer/legal-notice> (last visited Apr. 19, 2015); *Legal Notice*, LITTLER, <http://www.littler.com/content/legal-notice> (last visited Apr. 19, 2015).

<sup>73</sup> See, e.g., *Legal Notices and Disclaimers*, NORTON ROSE FULBRIGHT, <http://www.nortonrosefulbright.com/legal-notices-and-disclaimers/> (last visited Apr. 19, 2015).

<sup>74</sup> See *United States v. Ross*, 33 F.3d 1507, 1523 (11th Cir. 1994) (citing *United States v. Kitchin*, 592 F.2d 900, 904 (5th Cir. 1979) (explaining that "if one attorney in a firm has an actual conflict of interest," then a court "impute[s] that conflict to all the attorneys in the firm, subjecting the entire firm to disqualification"). Law firms structured as *vereins* typically hold themselves out as a unified entity; indeed, such unity is a key reason for organizing as a *verein*. But such affiliation creates conflict imputation concerns because under U.S. conflict of interest regimes, if one attorney in a firm has a conflict of interest, the conflict is imputed to all the attorneys in the firm. MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2014).



association, society, club, or union.”<sup>75</sup> Of course, for purposes of imputing conflicts of interest, the touchstone of being “in a firm” is “association.”<sup>76</sup>

Model Rule 1.10(a) imputes conflicts of interest to all lawyers “associated in a firm.”<sup>77</sup> The term *firm* as used in Model Rule 1.10(a) broadly encompasses lawyers in a “partnership, professional corporation, . . . or other association authorized to practice law.”<sup>78</sup> Similarly, section 123(1) of the Restatement (Third) of the Law Governing Lawyers imputes a lawyer’s conflicts to “affiliated lawyers” who are “associated with that lawyer . . . through a law partnership, professional corporation, . . . or similar association.”<sup>79</sup>

*Mustang Enterprises, Inc. v. Plug-In Storage Systems, Inc.*<sup>80</sup> illustrates the ease with which courts find lawyers to be affiliated when looking to impute conflicts of interest.<sup>81</sup> In that case, an

<sup>75</sup> *In re Parmalat Sec. Litig.*, 421 F. Supp. 2d 703, 707 n.15 (S.D.N.Y. 2006) (internal quotation marks omitted) (citing CASSEL’S GERMAN DICTIONARY 662 (1978)); Jarrett-Kerr & Wesemann, *supra* note 1, at 27; *see also* Jeffries v. Deloitte Touche Tohmatsu Int’l, 893 F. Supp. 455, 457 n.1 (E.D. Pa. 1995) (citing an affidavit of the defendant to explain: “[A] Swiss Verein is an entity without an exact legal counterpart in the United States, but which is somewhat akin to an incorporated membership association. It is legally distinct from its members.”). In Switzerland, the association is denoted by the initials “e.V.” for “eingetragener Verein” or “[r]egistered [a]ssociation.” Hasselback, *supra* note 28 (internal quotation marks omitted).

<sup>76</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.10(a) (2014) (stating that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123(1) & cmt. c (2000) (applying conflict of interest restrictions to lawyers associated with another lawyer “in various forms of organization engaged in the private practice of law”).

<sup>77</sup> MODEL RULES OF PROF’L CONDUCT R. 1.10(a) (2014); *see also* ABA Formal Op. 84-351, *supra* note 50, at 7 (explaining that “[a]n ‘affiliated’ or ‘associated’ law firm would normally mean a firm that is closely associated or connected with the other lawyer or firm in an ongoing and regular relationship”); N.Y.C. Comm. on Prof’l & Judicial Ethics, Formal Op. 2000-4 (2000), 2000 WL 33769163, at \*4 [hereinafter NYC Eth. Op. 2000-4] (adhering to the view that “the relationship between firms must be sufficiently close, personal and continuing” to warrant the “affiliated” designation (internal quotation mark omitted)).

<sup>78</sup> MODEL RULES OF PROF’L CONDUCT R. 1.10 cmt. 1 (2014).

<sup>79</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123(1) (2000).

<sup>80</sup> 874 F. Supp. 881 (N.D. Ill. 1995).

<sup>81</sup> *Id.* at 888–89; *see also* NYC Eth. Op. 2000-4, *supra* note 77, at \*1 (concluding that law firms that say they are “affiliated” with, or an “affiliate” of, another firm on their letterheads, in professional notices, and so on, must treat themselves as a single firm for conflict of interest purposes (internal quotation marks omitted)).

Illinois federal court held that two law firms in different cities identifying themselves as “affiliated” on their letterheads and in their Martin-Hubbell listings should be treated as the equivalent of a two-office law firm for conflict of interest purposes.<sup>82</sup> The court emphasized that “the term ‘associated’ plainly reflects a broad-brush approach intended to sweep up all nature of lawyer associations, rather than its being limited to traditional law partnership status or . . . professional corporation shareholder status.”<sup>83</sup>

As in *Mustang Enterprises*, courts tend to impute conflicts of interest to lawyers with mutual access to clients’ files and confidential information,<sup>84</sup> or who hold themselves out to the public in a way to suggest they are a part of a single firm.<sup>85</sup> *In re Project Orange Associates, LLC*<sup>86</sup> discusses the latter scenario in the context of a law firm verein.

Project Orange Associates, LLC (“Project Orange”) sought bankruptcy court approval to employ verein member firm DLA Piper LLP (“DLA Piper USA”) as its general bankruptcy counsel pursuant to section 327(a) of the Bankruptcy Code.<sup>87</sup> Under that section, the attorney to be retained “must be both disinterested and not hold or represent any interest adverse to the [bankruptcy] estate.”<sup>88</sup> The U.S. Trustee objected to Project Orange’s request, citing DLA Piper USA’s representation of

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<sup>82</sup> *Mustang Enters., Inc.*, 874 F. Supp. at 889–90.

<sup>83</sup> *Id.* at 884; *see also* *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1320–21 (7th Cir. 1978) (holding that receipt of confidential information by the Washington office of the firm while engaged in lobbying disqualified all lawyers in the Chicago office of the same firm); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976) (applying New York law and reasoning that the common partner of two law firms in separate cities made the firms in effect a single unit for conflict of interest purposes).

<sup>84</sup> *See, e.g.*, *J2 Global Commc’ns Inc. v. Captaris Inc.*, No. CV 09-04150 DDP (AJWx), 2012 WL 6618272, at \*1, \*4 (C.D. Cal. Dec. 19, 2012) (disqualifying the defendants’ law firm in major patent litigation because it presumably obtained confidential information about the plaintiff through its collaboration with one of the corporate defendant’s “outside in-house counsel” who previously represented the plaintiff involving three of the four patents at issue in the lawsuits (internal quotation marks omitted)).

<sup>85</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.10(c) cmt. 2 (2014) (advising that the relevant considerations when evaluating whether lawyers are associated for purposes of imputing conflicts include whether they hold themselves out to the public in a way to suggest the entity is a firm).

<sup>86</sup> 431 B.R. 363 (Bankr. S.D.N.Y. 2010).

<sup>87</sup> *Id.* at 365.

<sup>88</sup> *Id.* at 369.

certain General Electric ("GE") entities in other matters.<sup>89</sup> One of those entities, General Electric International, Inc. ("GEII"), was Project Orange's largest unsecured creditor.<sup>90</sup> Project Orange's bankruptcy was partly occasioned by maintenance problems with GE turbines serviced and maintained by GEII, which allegedly prevented Project Orange from generating sufficient income.<sup>91</sup>

Attempting to distance itself from GEII, DLA Piper USA argued that GEII "[was] not, and never ha[d] been" a client.<sup>92</sup> GEII was a client of DLA Piper International, LLP ("DLA Piper International"), another member of the *verein* DLA Piper Global.<sup>93</sup> DLA Piper USA asserted that it received no financial benefit from DLA Piper International's work for GEII.<sup>94</sup> In addition, DLA Piper USA emphasized that it had obtained a conflict waiver from GE "to shield it from allegations of ethical wrongdoing," and that Project Orange hired another law firm as conflict counsel to handle any issues related to GEII.<sup>95</sup>

The bankruptcy court denied Project Orange's application to retain DLA Piper USA.<sup>96</sup> The court refused to distinguish between GE and GEII, observing that the conflict waiver combined GE and GEII as a single entity, and that the waiver request was addressed to GEII in care of a GE attorney.<sup>97</sup> Equally important, the court refused to distinguish the sister law firms, pointing out that DLA Piper USA, not DLA Piper International, sent the conflict waiver to GE.<sup>98</sup> Because DLA Piper USA "dealt with itself and its affiliates as one entity in negotiating a conflict waiver," the court found it unnecessary "to consider whether different conflicts rules might apply in some circumstances where international law firms share a relationship through a Swiss *verein*."<sup>99</sup> Nevertheless, the *In re Project Orange* court seized the opportunity to quote parts of the *verein*'s website

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<sup>89</sup> *Id.* at 365.

<sup>90</sup> *Id.* at 365-66, 368.

<sup>91</sup> *Id.* at 366.

<sup>92</sup> *Id.* at 368, 371.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 368.

<sup>95</sup> *Id.* at 369.

<sup>96</sup> *Id.* at 366.

<sup>97</sup> *Id.* at 371.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 371 n.3.

touting the firm's worldwide reach, and then questioned the merits of a conflict of interest rule treating verein member law firms as distinct entities:

DLA Piper holds itself out to the world as one firm, although it now tries to separate itself into separate firms for conflicts purposes. Followed to its logical conclusion, this would lead to the anomalous result that DLA Piper, on behalf of one client, could be adverse to DLA Piper International, on behalf of one of its clients, without violating ethical standards.<sup>100</sup>

Finally, the court determined that DLA Piper USA's conflict waiver did not trump section 327(a)'s disinterestedness and non-adversity requirements, and that the retention of conflicts counsel did not satisfy section 327(a) under circumstances where the proposed general bankruptcy counsel had a conflict of interest with a creditor that was central to the debtor's reorganization.<sup>101</sup>

In terms of evaluating the case, *In re Project Orange* arose out of a bankruptcy, in which courts are exquisitely sensitive to alleged conflicts of interest,<sup>102</sup> and where the requirements of section 327(a) override conflict waivers and rules of professional conduct governing conflicts of interest.<sup>103</sup> As the bankruptcy court noted, Project Orange and GE had a highly interdependent and adversarial relationship—GE and Project Orange had an extensive litigation history related to the turbines, GEII was Project Orange's largest unsecured creditor, and GEII's alleged failure to keep Project Orange's turbines running was central to

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 374–79.

<sup>102</sup> See William Freivogel, *Bankruptcy*, FREIVOGEL ON CONFLICTS, <http://www.freivogelonconflicts.com/bankruptcy.html> (last visited Apr. 19, 2015) (“Federal bankruptcy law . . . has superimposed upon the bankruptcy practice conflict-of-interest concepts that are quite removed from conflicts rules that apply to every other body of law.”).

<sup>103</sup> See *In re Persaud*, 496 B.R. 667, 677 n.10 (Bankr. E.D.N.Y. 2013) (“For example, under New York Model Rule of Professional Conduct Rule 1.7(b), an attorney who represents one client whose interests are adverse to those of another client may continue such representation if each client consents. However, courts have recognized that conflicts waivers are not effective for purposes of satisfying the ‘adverse interest’ requirement of § 327(a) of the Bankruptcy Code.”); *In re Perry*, 194 B.R. 875, 880 (Bankr. E.D. Cal. 1996) (stating that “section 327(a) has a strict requirement of disinterestedness and absence of representation of an adverse interest which trumps the rules of professional conduct.”).

the entire bankruptcy.<sup>104</sup> Indeed, the court determined the conflict of interest to be so acute that it could not be mitigated or resolved by the retention of conflicts counsel.<sup>105</sup> That level of adversity is unusual. Moreover, the court's ruminations about the merits of treating law firms within a *verein* as separate entities are *dicta*. It is therefore debatable whether other courts will afford *In re Project Orange* persuasive value, or whether they will limit the holding to its facts. At the same time, the case should signal to *verein* member law firms practicing under a global brand the very real possibility that they will be considered a single firm for conflict of interest purposes, despite their status as separate legal entities. At a minimum, the decision *In re Project Orange*, when coupled with the holding in *Mustang Enterprises*, calls into doubt the ability of a *verein* member firm subject to Rule 1.10(a) to represent a client adverse to another *verein* member firm's client. In the end, "whether an entity should be regarded as a 'firm' must be evaluated in light of the underlying purpose of Rule 1.10, namely, ensuring client loyalty and confidentiality."<sup>106</sup> Treating the various law firms within a *verein* as a single firm for conflict of interest purposes protects these crucial client interests.<sup>107</sup>

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<sup>104</sup> *In re Project Orange Assocs.*, 431 B.R. 363, 367, 372–76 (Bankr. S.D.N.Y. 2010).

<sup>105</sup> *Id.* at 375.

<sup>106</sup> *State v. Severson*, 215 P.3d 414, 426 (Idaho 2009); see also MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. 2 (2014) (underscoring the principle that "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client"). By way of further illustration, law firms belonging to legal networks "that primarily consist of 'casual referrals, or even periodic mutual backscratching' may not be treated as a single firm for conflict of interest purposes if 'the firms 'in fact share no clients, no confidences, no fees and no professional engagements.'" Thomas D. Morgan, *Conflicts of Interest and the New Forms of Professional Associations*, 39 S. TEX. L. REV. 215, 240–41 (1998) (quoting ABA Formal Op. 94-388, *supra* note 49); see also *Statement of Purpose*, LEX MUNDI, [http://www.lexmundi.com/lexmundi/Statement\\_of\\_Purpose.asp](http://www.lexmundi.com/lexmundi/Statement_of_Purpose.asp) (last visited Apr. 19, 2015) ("The members of Lex Mundi shall maintain complete autonomy; shall render professional services to their respective clients on an individual and separate basis; shall not be restricted in referring, handling or accepting cases or in joining other professional organizations; and are not affiliated for the joint practice of law.").

<sup>107</sup> See Morgan, *supra* note 106, at 241 ("Networks of firms whose members frequently interact to handle cases together should often be treated for conflicts purposes as if they were a single firm made up of practice groups."). Professor Morgan observes that when two "networked" firms cooperate on a number of cases and later find themselves on opposing sides, a danger exists that one or both firms could "pull punches." *Id.* (internal quotation marks omitted). He concludes that this

When a law firm consists of hundreds of lawyers in offices in various states, it can be a daunting task to identify and avoid conflicts of interest. When the same law firm joins a verein, with other member firms in countries around the world, the task becomes even more arduous. Verein member firms must share client intake and conflict-checking systems to detect and address potential conflicts of interest.<sup>108</sup> Fortunately, and smartly, most law firms organized as vereins employ a single conflict-checking system that all lawyers in the constituent firms use for all matters.<sup>109</sup> In fact, law firm policies and procedures designed to detect and cure or mitigate conflicts of interest on a global scale are essential, inasmuch as conflicts represent one of the two greatest professional liability risks to large law firms, dishonest clients being the other.<sup>110</sup>

### C. *Fee-Splitting Among Verein Member Firms*

*Fee-splitting* or *fee-sharing* generally refers to lawyers in different law firms dividing fees, as well as arrangements in which lawyers impermissibly share fees with non-lawyers.<sup>111</sup> Model Rules 1.5(e) and 5.4(a) address the allocation of legal fees among lawyers and with non-lawyers, respectively.<sup>112</sup> Fee-splitting issues may surface when a lawyer represents a client in a matter together with another lawyer governed by different rules, as where a lawyer practicing in a jurisdiction that has adopted the Model Rules collaborates with lawyers practicing in jurisdictions that permit them to share fees with non-lawyers.<sup>113</sup> Given that law firms within a verein are separate firms, and a

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danger may merit a court finding that a conflict of interest exists, even for unrelated litigation. *Id.*

<sup>108</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 3 (2014) ("To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in . . . matters the persons and issues involved.").

<sup>109</sup> Johnson, *supra* note 1, at 77.

<sup>110</sup> Douglas R. Richmond, *Essential Principles for Law Firm General Counsel*, 53 U. KAN. L. REV. 805, 810 (2005).

<sup>111</sup> DOUGLAS R. RICHMOND ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 102 & n.316 (2011).

<sup>112</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2014) (governing the division of fees by lawyers who are not in the same firm); *id.* R. 5.4(a) (governing lawyers sharing fees with non-lawyers).

<sup>113</sup> See generally ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 464 (2013) (addressing these issues).

key motivation behind adoption of the verein model is the anticipated increase of revenues and profits through the referral of matters between member firms,<sup>114</sup> U.S. law firms in vereins must recognize the potential fee-splitting restrictions imposed by Rules 1.5(e) and 5.4(a).<sup>115</sup>

### 1. Model Rule 1.5(e) Considerations

Some verein member law firms reportedly share costs as a way of compensating one another for client referrals while maintaining discrete profit pools to avoid compromising their legal and financial separation.<sup>116</sup> It is prudent to ask whether a cost-sharing approach implicates Model Rule 1.5(e)'s fee-splitting requirements or triggers other ethics rules.<sup>117</sup>

Model Rule 1.5(e) governs fee-splitting between lawyers who are "not in the same firm."<sup>118</sup> Lawyers in the same firm may share fees however they like.<sup>119</sup> Without question, "the collective earning *and sharing* of fees is a salient, if not quintessential, characteristic of a law firm."<sup>120</sup> Thus, the threshold question in a fee-splitting controversy is whether the lawyers are in the same firm.<sup>121</sup> Lawyers who are otherwise independent contractors may be deemed to be in the same firm if they hold themselves out to clients as having such a relationship, or practice "as a single, collective business entity."<sup>122</sup> Although determining whether lawyers are in the same firm is a fact-intensive inquiry,<sup>123</sup> some

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<sup>114</sup> See, e.g., Reeser & Foley, *supra* note 23 (discussing the mechanics of cost-sharing).

<sup>115</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2014); *id.* R. 5.4(a).

<sup>116</sup> See, e.g., Reeser & Foley, *supra* note 23.

<sup>117</sup> See *id.* (questioning whether law firms practicing under vereins are complying with Model Rule 1.5(e)'s restrictions on fee-splitting).

<sup>118</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2014).

<sup>119</sup> See Tomar, Seliger, Simonoff, Adourian & O'Brien, P.C. v. Snyder, 601 A.2d 1056, 1059 (Del. Super. Ct. 1990) ("By its own terms, Rule 1.5(e) does not apply to lawyers who are in the same firm."); ROTUNDA & DZIENKOWSKI, *supra* note 45, § 1.5-4(a), at 197 ("The ethics rules simply do not concern themselves with intra-firm referrals.").

<sup>120</sup> Vincent Robert Johnson, *Ethical Limitations on Creative Financing of Mass Tort Class Actions*, 54 BROOK. L. REV. 539, 556 (1988).

<sup>121</sup> RICHMOND ET AL., *supra* note 111, at 103.

<sup>122</sup> Welch v. Davis, 114 S.W.3d 285, 290 (Mo. Ct. App. 2003).

<sup>123</sup> Commonwealth v. Allison, 751 N.E.2d 868, 889 (Mass. 2001).

observers argue that U.S. law firms that join a *verein* may test credibility if they claim to be in the same firm as other *verein* member firms for Model Rule 1.5(e) purposes.<sup>124</sup>

The Model Rules define the terms *firm* and *law firm* to mean a “partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”<sup>125</sup> Although it is true that a *verein* does not itself practice law, it is formed specifically to allow its constituent firms to practice law cooperatively and its member firms unquestionably are authorized to practice law.<sup>126</sup> Indeed, the *verein* would not exist but for its members’ law practices. Unlike members of an affinity group, firms in a *verein* adopt a common brand name, embrace a common marketing strategy, form global practice groups, and may adopt various common business practices.<sup>127</sup> The comments to Model Rule 1.0 recognize that the definition of *firm* invites fact-intensive inquiry into the nature of the group or organization.<sup>128</sup> Factors to consider in deciding whether lawyers may be identified as being in a firm include whether they hold themselves out “to the public in a way that suggests that they are a firm or conduct themselves as a firm,” the terms of any agreement between them, and whether they “have mutual access to information concerning the clients they serve.”<sup>129</sup> All those things are generally true regarding *vereins*. It is thus reasonable to conclude that law firms organized as *vereins* collectively constitute a single firm for professional responsibility purposes. That being so, the Model Rule 1.5(e) prohibition on fee-splitting ought not apply to them.<sup>130</sup>

As appealing or persuasive as the foregoing reasoning may be, however, it is worth testing its limits. Although law firms organized as *vereins* strive to convey one-firm unity to clients and prospective clients, such promotion will not by itself

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<sup>124</sup> See, e.g., Reeser & Foley, *supra* note 23 (questioning whether law firms practicing under *vereins* are complying with Model Rule 1.5(e)’s restrictions on fee-splitting).

<sup>125</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0(c) (2014).

<sup>126</sup> Vetula, *supra* note 21, at 1178–79.

<sup>127</sup> *Id.*

<sup>128</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0 cmt. 2 (2014).

<sup>129</sup> *Id.*

<sup>130</sup> See *id.* R. 1.5(e) (explaining the circumstances in which “lawyers who are not in the same firm” may divide fees).



inoculate lawyers in U.S. law firms against alleged Rule 1.5(e) violations when working with lawyers in sister firms, nor will the fact that affiliated firms “divulge or share client confidences to take advantage of the collective experience of [the verein].”<sup>131</sup> Adversaries or professional authorities only need to look to the Model Rule 7.1 disclosure obligations to argue with some force that a U.S. member firm of a verein cannot reasonably post disclaimers on its website emphasizing the legal separateness of each member firm and, at the same time, claim to be in the same firm as its sister firm in, say, Australia, for Rule 1.5(e) purposes.<sup>132</sup> Rules against fee-splitting are intended to protect clients and courts liberally construe them to accomplish the objectives of each rule.<sup>133</sup> A claim that law firms within a verein are unified for some professional responsibility purposes, but separate for others tempts invocation of the adage that “you can’t have your cake and eat it too.”

Based on the premise that two verein member firms are not in the same firm under Model Rule 1.5(e), they may divide fees only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.<sup>134</sup>

Working through these requirements in order, first, under Rule 1.5(e)(1), lawyers must divide fees in proportion to the services they each perform, or they must assume joint responsibility for the representation.<sup>135</sup> These are alternative

<sup>131</sup> See *Commonwealth v. Allison*, 751 N.E.2d 868, 890–91 (Mass. 2001) (concluding that any fee-sharing agreement among non-partnership office-sharing lawyers who divulge client confidences and utilize the collective experience of the associated lawyers must satisfy Rule 1.5(e)).

<sup>132</sup> MODEL RULES OF PROF'L CONDUCT R. 7.1 (2014) (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.”).

<sup>133</sup> For example, in *Saggese v. Kelley*, 837 N.E.2d 699 (Mass. 2005), the Supreme Judicial Court of Massachusetts amended Rule 1.5(e)’s requirements to further the rule’s policy to protect “the client against unreasonable fees through prior disclosure and client consent.” *Id.* at 705. More specifically, although Massachusetts’ version of Rule 1.5(e) was silent as to the method and timing of the disclosure of fee-sharing agreements, the court imposed a new compliance condition requiring a referring lawyer to disclose the fee-sharing agreement to the client before the referral is made and then secure the client’s consent in writing. *Id.* at 706.

<sup>134</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2014).

<sup>135</sup> *Id.* R. 1.5(e)(1).

requirements.<sup>136</sup> Regarding the first alternative, there is no uniform measure of proportionality.<sup>137</sup> Lawyers may either (1) attempt to reasonably forecast the amount of work that each will do at the outset of the representation and allocate fees accordingly at that time, or (2) wait until the representation concludes and then divide the fees in reasonable conformity with the amount of work that each performed.<sup>138</sup> As for the second alternative, *joint responsibility* means both supervisory responsibility under Model Rule 5.1 and the assumption of malpractice liability.<sup>139</sup> Or, as a comment to Model Rule 1.5 explains, joint responsibility “entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.”<sup>140</sup>

Second, Model Rule 1.5(e)(2) requires the client consent in writing to the division of fees, including the share that each lawyer or law firm will receive.<sup>141</sup> Written confirmation need not take the form of a stand-alone document; lawyers may provide for the division of fees in their engagement agreements.<sup>142</sup>

Third, Model Rule 1.5(e)(3) requires the total fee to be divided to be reasonable.<sup>143</sup> The reasonableness of a fee is generally evaluated according to the eight factors listed in Model Rule 1.5(a).<sup>144</sup> The Model Rule 1.5(a) factors are not exclusive,<sup>145</sup>

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<sup>136</sup> *In re Hailey*, 792 N.E.2d 851, 862 (Ind. 2003).

<sup>137</sup> RICHMOND ET AL., *supra* note 111, at 104.

<sup>138</sup> *Kummerer v. Marshall*, 971 N.E.2d 198, 202 (Ind. Ct. App. 2012).

<sup>139</sup> ROTUNDA & DZIENKOWSKI, *supra* note 45, § 1.5-4(c), at 197–98.

<sup>140</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. 7 (2014).

<sup>141</sup> *Id.* R. 1.5(e)(2).

<sup>142</sup> *See, e.g., Rice, Steinberg, & Stutin, P.A. v. Cummings, Cummings & Dudenhefer*, 716 So. 2d 8, 16 (La. Ct. App. 1998) (finding no Rule 1.5(e) violation where engagement agreement included relevant provision); *McCord & Burns Law Firm, LLP v. Piuze*, 752 N.W.2d 580, 587 (Neb. 2008) (construing a fee-sharing provision in retainer agreement).

<sup>143</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(3) (2014).

<sup>144</sup> *Kummerer v. Marshall*, 971 N.E.2d 198, 201–02 (Ind. Ct. App. 2012).

<sup>145</sup> *Nunn Law Office v. Rosenthal*, 905 N.E.2d 513, 520 (Ind. Ct. App. 2009); *Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 929 A.2d 932, 955 (Md. 2007); *Twp. of W. Orange v. 769 Assocs., LLC*, 969 A.2d 1080, 1088 (N.J. 2009); *In re Jardine*, 289 P.3d 516, 523 (Utah 2012).

however, and courts may consider other factors in appropriate cases.<sup>146</sup> The reasonableness of attorney fees always depends on the facts and circumstances of the particular case.<sup>147</sup>

If the financial arrangement between a U.S. member firm and foreign member firm involves a direct division of the actual fee paid by the client, and the firms do not qualify as an association authorized to practice law as offered earlier, then Rule 1.5(e) compliance is plainly required.<sup>148</sup> But because fees include a profit component, this scenario is squarely at odds with the recognized structural limitation on direct profit sharing among or between *verein* members.<sup>149</sup> On the other end of the spectrum, if a lawyer in a U.S. member firm refers a matter to a foreign member firm, the matter requires only the foreign lawyers to perform the legal work, the client separately retains and pays the lawyers from the foreign firm, and there is no financial reward to the U.S. lawyer for the referral, then Rule 1.5(e) is not implicated. But this scenario fails to compensate the U.S. lawyer for originating the business, and therefore appears to undermine a primary benefit of joining a *verein*—that is, business growth.<sup>150</sup> As mentioned previously, a possible financial arrangement between these hypothetical firms indirectly rewards the referring lawyer through a cost-allocation approach. Whether a cost-sharing arrangement circumvents Model Rule 1.5(e), however, is unclear.

Model Rule 1.5(e) facially governs *fees*.<sup>151</sup> No court has addressed whether profit-sharing by lawyers is subject to the same requirements as fee-sharing, much less whether the sharing of costs as an indirect profit-sharing mechanism implicates Rule 1.5(e). But in 1995, the New Jersey Supreme Court Advisory Committee on Professional Ethics was asked

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<sup>146</sup> See *Berman v. Linnane*, 748 N.E.2d 466, 469 (Mass. 2001) (quoting an earlier case listing additional factors).

<sup>147</sup> *Silver Creek Invs., Inc. v. Whitten Constr. Mgmt., Inc.*, 307 P.3d 360, 365 (Okla. Civ. App. 2013).

<sup>148</sup> See ABA Formal Op. 94-388, *supra* note 49, at 8 (“The final issue that the Committee has been asked to address concerns fee sharing and other financial arrangements between related firms, however the relationship is denominated. A fundamental proposition, of course, is that all of the firms in the relationship must comply with ethical requirements regarding the sharing of fees.”).

<sup>149</sup> *Reeser & Foley*, *supra* note 23.

<sup>150</sup> *Id.*

<sup>151</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2014).

whether the following profit-sharing system between independent U.S. and London law firms violated New Jersey's virtually identical version of Rule 1.5(e):

Law firm A, which has offices located in various states, including New Jersey, and law firm B, which is located in London, England, would be closely affiliated with one another, but would not merge into a single law firm. The purpose of the proposed affiliation would be to provide enhanced legal services by making easily available to clients the combined expertise of lawyers in both firms.

No referral fees would be paid by either firm if attorneys from only one of the firms performed work for a particular client, even if that work was referred by one firm to the other. If attorneys from both law firm A and law firm B worked on a matter for the same client, then the fee charged to the client would be divided in accordance with RPC 1.5(e)—that is, the division would be in proportion to the services provided by each firm, consent to the participation of all the lawyers involved would be obtained from the client, and the total fee would be reasonable.

At the end of the fiscal year, a portion of each firm's profits would be pooled, and then distributed between the two firms in accordance with a specified formula, unrelated to the amount of any business referred from one firm to the other. (As a practical matter, this probably would be accomplished by a single year-end payment from law firm A to law firm B, or vice versa.)<sup>152</sup>

The New Jersey Committee concluded in Formal Opinion 681 that the law firms' proposed year-end pooling and sharing of profits did not constitute a division of fees and, thus, the firms did not need to satisfy Rule 1.5(e).<sup>153</sup> The New Jersey Committee agreed with the inquirer that the proposed profit-sharing arrangement was distinguishable from fee-sharing.<sup>154</sup> Focusing on the public policy rationale behind Rule 1.5(e), the New Jersey Committee initially reasoned that neither the profitability of a law firm, nor the disposition of those profits, triggered concerns within Rule 1.5(e)'s scope:

Ethical regulation of fee sharing is grounded in a concern for protecting clients, by insuring that in arriving at the total fee,

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<sup>152</sup> N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, N.J. Eth. Op. 681, 1995 WL 427922, at \*1 (1995) [hereinafter N.J. Eth. Op. 681].

<sup>153</sup> *Id.* at \*5.

<sup>154</sup> *Id.* at \*3.

the participating law firms do not submit parts which in sum exceed the whole. The premise is that the client should be charged only one overall fair and reasonable fee, calculated upon the totality of professional services rendered and responsibility assumed. . . .

Profits are another matter. They depend not only on total fees received over a period of time, but also on other income and the expenses attendant to the business of the firm's practice, turning on efficiency, methods of operation, and many other factors.

With regard to the present inquiry, neither the profitability of a law firm nor the disposition of those profits raised concerns within the scope of RPC 1.5(e).<sup>155</sup>

In addition, the New Jersey Committee cited the express language of Rule 1.5(e), which governs the division of a "fee" charged to a client, as opposed to using broader language.<sup>156</sup> Consistent with this limited construction, the New Jersey Committee observed that the comments to Model Rule 1.5 provided that "[a] division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm."<sup>157</sup>

The New Jersey Committee's analysis did not end with Rule 1.5(e). On its own initiative, the New Jersey Committee concluded that although the proposed profit-sharing scheme sidestepped Rule 1.5(e), it violated New Jersey Rule 7.3(d).<sup>158</sup> That rule prohibits lawyers from compensating another for making referrals to that lawyer, except in the case of certain lawyer referral services.<sup>159</sup> Unlike Rule 1.5(e), New Jersey Rule 7.3(d) "is grounded in a concern for protecting the public from various profit-oriented schemes to steer clients to certain lawyers, especially in circumstances where a client is likely to rely on the referral as connoting an endorsement of competence,

<sup>155</sup> *Id.* at \*3-4.

<sup>156</sup> *Id.* at \*4.

<sup>157</sup> *Id.* (alteration in original) (quoting unspecified comments to Model Rule 1.5) (internal quotation marks omitted).

<sup>158</sup> *Id.* at \*5.

<sup>159</sup> *Id.*; N.J. RULES OF PROF'L CONDUCT R. 7.3(d) (2013) ("A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by RPC 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.").

expertise, integrity or some other positive value.”<sup>160</sup> The New Jersey Committee reasoned that the profit-sharing pool violated New Jersey Rule 7.3(d) because it was an effort to compensate or give something of value, that is, shared profits, in return for the referring firm’s efforts to make a referral recommendation.<sup>161</sup>

Formal Opinion 681 raises multiple red flags for verein member law firms that share costs to avoid the possible ramifications of profit-sharing and otherwise reward partners for referrals and business origination. At first blush, it is easy to take comfort in the New Jersey Committee’s narrow construction of dividing fees under Rule 1.5(e) and conclude that profit-sharing and cost-sharing systems fall outside of Rule 1.5(e). Under the arrangement presented, however, the U.S. and London firms also agreed to (1) comply with Rule 1.5(e) on all matters requiring both firms to perform legal work, and (2) have the referring attorney decline a referral fee even when the matter was handled entirely by the receiving firm.<sup>162</sup> The other practical problem is that the hypothetical U.S. and London firms were not in a verein, and thus could freely pool profits if the arrangement was otherwise permissible.

Verein member law firms that want to maintain the legal separateness and limited liability protection afforded by the verein structure may balk at complying with Rule 1.5(e). To avoid the Rule 1.5(e) requirements, they might instead use a cost-allocation approach as a means of dividing fees on the back end, or even as an indirect means of compensating the originating lawyer. Depending on how firms structure or manage cost-sharing approaches, a court could conclude that such a system is disguised fee-sharing. Courts typically mandate strict compliance with Rule 1.5(e),<sup>163</sup> and lawyers who violate the Rule 1.5(e) ban on fee-splitting risk discipline, even if their conduct does not harm clients.<sup>164</sup> In addition, agreements to divide fees that violate Rule 1.5(e) or equivalent rules are unenforceable in many jurisdictions.<sup>165</sup>

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<sup>160</sup> N.J. Eth. Op. 681, *supra* note 152, at \*5.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at \*1.

<sup>163</sup> *In re Law Offices of James Sokolove, LLC*, 986 A.2d 997, 1004–05 (R.I. 2010).

<sup>164</sup> *See, e.g., In re Hart*, 605 S.E.2d 532, 534 (S.C. 2004) (finding violation in absence of harm to client).

<sup>165</sup> *See, e.g., Eng v. Cummings, McClorey, Davis & Acho, PLC*, 611 F.3d 428, 432–35 (8th Cir. 2010) (applying Missouri law); *Barnes, Crosby, Fitzgerald &*

Even if a *verein's* profit-sharing or cost-sharing system did not offend Rule 1.5(e), the New Jersey Committee's disapproval of the profit-sharing pool under New Jersey Rule 7.3(d) is concerning. Model Rule 7.2(b), which is similar to New Jersey Rule 7.3(d), generally prohibits lawyers from giving something of value to others for recommending the lawyer's services or channeling work.<sup>166</sup> This ban extends to "indirect compensation for referrals."<sup>167</sup> One of the express exceptions to Model Rule 7.2(b) permits mutual referrals of clients between lawyers if they are otherwise permitted by the rules, the agreement is not exclusive, and the client is informed of the existence and nature of the agreement.<sup>168</sup> But even then, the comments to Model Rule 7.2(b) reaffirm that "[e]xcept as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer . . . must not pay anything solely for the referral."<sup>169</sup>

The entire concept of a *verein* dividing and sharing fees is difficult to reconcile with member firms maintaining their legal separateness and avoiding direct profit sharing.<sup>170</sup> Firms' acceptance of joint responsibility on a legal matter may be one option to stay within the confines of Model Rule 1.5(e), comply with the *verein's* structural limitation on profit-sharing, and realize their expected rewards.<sup>171</sup> Yet, this negates one of the *verein's* defining characteristics—the maintenance of member

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Zeman, LLP v. Ringler, 151 Cal. Rptr. 3d 134, 141 (Ct. App. 2012) (discussing an equivalent California rule); Donald W. Fohrman & Assocs., Ltd. v. Mark D. Alberts, P.C., 7 N.E.3d 807, 815–23 (Ill. App. Ct. 2014) (refusing to enforce referral agreement in the absence of strict compliance with Rule 1.5(e); substantial compliance with the rule is inadequate); Daniel v. Aon Corp., 952 N.E.2d 638, 645 (Ill. App. Ct. 2011) (refusing to enforce an agreement that failed to comply with Rule 1.5(e)); Christensen v. Eggen, 577 N.W.2d 221, 224–25 (Minn. 1998) (finding that a fee-splitting agreement that violated Rule 1.5(e) offended public policy and therefore was unenforceable); Neilson v. McCloskey, 186 S.W.3d 285, 287 (Mo. Ct. App. 2005) ("[A]n agreement to share attorney fees that does not comply with [Missouri] Rule 4–1.5(e) is unenforceable."); Kalled v. Albee, 712 A.2d 616, 618 (N.H. 1998) (concluding that a contract that violated the fee-splitting rule was against public policy and thus void). *But see* Poole v. Prince, 61 So. 3d 258, 282 (Ala. 2010) (concluding that a Rule 1.5(e) violation does not invalidate a fee-sharing agreement because the sole remedy for the violation is a disciplinary penalty).

<sup>166</sup> MODEL RULES OF PROF'L CONDUCT R. 7.2(b) & cmt. 5 (2014).

<sup>167</sup> ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 545 (7th ed. 2011) [hereinafter ANNOT. MODEL RULES].

<sup>168</sup> MODEL RULES OF PROF'L CONDUCT R. 7.2(b)(4) (2014).

<sup>169</sup> *Id.* R. 7.2 cmt. 8.

<sup>170</sup> Reeser & Foley, *supra* note 23.

<sup>171</sup> *Id.*

firms' separate legal identities and financial independence. Another possible solution when a matter requires more than one firm to carry out the representation is to have each firm separately bill the client for its own services. As a practical matter, however, sending a client multiple bills covering the same time frame is an undesirable alternative because it is unwieldy, complicates the attorney-client relationship, erodes vereins' claims that they are unified firms providing seamless service to clients in the jurisdictions in which their lawyers practice, and, again, fails to fulfill the first attorney's and firm's reasonable expectations of reward for business origination.<sup>172</sup>

When Model Rule 1.5(e) is read in conjunction with Model Rule 7.1, a verein member law firm is required to communicate to the client in an engagement letter whether any part of the fees earned in the representation will be shared with another member firm and obtain the client's consent to the division.<sup>173</sup> That should be easy to do.<sup>174</sup> Indeed, clients of the type global law

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<sup>172</sup> *Id.*

<sup>173</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2014); *Id.* R. 7.1.

<sup>174</sup> Mechanically, it is simple for a lawyer to send an engagement letter to a client detailing the fee-sharing arrangement between verein member firms. Ideally, to achieve the client's written agreement to the fee-sharing arrangement under Model Rule 1.5(e)(2), a lawyer handling the matter will have a separate conversation with the client to explain the division of fees that is later confirmed in a writing acknowledged by the client, or will at least obtain a signed copy of the engagement letter from the client. But assume that neither scenario occurs. Rather, the client does not object after receiving the engagement letter, or merely says nothing at all. Is the client's receipt of a unilateral engagement letter disclosing the fee-sharing arrangement, without more, sufficient to manifest the client's consent for purposes of Model Rule 1.5(e)(2)? The answer is unclear. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 7 (2014) (explaining that obtaining informed consent usually requires the client's affirmative response because generally "a lawyer may not assume consent from a client's or other person's silence," but then noting that consent may be inferred "from the conduct of a client or other person who has reasonably adequate information about the matter").

The pre-2002 amendment version of Model Rule 1.5(e)(2) provided that lawyers can split fees if "the client is advised of and does not object to the participation of all the lawyers." MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(2) (2001) (emphasis added). This pre-2002 amendment language suggested that a client who "passively acquiesce[d] in the fee-split" would "be deemed to have consented to it." See Stephen E. Kalish, *The Sale of Law Practice: The Model Rules of Professional Conduct Point in a New Direction*, 39 U. MIAMI L. REV. 471, 490 (1985); see also *In re W/B Assocs.*, 307 B.R. 476, 482-83 (Bankr. W.D. Pa. 2004); Donald R. Lundberg & Charles M. Kidd, *You Say You Want An Evolution?: An Overview of the Ethics 2000 Amendments to the Indiana Rules of Professional Conduct*, 38 IND. L. REV. 1255, 1276 (2005) (Under pre-amendment Rule 1.5(e), "a written agreement was only required in cases where the division of fee was not in proportion to each lawyer's



firms typically represent are unlikely to care about fee-splitting in the verein context.<sup>175</sup>

## 2. Model Rule 5.4(a) Considerations

Taking fee-splitting one step further, if, for example, lawyers in a U.S. member firm collaborate with lawyers in a sister firm in the United Kingdom or Australia, which permit non-lawyer ownership of law firms, will the U.S. lawyers violate Model Rule 5.4(a)'s general prohibition against sharing fees with non-lawyers?<sup>176</sup> The concern here is that the U.S. lawyers will be held to share a legal fee in violation of Model Rule 5.4(a) because the

services. Also, the client did not necessarily have to be informed of the specifics of the fee division and did not need to explicitly agree.”)

The 2002 amendments to Model Rule 1.5(e) tightened the consent element, adding “a requirement that the client agree in writing to the participation of each lawyer, including the share each will receive.” ANNOT. MODEL RULES, *supra* note 167, at 88. In short, while an engagement letter that is not signed by the client generally is reliable proof of the parties' agreement, inferring or implying consent based on a client's failure to object to a term is not foolproof. There is good reason to believe a court will hold that the client consented to the arrangement. *See, e.g., Flynn v. Sarasota Cnty. Pub. Hosp. Bd.*, 169 F. Supp. 2d 1363, 1370 n.6 (M.D. Fla. 2001) (determining that “the parties had a valid fee agreement consisting of the engagement letter as confirmed by [their] subsequent conduct,” and observing that “[a]lthough the engagement letter was unsigned and a unilateral agreement, it became binding on the parties upon the mutual performance of the respective obligations”); *Macy's Inc. v. J.C. Penny Corp.*, 107 A.D.3d 616, 617, 968 N.Y.S.2d 64, 65–66 (1st Dep't 2013) (holding that J.C. Penney had accepted an advance conflict waiver in an engagement letter because, although J.C. Penney claimed that it never countersigned the letter, the letter expressly provided that “your instructing us or continuing to instruct us on this matter will constitute your full acceptance of the terms set out above” and it was undisputed that the law firm continued to represent J.C. Penney after receipt of the letter). Some courts may disagree, however. *See W/B Assocs.*, 307 B.R. at 483 (stating that “[a]n unsigned [engagement letter], in and of itself, raises material questions as to its validity and applicability”).

<sup>175</sup> *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. 7 (2014) (“A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist”).

<sup>176</sup> Under Model Rule 5.4(a), lawyers are prohibited from sharing fees with non-lawyers, except in four distinct circumstances: (1) payments to the survivors or estates of deceased lawyers; (2) payments made under Model Rule 1.17 to purchase the practice of a deceased, disabled, or disappeared lawyer; (3) firm compensation and retirement plans; and (4) sharing court-awarded fees with nonprofit organizations. MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2014). “The exception for firm compensation and retirement plans depends on whether the profits being shared are ‘tied to particular clients or particular matters.’” ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 464, at 2 (2013) [hereinafter ABA Formal Op. 464] (quoting ANNOT. MODEL RULES, *supra* note 167, at 461).

foreign lawyers' portion of the fee will ultimately be distributed to non-lawyers holding an ownership interest in the foreign firm. To be sure, this is not an issue where the foreign firm has no lay owners. Regardless, U.S. firms may find shelter under a recent ethics opinion by the ABA Standing Committee on Ethics and Professional Responsibility.<sup>177</sup>

ABA Formal Opinion 464, issued in August 2013, concludes:

[The] division of a legal fee by a lawyer or law firm in a Model Rules jurisdiction with a lawyer or law firm in another jurisdiction that permits the sharing of legal fees with nonlawyers does not violate Model Rule 5.4(a) simply because a nonlawyer could ultimately receive some portion of the fee under the applicable law of the other jurisdiction.<sup>178</sup>

Emphasizing that Model Rule 5.4 is intended to protect a "lawyer's independent professional judgment by limiting the influence of nonlawyers on the client-lawyer relationship," the Committee suitably gathered that there is scant reason to believe that the non-lawyer in the other jurisdiction would influence the professional judgment of the lawyer or law firm subject to the Model Rules.<sup>179</sup> Accordingly, as long as a lawyer subject to the Model Rules complies with Rule 5.4(c)'s requirement of professional independence, the lawyer may work with other lawyers or law firms practicing in jurisdictions with rules that permit fee-sharing with non-lawyers.<sup>180</sup>

Although Formal Opinion 464 expressly mentions only the District of Columbia as an example of a jurisdiction permitting non-lawyer ownership of law firms,<sup>181</sup> the analysis easily extends to lawyers practicing in foreign jurisdictions such as Australia or the United Kingdom. A lawyer in a Model Rules jurisdiction may reasonably conclude that the client needs the services of a second lawyer in another *verein* member firm in which a non-lawyer holds an ownership interest. The possibility that the second

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<sup>177</sup> ABA Formal Op. 464, *supra* note 176, at 1.

<sup>178</sup> *Id.* at 4.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1, 4. ABA Formal Opinion 464 is not without its detractors. Some critics have lamented that the ABA overstepped its jurisdiction in issuing Formal Opinion 464, and that the opinion otherwise represents a drastic change in long-standing ABA policy prohibiting non-lawyer ownership of law firms. *See, e.g.*, James Podgers, *Second Time Around: An ABA Ethics Opinion Sparks Renewed Debate over Nonlawyer Ownership of Law Firms*, A.B.A. J., Dec. 2013, at 20–21.

<sup>181</sup> ABA Formal Op. 464, *supra* note 176.

lawyer may share a fee, or other consideration for the referral work, with a non-lawyer should not expose the lawyer in the Model Rules jurisdiction to discipline. Model Rule 5.4 addresses a lawyer's professional independence.<sup>182</sup> Barring any undue influence exerted by a non-lawyer in the second firm—which seems like a remote and speculative possibility at best<sup>183</sup>—verein member firms in Model Rules jurisdictions should not view Rule 5.4(a) as an obstacle to teaming with sister firms in jurisdictions that permit the sharing of legal fees with non-lawyers.<sup>184</sup>

#### D. Summary and Synthesis

The Model Rules of Professional Conduct are rules of reason.<sup>185</sup> In many, if not most, circumstances, a lawyer's own interests are served by interpretations of ethics rules that advance the client's objectives as well. In some situations this will not necessarily be true, and courts almost always decide uncertain cases in the client's favor.<sup>186</sup> At times, the ramifications of this approach may seem unfair to global law firms organized as vereins. It is arguably inconsistent to treat a verein and its member law firms as the same firm when imputing conflicts of interest, and then as separate firms for purposes of fee-splitting. From a client perspective, however, it

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<sup>182</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. 1 (2014). Model Rule 5.4 is generally concerned with financial relationships entered into between lawyers and non-lawyers. For instance, Rule 5.4(d) prohibits a lawyer from practicing law in a professional corporation or association that practices law for profit if a non-lawyer owns an interest in the entity, is a director or officer, or has the right to direct or control the lawyer's decisions in rendering legal services.

<sup>183</sup> See Podgers, *supra* note 180, at 21 ("If you presume that you are dealing with the typical lawyer—that is, one who tries to be ethical and who is reasonably aware of her obligations under the rules of professional conduct—I see little likelihood that this type of fee sharing by co-counsel would have any impact on the lawyer in the Model Rules state or her client." (quoting Paula J. Frederick, chair of the ABA's Standing Committee on Ethics and Professional Responsibility) (internal quotation marks omitted)).

<sup>184</sup> See Vetula, *supra* note 21, at 1186 ("Deciding that a structure like the Swiss verein, in which a U.S. law firm is a member of an association alongside a U.K. firm allowing nonlawyer investment, does not violate the Model Rule[] [5.4] would . . . allow U.S. firms to adapt to the globalization of legal services while respecting other nations' public policy interests as well as the American bar's policy goals." (emphasis omitted)).

<sup>185</sup> MODEL RULES OF PROF'L CONDUCT: Preamble and Scope para. 3 (2014).

<sup>186</sup> See, e.g., David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 473 (1990) (stating that "the traditional model strongly implies that doubts about the exact contours of the law should be resolved in the client's favor").

is easy to understand why a good client of *verein* member Firm A would, for example, be displeased upon learning that *verein* member Firm B represents its adversary in major litigation.<sup>187</sup> By the same token, clients have the right to choose their lawyers and to be aware of the details related to the payment of fees, especially in light of *verein* member law firms' notices and disclaimers emphasizing their legal separateness.

Whether applying standards of professional conduct generally, or focusing on *vereins* specifically, "all doubts should be resolved in favor of furthering the best interest of the client."<sup>188</sup> For lawyers who might doubt the vitality of this principle in the global legal marketplace, where the clients tend to be large, sophisticated, and capable of protecting their own interests, it is worth recalling that courts have repeatedly declined to deviate from the client primacy principle, even when the client is sophisticated and appears to be able to protect its own interests, as in the case of corporations with in-house law departments.<sup>189</sup> Although some courts analyzing professional responsibility issues such as conflicts of interest have, from a lawyer's perspective, been more attuned to current commercial realities of large law firm practice,<sup>190</sup> such understanding is never assured.

In terms of eliminating perceived inconsistencies, a reasonable alternative may be to treat constituent law firms within a *verein* as the same firm for both conflict of interest and fee-splitting purposes. Most law firms organized as *vereins* employ unified conflict-checking systems, arguably suggesting that they consider themselves a single firm for conflict of interest purposes. As explained in connection with fee-splitting, the

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<sup>187</sup> See NYC Eth. Op. 2000-4, *supra* note 77, at \*4 (mandating that "affiliated" firms "treat the clients of each member as clients of every member of the group" (internal quotation marks omitted)).

<sup>188</sup> Wilkins, *supra* note 186, at 473 n.17, 476.

<sup>189</sup> See, e.g., *Celgene Corp. v. KV Pharm. Co.*, Civ. No. 07-4819(SDW), 2008 WL 2937415, at \*14-15 (D.N.J. July 29, 2008) (concluding that the plaintiff had not given "truly informed consent" to a concurrent conflict of interest and thus disqualifying the lawyers for the defendant notwithstanding the presence of a well-crafted advance waiver of conflicts (internal quotation marks omitted)).

<sup>190</sup> See, e.g., *Galderma Labs., L.P. v. Actavis Mid Atl. LLC*, 927 F. Supp. 2d 390, 395-406 (N.D. Tex. 2013) (enforcing an advance waiver of conflicts of interest executed by a client with in-house lawyers and thus declining to disqualify the law firm that obtained the waiver in litigation between the client granting the advance waiver and another client of the firm).

definition of *firm* and *law firm* in Model Rule 1.0(c) to include partnerships, professional corporations, and "other association[s] authorized to practice law" supports a one-firm approach.<sup>191</sup> The complication, obviously, is the potential effect on *verein* firms' civil liability that single-firm treatment under the ethics rules might yield. This may be a greater concern for some law firms than it is for others, but still requires consideration. It is to the professional liability ramifications of the *verein* structure that we now turn.

### III. POTENTIAL LIABILITY RAMIFICATIONS OF THE VEREIN STRUCTURE

One of the defining features of the *verein* structure is the isolation of liabilities among the *verein* entity and its individual members.<sup>192</sup> One law firm within a *verein* should not be vicariously liable for a sister firm's alleged errors merely by virtue of its affiliation or association. By analogy, courts generally respect corporate boundaries when it comes to liability.<sup>193</sup> A corporation is liable for the acts of a separate but related entity, such as a subsidiary or sister subsidiary, only in extraordinary circumstances, as when disregarding the corporate form is necessary to prevent fraud or injustice.<sup>194</sup> Courts have yet to address whether *verein*-structured law firms should escape liability for a sister firm's torts. Despite the absence of case law and the isolation of potential liabilities that organization as a *verein* is intended to achieve, it is plausible that the right circumstances could expose a *verein* itself or a member law firm to vicarious liability for another member law firm's misconduct.

Although there is currently no law firm experience on which to draw, lawsuits filed by plaintiffs to reach the deep pockets of global accounting firms provide guidance on threshold personal jurisdiction limitations on claims against global law firms structured as *vereins*, the application of traditional vicarious

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<sup>191</sup> MODEL RULES OF PROF'L CONDUCT R. 1.0(c) (2014); *see supra* notes 131–34 and accompanying text.

<sup>192</sup> Jarett-Kerr & Wesemann, *supra* note 1, at 28.

<sup>193</sup> *Spartan Tube & Steel, Inc. v. Himmelspach*, 102 F.3d 223, 226 (6th Cir. 1996) (applying Michigan law); *Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996) (applying New York law).

<sup>194</sup> *Murray*, 74 F.3d at 404 (applying New York law); *Arctic Ocean Int'l, Ltd. v. High Seas Shipping Ltd.*, 622 F. Supp. 2d 46, 53 (S.D.N.Y. 2009) (applying federal maritime common law).

liability theories to law firms organized as vereins, and even barriers to subpoenaing U.S. law firms within vereins to obtain documents in the custody of foreign law firms in the same vereins.<sup>195</sup> Pointedly, plaintiffs' efforts to hold vereins and their member accounting firms responsible for the wrongs of other member firms have seldom succeeded.<sup>196</sup> A few reported decisions, however, offer plaintiffs a roadmap for defeating law firms' dispositive motions.<sup>197</sup> This is significant. If a plaintiff can survive a motion to dismiss or motion for judgment on the pleadings, the costs for a verein and its members to defend the suit going forward may be substantial—even if the court ultimately rejects the plaintiff's claims. If a plaintiff can defeat summary judgment, the risk of trial may prompt a law firm to negotiate a substantial settlement, notwithstanding the existence of valid legal defenses to liability.

Finally, there is the alarming possibility that a verein entity and its entire network of firms might be held liable for the wrongdoing of one member firm. What conditions might allow a plaintiff to effectively pursue a one-firm theory of liability? In light of several global verein law firms pushing the integration envelope,<sup>198</sup> it is perhaps possible that these firms are inadvertently laying the foundation for a viable theory of collective liability.

#### A. *Personal Jurisdiction over Vereins and Foreign Member Firms*

Before a verein or its member firms may be exposed to various liability based on the theories plaintiffs commonly raise, the Due Process Clause of the U.S. Constitution must permit courts to exercise of personal jurisdiction over them.<sup>199</sup> The few courts confronting personal jurisdiction challenges from vereins and their foreign members in the accounting firm context have

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<sup>195</sup> See *Arctic Ocean Int'l, Ltd.*, 622 F. Supp. 2d at 49 (discussing admiralty jurisdiction and maritime transactions); *Murray*, 74 F.3d at 404–05 (discussing employer liability).

<sup>196</sup> See *Turley v. ISG Lackawanna, Inc.*, 960 F. Supp. 2d 425, 441 (W.D.N.Y. 2013); *Saleh v. Pretty Girl, Inc.*, 09-CV-1769(ENV)(RER), 2012 WL 4511372, at \*10 (E.D.N.Y. Sept. 28, 2012).

<sup>197</sup> *Arctic Ocean Int'l, Ltd.*, 622 F. Supp. 2d at 52–53.

<sup>198</sup> See *Johnson*, *supra* note 1, at 75–76 (surveying law firms organized as a verein to determine how well they are integrated structurally).

<sup>199</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

applied familiar constitutional analysis for the exercise of either specific or general jurisdiction over a nonresident defendant,<sup>200</sup> with foreseeable results.<sup>201</sup> The Texas Court of Appeals' decisions in *Gutierrez v. Cayman Islands Firm of Deloitte & Touche*<sup>202</sup> and *Deloitte & Touche Netherlands Antilles & Aruba v. Ulrich*,<sup>203</sup> both of which involved global accounting firms structured as vereins, are instructive.

In *Gutierrez v. Cayman Islands Firm of Deloitte & Touche*, foreign investors filed a class action against the verein Deloitte Touche Tohmatsu International ("DTT") and its member firms DT-Cayman and DT-Texas arising out of the collapse of InverWorld Ltd.<sup>204</sup> InverWorld had engaged DT-Cayman to serve as its independent accounting and auditing firm for a five-year period.<sup>205</sup> DT-Cayman then contracted with DT-Texas to perform the bulk of the audit work at InverWorld's San Antonio headquarters.<sup>206</sup> The engagement letter named both a DT-Cayman partner and a DT-Texas partner as joint accountants in charge.<sup>207</sup> Although no DTT-Cayman accountants ever went to Texas, DT-Cayman reserved ultimate responsibility for the audit,

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<sup>200</sup> It is settled that a court may exercise personal jurisdiction over a nonresident defendant only if there are "minimum contacts" between the defendant and the forum state." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). This standard may be satisfied in two ways. First, a court may exercise specific jurisdiction "if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *AST Sports Science, Inc. v. CLF Distrib. Ltd.*, 514 F.3d 1054, 1058 (10th Cir. 2008) (quoting *Burger King Corp.*, 471 U.S. at 472) (internal quotation marks omitted). Second, a court may exercise general jurisdiction when the cause of action does not arise from activities in the forum "based on the defendant's business contacts with the forum state." *Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000). If the defendant has sufficient minimum contacts with the forum state, the court must then analyze whether the exercise of personal jurisdiction over the defendant would offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (internal quotation marks omitted).

<sup>201</sup> See, e.g., *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 491 (S.D.N.Y. 2001) (holding that verein member firm Deloitte & Touche-Bermuda was hard pressed to argue that its relationship with the United States was random, fortuitous, or attenuated where it knew that it served a fund managed entirely in New York).

<sup>202</sup> 100 S.W.3d 261 (Tex. App. 2002).

<sup>203</sup> 172 S.W.3d 255 (Tex. App. 2005).

<sup>204</sup> *Gutierrez*, 100 S.W.3d at 265-66.

<sup>205</sup> *Id.* at 266, 269.

<sup>206</sup> *Id.* at 266.

<sup>207</sup> *Id.* at 269-70.

communicated regularly with DT-Texas, and issued the annual final auditor's reports.<sup>208</sup> DTT did no work on the InverWorld audits.<sup>209</sup> The trial court ruled that it lacked personal jurisdiction over DT-Cayman and DTT.<sup>210</sup> The plaintiffs filed an interlocutory appeal.<sup>211</sup>

The Texas Court of Appeals reversed the trial court's decision concerning DT-Cayman.<sup>212</sup> Refusing to find an agency relationship without any evidence of DT-Cayman's right to control DT-Texas's audit work, the court concentrated on DT-Cayman's connection to Texas.<sup>213</sup> Because DT-Cayman knew it was serving a client managed entirely in San Antonio, the court quickly concluded that DT-Cayman purposely directed its activities toward Texas and that the minimum contacts required for specific jurisdiction existed.<sup>214</sup>

In contrast, the *Gutierrez* court was not persuaded by the plaintiffs' argument that DTT was subject to Texas jurisdiction because DTT had a "worldwide presence," advertised its "full service capacity in all regions of the world," and acted as a "conduit" for activities in Texas.<sup>215</sup> The court noted that aside from maintaining a website and lending its name to multiple accounting firms, DTT had no relationship to the lawsuit.<sup>216</sup> More specifically, DTT had performed no services for DT-Cayman or DT-Texas in connection with the InverWorld audit, and did not otherwise interact with InverWorld.<sup>217</sup> Addressing only the absence of specific jurisdiction, the *Gutierrez* court affirmed the trial court's ruling that DTT could not reasonably anticipate being haled into a Texas court.<sup>218</sup>

Just three years later, the Texas Court of Appeals considered another personal jurisdiction challenge involving DTT, this time tied to Deloitte Touche Netherlands Antilles and Aruba

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<sup>208</sup> *Id.* at 266, 270.

<sup>209</sup> *Id.* at 270.

<sup>210</sup> *Id.* at 265.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 271.

<sup>214</sup> *Id.* at 273.

<sup>215</sup> *Id.* at 268, 270 (internal quotation marks omitted).

<sup>216</sup> *Id.* at 270.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*



("DTNA").<sup>219</sup> In *Deloitte & Touche Netherlands Antilles & Aruba v. Ulrich*,<sup>220</sup> fifty-four investors filed a lawsuit in Texas state court against DTT and DTNA, among others, arising out of a fraudulent securities scheme involving Integra Bank, an international bank incorporated in the Netherlands Antilles.<sup>221</sup> DTNA had contracted to audit Integra Bank for three years, with substantial portions of the work in Texas, where Integra Bank handled most of its administrative and accounting operations.<sup>222</sup> DTNA did not contract with a U.S.-based verein member to perform the Texas portion of the audit.<sup>223</sup> Rather, DTNA sent one of its own accountants to Texas each year.<sup>224</sup> Based on DTNA's clear expectation to profit from its Texas activities, both the trial court and the Texas Court of Appeals easily concluded that DTNA's Texas business contacts supported the exercise of specific jurisdiction.<sup>225</sup> In short, DTNA fared no better than DT-Cayman did in *Gutierrez*. The end result for DTT, however, changed dramatically from *Gutierrez*.

The court in *Ulrich* held that DTT was subject to general jurisdiction based on its continuous and systematic contacts with Texas.<sup>226</sup> The court initially recited DTT's position that it had no "offices, salaried employees, property, telephone numbers, mailing addresses, bank accounts, licenses to do business, agents for services of process, or taxpayer identification numbers in Texas."<sup>227</sup> The court also noted that DTT did not provide audit, tax, or consulting services to the individual member firms' clients.<sup>228</sup> As opposed to engaging in "commercial business," DTT maintained that it "provide[d] services only to its member firms."<sup>229</sup> Setting these arguments aside, the *Ulrich* court

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<sup>219</sup> *Deloitte & Touche Neth. Antilles & Aruba v. Ulrich*, 172 S.W.3d 255, 259 (Tex. App. 2005).

<sup>220</sup> 172 S.W.3d 255.

<sup>221</sup> *Id.* at 259, 261.

<sup>222</sup> *Id.* at 261-62.

<sup>223</sup> *Id.* at 263.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 259, 269-70.

<sup>226</sup> *Id.* at 267.

<sup>227</sup> *Id.* at 265.

<sup>228</sup> *Id.* at 264.

<sup>229</sup> *Id.* at 265 (internal quotation marks omitted).

carefully detailed the operations base maintained by DTT in Texas for the prior ten years<sup>230</sup>—evidence which was noticeably absent from the record in *Gutierrez*.<sup>231</sup>

During this period, DTT member firm DT-U.S. seconded a partner and three employees to DTT full-time.<sup>232</sup> Under this arrangement, DTT reimbursed DT-U.S. for office space in Houston, Texas, as well as the individuals' earnings.<sup>233</sup> The partner managed DTT's member firms in the Latin American region and one of the employees facilitated training for the verein's member firms in that region.<sup>234</sup> Predictably, the court in *Ulrich* rejected DTT's perceived attempt to split hairs about the absence of "salaried" employees or "commercial" business in Texas.<sup>235</sup> The court determined that the seconded personnel in Texas were DTT's employees because their work was "DTT work ultimately paid for and controlled by DTT."<sup>236</sup> The court then held that a verein or any other foreign association "that sets up what is, in effect, a permanent office in Texas, and uses this base for conducting out-of-state or global business, could reasonably anticipate a Texas court may exercise general jurisdiction over the firm."<sup>237</sup> Accordingly, under *Ulrich*, a verein that maintains an office for a continuous period of time and staffs the office with seconded employees conducting business on its behalf may be subject to general jurisdiction.<sup>238</sup>

The results in *Gutierrez* and *Ulrich* are straightforward. Foreign law firms within vereins that contract to work on matters for clients with U.S. operations likely will be held to have the necessary minimum contacts to satisfy state long-arm statutes and constitutional due process requirements. The verein itself will not be subjected to jurisdiction on the basis that it advertises itself as a global firm capable of servicing clients around the world, or licenses its name to member firms located in the United States. The verein must either have a meaningful

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<sup>230</sup> *Id.* at 265–66.

<sup>231</sup> *Gutierrez v. Cayman Is. Firm of Deloitte & Touche*, 100 S.W.3d 261, 269–70 (Tex. App. 2002).

<sup>232</sup> *Ulrich*, 172 S.W.3d at 265.

<sup>233</sup> *Id.* at 265–66.

<sup>234</sup> *Id.* at 265.

<sup>235</sup> *Id.* at 266 (internal quotation marks omitted).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *See id.*

relationship to the actual transaction at issue in the litigation to trigger specific jurisdiction or a permanent business office in the state conducting activities of such a substantial nature and quality to support general jurisdiction. Even that possibility seems unlikely given that a *verein* does not practice law.

Finally, although not addressed in *Gutierrez* or *Ulrich*, another possible ground for the exercise of personal jurisdiction over a *verein* or a foreign member law firm is to impute the contacts of a U.S. member firm to the *verein* or foreign member firm under an agency, alter ego, or joint enterprise theory.<sup>239</sup> The underlying justification for imputation in this context is that because the two entities are effectively the same entity, “the jurisdictional contacts of one *are* the jurisdictional contacts of the other” under the Supreme Court’s due process analysis.<sup>240</sup> Although these liability theories are discussed in the next section, for purposes of exercising personal jurisdiction, courts have consistently refused to impute contacts to a foreign defendant based solely on references in marketing materials or other public statements about the defendant’s status as a global or worldwide firm.<sup>241</sup>

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<sup>239</sup> See, e.g., *Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 653 (5th Cir. 2002) (observing that “federal courts have consistently acknowledged that it is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court”).

<sup>240</sup> *Id.*

<sup>241</sup> See, e.g., *Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 193–94 (S.D.N.Y. 2000) (addressing the sufficiency of the pleadings to establish jurisdiction on an alter ego theory, and determining that public statements intended to create the impression that a global communications company existed would not be sufficient to “create” a single entity structure, though the allegations that the entities were “mere departments” of a parent were sufficient to defeat the motion to dismiss for lack of jurisdiction); *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 661–62 (S.D.N.Y. 1997) (dismissing for lack of personal jurisdiction an employment discrimination complaint filed against a Netherlands-based association with no office or employees in the United States, and observing that marketing statements to the effect that the defendant was an international network of member firms was insufficient to confer personal jurisdiction over the foreign defendant); *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1253–54 & n.10 (S.D.N.Y. 1984) (refusing to exercise personal jurisdiction over an Australian accounting firm because it shared referral fees with its United States-based affiliate, and concluding that their joint membership in “a single cohesive worldwide organization” was insufficient to make the American entity the alter ego of the Australian entity for jurisdictional purposes (internal quotation marks omitted)).

## B. Vicarious Liability Theories

### 1. Agency

Courts have uniformly rejected the claim that a verein, as an umbrella organization, is structured in such a way that its member firms always act as agents of the verein when performing services.<sup>242</sup> Bare assertions that member firms of a verein are agents of one another have also failed to gain judicial traction.<sup>243</sup> It is hornbook law that control is the essential element in establishing an agency theory of vicarious liability.<sup>244</sup> A plaintiff premising liability on agency cannot simply allege facts permitting an inference of a principal's control or influence over an agent,<sup>245</sup> but must instead allege the principal's control or

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<sup>242</sup> See *Star Energy Corp. v. RSM Top-Audit*, No. 08 Civ. 00329(DC), 2008 U.S. Dist. LEXIS 99825, at \*11–12 (S.D.N.Y. Nov. 26, 2008) (concluding that an agency relationship cannot be grounded on the general assertion that RSM International “advertises itself as one combined organization” and has “member firms in over 64 countries and is represented in each of the top 40 major business centres throughout the world” (internal quotation marks omitted)); *Skidmore Energy, Inc. v. KPMG*, No. 3: 03-CV-2138-B, 2004 U.S. Dist. LEXIS 28396, at \*10–14 (N.D. Tex. Dec. 28, 2004) (concluding that plaintiffs failed to state a claim against KPMG’s U.S. member firm for the actions of KPMG’s Morocco member firm based on bare-bones allegations that KPMG was operating as a “worldwide organization” (internal quotation marks omitted)); *In re Worldcom, Inc. Sec. Litig.*, No. 02 Civ. 3288(DLC), 2003 U.S. Dist. LEXIS 10863, at \*31 (S.D.N.Y. June 25, 2003) (dismissing securities claim against Andersen Worldwide SC because the plaintiff’s agency theory was premised on the sole allegation that AWSC was an “umbrella organization for its member firms worldwide” (internal quotation marks omitted)).

<sup>243</sup> See *In re AM Int’l Inc. Sec. Litig.*, 606 F. Supp. 600, 607 (S.D.N.Y. 1985) (dismissing complaint against Pricewaterhouse entities outside the United States after rejecting the argument that all Pricewaterhouse affiliates worldwide were “in fact one entity, and acted as agents of one another”).

<sup>244</sup> See, e.g., *In re Parmalat Sec. Litig.*, 594 F. Supp. 2d 444, 451 (S.D.N.Y. 2009) (noting that control is generally considered to be “the essential characteristic of the principal-agent relationship”); see also *In re Lernout & Hauspie Sec. Litig.*, 230 F. Supp. 2d 152, 173 (D. Mass. 2002) (citing the lack of specific allegations supporting an inference of an agency relationship, such as audits bearing the name, logo, or signature of the verein; a memorandum or other writing implying that the verein itself was retained as an independent auditor; or that cooperation between various member firms on different aspects of the audit occurred under the direction of, or subject to the control of, the verein).

<sup>245</sup> *Green v. Beer*, No. 6 Civ. 4156(KMW)(JCF), 2009 U.S. Dist. LEXIS 27503, at \*42 (S.D.N.Y. Mar. 30, 2009); see also *Neubauer v. Eva-Health USA, Inc.*, 158 F.R.D. 281, 285 (S.D.N.Y. 1994) (holding that the bare allegation of control did not suffice to allege control person liability “as the Court need not accept as true on a motion to dismiss allegations which amount simply to legal conclusions”); *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 547 (S.D.N.Y. 2008) (stating

influence over the particular activity at issue.<sup>246</sup> In an effort to satisfy the control test, plaintiffs have primarily focused on some combination of the verein's branding and promotional materials, member firms' compliance with uniform professional standards and procedures approved by the verein, and cooperation between the putative principal and agent on a certain part of the relevant transaction.

Although a facially appealing basis for liability, a verein's global marketing of its member firms or promotion of a uniform brand name does not transform member firms into agents of the verein.<sup>247</sup> Nor does a member firm become an agent or partner of other member firms by using the same brand name.<sup>248</sup> For

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that where the only language justifying a principal-agent relationship "is general, vague, and conclusory," the relationship has not been sufficiently alleged).

<sup>246</sup> See *Star Energy Corp.*, 2008 U.S. Dist. LEXIS 99825, at \*7-8 (dismissing plaintiff's vicarious liability claim grounded on allegations that the umbrella entity supervised the compliance of member firms by auditing their work to ensure compliance with its strict procedures, controlled eligibility for membership and ability to use the brand name, and dictated the attributes of members before allowing them to bear the brand name); *In re Asia Pulp & Paper Sec. Litig.*, 293 F. Supp. 2d 391, 393, 396 (S.D.N.Y. 2003) (concluding that allegations of cost and profit sharing, partner overlap, global setting of professional standards, maintenance of a global infrastructure and administration, and marketing of a "one firm" concept through website and press releases were insufficient to demonstrate "control person" liability under securities laws, and noting the significant absence of allegations that the global entity "was able to control or in any way influence the particular audits conducted or opinions offered by its individual member firms" (internal quotation marks omitted)).

<sup>247</sup> *Nuevo Mundo Holdings v. PriceWaterhouseCoopers LLP*, No. 03 Civ. 0613(GBD), 2004 U.S. Dist. LEXIS 780, at \*15-18 (S.D.N.Y. Jan. 22, 2004) (rejecting agency theory between PricewaterhouseCoopers, Arthur Andersen, and their respective Peruvian member firms when the plaintiff's only specific allegations were the statements of the member firms themselves and the fact that they shared an associational name); *Lernout*, 230 F. Supp. 2d at 170-72 (holding that allegations that KPMG International touted itself as a unitary global firm that provided service around the world through global service teams and that there was collaboration and coextensive responsibility for auditing Lernout & Hauspie was insufficient to plead an agency relationship with member firms KPMP Belgium, UK, and United States); *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1254 n.10 (S.D.N.Y. 1984) (noting that references in brochures and pamphlets describing an entity as "a single cohesive worldwide organization" could not alone contradict the plain language of business agreements between the Australian and American accounting firms (internal quotation marks omitted)).

<sup>248</sup> *Nuevo Mundo Holdings*, 2004 U.S. Dist. LEXIS 780, at \*7 (recognizing that "[m]ember firms in an international accounting association are not part of a single firm and are neither agents nor partners of other member firms simply by virtue of using the same brand name").

example, in *In re Lernout & Hauspie Securities Litigation*,<sup>249</sup> the plaintiffs attempted to substantiate an agency relationship between Swiss verein KPMG International and its member firms using excerpts from KPMG's website and annual shareholder report touting its global services regime.<sup>250</sup> Rejecting the plaintiffs' allegations, the court opined that KPMG's public relations materials proclaiming firm unity and referring to the firm as a global entity were undercut by the very same web pages and marketing information declaring the legal separateness of the verein and each member firm.<sup>251</sup> These declarations alone precluded any reasonable inference of actual or apparent authority.<sup>252</sup> *Lernout* affirms the principle that the actual interaction between the putative principal and agent is the determinative inquiry, not a third party's perception of the relationship.

Cases involving global accounting firms also illustrate that agency is not created because member firms share quality assurance standards established and enforced by the verein.<sup>253</sup> In *Nuevo Mundo Holdings v. PriceWaterhouseCoopers LLP*,<sup>254</sup> for

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<sup>249</sup> 230 F. Supp. 2d 152.

<sup>250</sup> *Id.* at 171–72.

<sup>251</sup> *Id.* at 173 n.16; *see also* *Skidmore Energy, Inc. v. KPMG*, No. 3: 03-CV-2138-B, 2004 U.S. Dist. LEXIS 28396, at \*12 (N.D. Tex. Dec. 28, 2004) (observing that, despite plaintiffs' allegations that KPMG was a world-wide organization, KPMG's website stated that KPMG itself did not serve clients and that its member firms were separate and independent legal entities).

<sup>252</sup> *Lernout*, 230 F. Supp. 2d at 173 n.17.

<sup>253</sup> *See, e.g.*, *Newby v. Enron Corp.*, 394 F.3d 296, 308–09 (5th Cir. 2004) (noting that Andersen Worldwide's responsibility for promulgating and enforcing professional standards would not be sufficient to hold it liable for the actions of its U.S. member firm Arthur Andersen); *Nuevo Mundo Holdings*, 2004 U.S. Dist. LEXIS 780, at \*15–16 (concluding that an allegation that the putative principal and agent used the same accounting standards was insufficient to infer an agency relationship); *In re Asia Pulp & Paper Sec. Litig.*, 293 F. Supp. 2d 391, 396 (S.D.N.Y. 2003) (concluding that general allegations that AWSC set management and policies for Andersen member firms was insufficient for the purpose of pleading control person liability under securities laws); *Maresca v. Holiday Inns, Inc.*, No. 92 Civ. 4550(RPP), 1993 U.S. Dist. LEXIS 57, at \*14–15 (S.D.N.Y. Jan. 5, 1993) (requiring licensees or franchisees to comply with quality standards does not create a principal-agent relationship); *see also* *United States v. Bestfoods, Inc.*, 524 U.S. 51, 72 (1998) (holding that “[a]ctivities that involve [a subsidiary's] facility but which are consistent with the parent[] [corporation's] investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct [parental] liability” (internal quotation marks omitted)).

<sup>254</sup> No. 03 Civ. 0613(GBD), 2004 U.S. Dist. LEXIS 780.

example, the court refused to find a principal-agent relationship between two global accounting firms and their affiliates based, in relevant part, on allegations that the umbrella organizations required their member firms to adhere to certain procedures and conducted reviews to ensure that member firms followed those procedures.<sup>255</sup> Key to the court's ruling was the absence of any indication that the global entities participated in decisions about how their member firms completed audit reports; that they were aware of, or contributed to, a decision to alter the relevant audit reports; or that the global entities and their firms mutually understood that the global entities' controlled the firms' accounting services.<sup>256</sup> Similarly, in *Star Energy Corp. v. RSM Top-Audit*,<sup>257</sup> the court held that Star Energy's assertions that the verein RSM International controlled its U.S. member firm's eligibility for membership use of the RSM brand name, and promulgated the audit manual and policies that enabled its member firm to serve U.S. companies, was insufficient to sustain an agency claim that RSM International controlled the U.S. member firm's dealings with Star Energy.<sup>258</sup>

Just as a verein's oversight of its constituent firms to assure compliance with professional standards does not establish agency,<sup>259</sup> simple collaboration between a member firm and the verein or another member firm on an engagement is insufficient to impose vicarious liability.<sup>260</sup> In *In re Royal Ahold N.V. Securities & ERISA Litigation*,<sup>261</sup> for example, the plaintiffs alleged that Deloitte US and Deloitte Netherlands effectively

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<sup>255</sup> *Id.* at \*8, \*18.

<sup>256</sup> *Id.* at \*16.

<sup>257</sup> No. 08 Civ. 00329(DC), 2008 U.S. Dist. LEXIS 99825 (S.D.N.Y. Nov. 26, 2008).

<sup>258</sup> *Id.* at \*7-8.

<sup>259</sup> *See, e.g., Nuevo Mundo Holdings*, 2004 U.S. Dist. LEXIS 780, at \*9-10 (rejecting agency claims where the umbrella entity oversaw the activities of member firms to assure compliance with professional standards and ethical requirements); *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 661-62 (S.D.N.Y. 1997) (concluding that an umbrella organization that set standards for member accounting firms and provided general assistance did not have a principal-agent relationship with its member firms). *But see Banco Espirito Santo Int'l, Ltd. v. BDO Int'l*, 979 So. 2d 1030, 1033-34 (Fla. Dist. Ct. App. 2008) (holding that evidence demonstrating that a global entity could require member firms to provide services to clients, comply with global operating directives and restrictions, and submit to compliance reviews, presented a triable issue as to agency).

<sup>260</sup> *In re Parmalat Sec. Litig.*, 594 F. Supp. 2d 444, 454 n.71 (S.D.N.Y. 2009).

<sup>261</sup> 351 F. Supp. 2d 334 (D. Md. 2004).

operated as one based on the corporate website's description of Deloitte as a global brand name and its characterization of Deloitte US's service as a "file reviewer" for Deloitte Netherlands to ensure that audits conformed to generally accepted accounting principles in the U.S.<sup>262</sup> The court held that, at most, these facts established "that the two firms 'acted as a source of information' for one another and coordinated efforts."<sup>263</sup> Thus, even if a firm confers with the verein or another member firm, this interaction does not necessarily indicate that the first firm was subject to another's direction and control in a legally relevant sense.<sup>264</sup> It is one thing for a member firm to consult or to obtain recommendations, but it is quite another to require a member firm to seek the approval of the verein or another member before it can act.<sup>265</sup>

In summary, courts' reluctance to accept agency allegations grounded on a mix of marketing slogans, compliance with professional protocols, and collaboration on a specific project task should comfort global law firms structured as vereins. Nevertheless, two fairly recent decisions from the Southern District of New York provide a cautionary tale about the inherent risks of defending against agency allegations.

a. *Cromer Finance Ltd. v. Berger*

In *Cromer Finance Ltd. v. Berger*,<sup>266</sup> the plaintiffs sought to hold accounting giant Deloitte Touche & Tohmatsu ("DTT"), a Swiss verein, and its Bermuda member firm, DT-Bermuda, liable for audits of Manhattan Investment Fund, Ltd., an offshore investment fund managed from New York.<sup>267</sup> DTT successfully moved to dismiss all claims against it due to the plaintiffs' failure to sufficiently allege DTT's scienter, an essential element of the plaintiffs' various theories of recovery.<sup>268</sup> The deficient complaint

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<sup>262</sup> *Id.* at 385 n.41 (internal quotation marks omitted).

<sup>263</sup> *Id.*

<sup>264</sup> *Maung Ng We v. Merrill Lynch & Co.*, No. 99 Civ. 9687(CSH), 2000 U.S. Dist. LEXIS 11660, at \*20 (S.D.N.Y. Aug. 14, 2000).

<sup>265</sup> *See Butto v. Collecto Inc.*, 845 F. Supp. 2d 491, 496 (E.D.N.Y. 2012) (citing cases for the proposition that one entity's right to review the work of another entity with respect to a project "does not necessitate a finding of agency").

<sup>266</sup> Nos. 00 CIV. 2284(DLC), 00 CIV. 2498(DLC), 2002 U.S. Dist. LEXIS 7782 (S.D.N.Y. May 2, 2002).

<sup>267</sup> *Id.* at \*2.

<sup>268</sup> *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 493-96 (S.D.N.Y. 2001).



relied heavily on the presence of DTT's name and logo on the audit reports to establish DTT's knowledge of the allegedly false and misleading information contained therein.<sup>269</sup> DTT's good fortune to exit a lawsuit with alleged damages in excess of \$400 million,<sup>270</sup> however, was short-lived.

Following the dismissal, the plaintiffs sought leave to amend their complaint to add ten causes of action against DTT.<sup>271</sup> To overcome the scienter hurdle, the plaintiffs alleged DTT's participation in the audits on an agency theory.<sup>272</sup> The purported agency relationship was not between DTT and DT-Bermuda, but instead between DTT and William Jack, a partner in DT-Bermuda who was in charge of the audits.<sup>273</sup> The plaintiffs claimed that DTT identified Jack as a "global practice leader," a member of DTT's Global Financial Services Industries ("GFSI") practice, a member of DTT's global investment management and hedge fund practice, and DTT's "contact person in Bermuda for asset management company audits."<sup>274</sup> Based on these representations, the plaintiffs alleged that Jack had actual authority to act on DTT's behalf and that "he signed off on the Fund audits not only in his capacity as a [DT-Bermuda] partner but also in his capacity as an agent exercising actual authority to act on behalf of [DTT]."<sup>275</sup> The court held that the plaintiffs had sufficiently alleged facts showing that Jack had actual authority to act as DTT's agent when performing the underlying audit work.<sup>276</sup>

The court was unimpressed with DTT's position that it was not truly a single international accounting firm because it and its member firms promoted the "concept of uniformity of service, without 'conveying that a single international accounting firm actually exist[ed].'"<sup>277</sup> The court reasoned that the plaintiffs' allegations of agency rested not only on DTT's organization of its business operations and its use of its member firms generally, but also on Jack's specific performance of the audit work that

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<sup>269</sup> *Id.* at 493–94.

<sup>270</sup> *Cromer Fin. Ltd. v. Berger*, 245 F. Supp. 2d 552, 553 (S.D.N.Y. 2003).

<sup>271</sup> *Cromer Fin. Ltd.*, 2002 U.S. Dist. LEXIS 7782, at \*5–6.

<sup>272</sup> *Id.* at \*3.

<sup>273</sup> *Id.* at \*2, \*7–8.

<sup>274</sup> *Id.* at \*7.

<sup>275</sup> *Id.* at \*10.

<sup>276</sup> *Id.* at \*13.

<sup>277</sup> *Id.*

DTT advertised it was equipped to handle around the world.<sup>278</sup> The court emphasized that its decision did not pivot solely on DTT's marketing materials.<sup>279</sup> Nevertheless, the court believed that at the dismissal stage, it was reasonable to infer that DTT's representations to third parties in its marketing materials bore a relationship to how DTT conducted its business.<sup>280</sup>

Things did not improve for DTT at summary judgment. There, the court focused on the extent to which DTT's organized globalization efforts rendered DTT partners, who were responsible for those efforts, agents of DTT, thereby imputing their alleged scienter to DTT.<sup>281</sup> Ultimately, DTT could not overcome Jack's participation in the GFSI practice,<sup>282</sup> which DTT created to build a "seamless global practice."<sup>283</sup>

Although some documents reflected that DTT did not establish GFSI as a command operation to direct every aspect of member firms' operations, the evidence permitted a finding that Jack's work on behalf of DTT generally, and GFSI specifically, was subject to DTT's control.<sup>284</sup> The more complex issue was whether the knowledge Jack acquired about the Fund's audits was within the scope of that agency.<sup>285</sup> According to the court, the evidence permitted an inference that DTT invited Jack to join GSF's Investment Funds Committee precisely because of his expertise in similar engagements, and that a jury could conclude that GFSI required him to acquire and share knowledge about the performance of off-shore investment funds and advise how DTT and its member firms could improve their performance.<sup>286</sup>

*Cromer* presented the court a set of facts beyond the stock verein agency allegations. Like plaintiffs in previous cases, the *Cromer* plaintiffs pointed to DTT's promotional materials. DTT marketed itself as an auditor conducting audits through its "internationally experienced professionals" deployed across the

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<sup>278</sup> *Id.* at \*14.

<sup>279</sup> *Id.* at \*14–17.

<sup>280</sup> *Id.* at \*14.

<sup>281</sup> *Cromer Fin. Ltd. v. Berger*, 245 F. Supp. 2d 552, 553 (S.D.N.Y. 2003).

<sup>282</sup> *Id.* at 561.

<sup>283</sup> *Id.* at 557 (internal quotation marks omitted).

<sup>284</sup> *Id.* at 561.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 561–62.

globe to support clients' needs.<sup>287</sup> But not only did the relevant engagement letter and audit reports all display DTT's name and logo, one of the Fund's audits was signed in cursive "Deloitte & Touche."<sup>288</sup> Moreover, the plaintiffs in *Cromer*, as with prior litigants, cited the provision of the verein's governing charter conferring upon DTT the power and authority to promulgate professional standards for its member firms.<sup>289</sup> The *Cromer* plaintiffs carried this one step further, citing DTT's professional practice manual for member firms that required audits to follow DTT's prescribed methodology—including the software package Jack used to perform the Fund audits.<sup>290</sup> As expected, DTT invoked the legal separateness disclaimers on its websites.<sup>291</sup> It also championed its license agreement between DTT and DT-Bermuda, which specified that verein membership did not authorize "the Verein, Member Firm or any other Member Firm to act as agent or representative of the other."<sup>292</sup> Considering all of the other evidence in the record, these materials only bolstered the court's resolution that material factual issues remained for trial.

*b. Parmalat*

In 2003, Italian dairy conglomerate Parmalat Finanziaria, S.p.A. and its subsidiaries imploded in an accounting scandal.<sup>293</sup> Parmalat insiders, to the purported knowledge of the company's auditors at the Italian member firm ("DT-Italy") of Deloitte Touche & Tohmatsu ("DTT"), engaged in a scheme involving misleading transactions and off-shore entities that falsely indicated that Parmalat was financially strong and allowed the company to operate normally even as it was failing.<sup>294</sup> Parmalat's auditors allegedly blessed the company's financial statements throughout the relevant period, but the scheme eventually

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<sup>287</sup> *Cromer Fin. Ltd. v. Berger*, Nos. 00 CIV. 2284(DLC), 00 CIV. 2498(DLC), 2002 U.S. Dist. LEXIS 7782, at \*6 (S.D.N.Y. May 2, 2002) (internal quotation marks omitted).

<sup>288</sup> *Id.* at \*8–9; *Cromer Fin. Ltd.*, 245 F. Supp. 2d at 555 (internal quotation marks omitted).

<sup>289</sup> *Cromer Fin. Ltd.*, 2002 U.S. Dist. LEXIS 7782, at \*6–7; *Cromer Fin. Ltd.*, 245 F. Supp. 2d at 555–56.

<sup>290</sup> *Cromer Fin. Ltd.*, 245 F. Supp. 2d at 556.

<sup>291</sup> *Cromer Fin. Ltd.*, 2002 U.S. Dist. LEXIS 7782, at \*15–16.

<sup>292</sup> *Cromer Fin. Ltd.*, 245 F. Supp. 2d at 556 (internal quotation mark omitted).

<sup>293</sup> *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 282–83 (S.D.N.Y. 2005).

<sup>294</sup> *Id.* at 283–84.

became unsustainable and the company failed.<sup>295</sup> These events resulted in suits by Parmalat investors under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5.<sup>296</sup> The plaintiffs in these cases sought to hold DTT vicariously liable for the alleged misconduct of DT-Italy in connection with Parmalat's downfall.<sup>297</sup>

In response to DTT's motion to dismiss, the plaintiffs underlined the structural characteristics of DTT's verein.<sup>298</sup> DTT's website communicated the legal separateness of DTT and its member firms.<sup>299</sup> DTT marketed itself and its members under the same global brand name and reported firm revenues on a combined basis.<sup>300</sup> DTT had a centralized leadership headed by a global CEO and a global board of directors.<sup>301</sup> The member firms followed "professional standards and auditing procedures promulgated by DTT," cross-checked each other's work to ensure quality, and cooperated in bidding for audit services.<sup>302</sup> Partners and associates of DTT's member firms also attended DTT meetings and participated in global practice groups.<sup>303</sup>

In line with the plaintiffs' strategy in *Cromer*, the plaintiffs in *Parmalat* intertwined the verein's structural features with DT-Italy's alleged misconduct. Specifically, the plaintiffs alleged that DT-Italy "sought direction and help" from DTT on the specific audit and that DTT helped direct aspects of the alleged fraud, including "directing—or directing the removal of—auditors on the Parmalat audit."<sup>304</sup> At the dismissal stage, the *Parmalat* court refused to decide whether these activities reflected "simple collaboration or an agency relationship."<sup>305</sup> But even more damaging, the *Parmalat* court armed future plaintiffs with a weapon to combat website notices declaring the legal separateness of the verein and its member firms. Responding to DTT's steadfast reliance on its disclaimers, the court issued a

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<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 283.

<sup>297</sup> *Id.* at 289.

<sup>298</sup> *Id.* at 287–88.

<sup>299</sup> *Id.* at 288.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 292–93.

<sup>302</sup> *Id.* at 287.

<sup>303</sup> *Id.* at 287–88.

<sup>304</sup> *Id.* at 294–95.

<sup>305</sup> *Id.*

subsequent opinion holding that “written disclaimers of agency are not controlling, but merely raise an issue of fact with respect to an alleged agent’s authority.”<sup>306</sup> The upshot is that, at least at the motion to dismiss stage, *Parmalat* allows a plaintiff to defeat a disclaimer based on reasonably detailed allegations that “a principal’s actions are ‘sufficiently inconsistent’ with any such disclaimer or limitation of authority.”<sup>307</sup>

The district court later denied DTT’s summary judgment motion.<sup>308</sup> In the *Parmalat* court’s view, DTT’s overall structure demonstrated control over DT-Italy’s affairs.<sup>309</sup> Each member firm agreed in DTT’s governing verein document to follow DTT’s policies, resolutions, and protocols; adhere to DTT’s specific methodologies to conduct audits and the particular software and document procedures to be used in audits; and comply with DTT’s “quality standards, specifications, directions, and procedures.”<sup>310</sup> The court noted that DTT controlled member firms’ acceptance and rejection of engagements, prohibited member firms from suing each other, required member firms to accept client work referrals from each other, and played a substantial role in member firms’ legal and risk management affairs, including requirements to purchase specific levels of insurance coverage.<sup>311</sup>

The *Parmalat* court’s decision, though, was not exclusively tied to DTT’s structure. The court also focused on evidence supporting DTT’s authority in the specific context of the *Parmalat* audit.<sup>312</sup> The high point was DTT’s binding resolution of a dispute between DT-Italy and member firm DT-Brazil, pursuant to DTT’s professional practice manual, about the disclosure of a transaction on the *Parmalat* audit report.<sup>313</sup> The court viewed this as “evidence that would permit the conclusion that DTT had the power to impose its will on a member firm’s

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<sup>306</sup> *In re Parmalat Sec. Litig.*, 377 F. Supp. 2d 390, 404 (S.D.N.Y. 2005).

<sup>307</sup> *Id.*

<sup>308</sup> *In re Parmalat Sec. Litig.*, 594 F. Supp. 2d 444, 455 (S.D.N.Y. 2009).

<sup>309</sup> *See id.*

<sup>310</sup> *Id.* at 452 (internal quotation marks omitted).

<sup>311</sup> *Id.* at 452–53.

<sup>312</sup> *Id.* at 453.

<sup>313</sup> *Id.* at 454–55.

professional judgment.”<sup>314</sup> Once the court allowed the investors to proceed to trial against DTT based on DT-Italy’s alleged misconduct, the parties settled the case.<sup>315</sup>

In summary, to succeed on an agency theory, a plaintiff must marshal facts suggesting that a verein or a member firm had the power to control the manner in which another member firm delivered the actual services to the client.<sup>316</sup> The *Cromer* and *Parmalat* courts embraced a fact-intensive, totality of the circumstances approach to determining agency. The verein structure is not itself determinative if negated by the firms’ behavior.<sup>317</sup> Likewise, when a verein’s liability disclaimers on its materials or website are contradicted by other facts, the result is a genuine issue of material fact precluding summary judgment for the verein. The end result is that on the right facts a verein may become entangled in onerous litigation and protracted discovery, even if the plaintiffs’ claims lack merit.<sup>318</sup> To alleviate this concern, some commentators have urged courts to adopt a bright-line rule allowing international associations to escape vicarious liability as a matter of law when member firms’ agreements contain certain requirements, such as requiring member firms to maintain liability insurance.<sup>319</sup> The problem with this solution in some instances lies in the amount of insurance required to be maintained versus the value or worth of the matters that spawn any litigation. If plaintiffs’ alleged losses potentially exceed the liability limits of any single member firm’s

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<sup>314</sup> *Id.*

<sup>315</sup> See Pamela H. Woldow & Douglas Richardson, *Do You Want Swiss With That? Client Perceptions of the Trend Toward Global Law Firms*, EDGE INT’L REV., 2012, at 54, 60 (reporting the settlement).

<sup>316</sup> See *Nuevo Mundo Holdings v. PriceWaterhouseCoopers LLP*, No. 03 Civ. 0613(GBD), 2004 U.S. Dist. LEXIS 780, at \*13–18 (S.D.N.Y. Jan. 22, 2004).

<sup>317</sup> *In re Parmalat Sec. Litig.*, 421 F. Supp. 2d 703, 718 (S.D.N.Y. 2006); Vetula, *supra* note 21, at 1189.

<sup>318</sup> See Daniel Allen & Mindy Haverson, Note, *An Alternative Approach to Vicarious Liability for International Accounting Firm Networks*, 15 STAN. J.L. BUS. & FIN. 426, 427–28 (2010) (“Even though the *Parmalat* approach only allows for the possibility of vicarious liability and places the final determination of agency in the hands of a jury, the possibility alone imposes significant costs on international accounting firm networks.”).

<sup>319</sup> See *id.* at 428 (urging courts to “adopt a bright-line rule that allows international coordinating entities whose member firm agreements fulfill certain key criteria, such as requiring member firms to maintain liability insurance, to escape vicarious liability as a matter of law”).

insurance coverage, the plaintiffs will be understandably motivated to sue every potential defendant in hopes of being made whole.

## 2. Alter Ego

Alter ego theory offers another potential basis to hold a veerein or member firm vicariously liable for the misconduct of another member firm. To explain, courts will disregard corporate form when one entity has been so dominated by another, and its separate identity so disregarded, that it primarily transacted the dominating entity's business rather than its own and the domination was used to commit a fraud or other injustice that caused the plaintiff's loss.<sup>320</sup> In essence, the plaintiff must prove that the two entities legally are one.<sup>321</sup>

Early in the *Parmalat* litigation, the alter ego doctrine was a key element of the plaintiffs' case.<sup>322</sup> Specifically, the plaintiffs sought to hold Deloitte USA ("DT-USA") liable as DTT's alter ego.<sup>323</sup> This alter ego theory rested on marketing materials that indicated a close relationship between DT-USA and DTT, and the fact that DT-USA's top executives also served as the top

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<sup>320</sup> Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979) (applying New York law).

<sup>321</sup> See Gov't Dev. Bank *ex rel.* P.R. v. HoltMarine Terminal, Inc., No. 02-7825, 2011 U.S. Dist. LEXIS 30983, at \*39-40 (E.D. Pa. Mar. 24, 2011). Some courts characterize the doctrines of alter ego and piercing the corporate veil as interchangeable or indistinguishable. See, e.g., Balmer v. 1716 Realty LLC, No. 05 CV 839(NG)(MDG), 2008 U.S. Dist. LEXIS 38113, at \*12 n.5 (E.D.N.Y. May 9, 2008) (explaining that the standards for imposing liability under an alter ego theory and piercing the corporate veil theory under New York law are "indistinguishable, do not lead to different results, and should be treated as interchangeable" (quoting *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 138 (2d Cir. 1991) (internal quotation marks omitted)); *In re Steffner*, 479 B.R. 746, 762 (Bankr. E.D. Tenn. 2012) (stating that under Tennessee law, "the alter ego analysis is the same as piercing the corporate veil"). *But see* *Drury Dev. Corp. v. Found. Ins. Co.*, 668 S.E.2d 798, 800 n.1 (S.C. 2008) (noting that "[a]lthough often used interchangeably, the terms 'alter ego' and 'piercing the corporate veil' are not one and the same"). Other authorities distinguish the two theories on the basis that "alter ego" describes a theory of procedural relief, whereas "piercing the corporate veil" refers to the relief itself. Francis C. Amendola et al., "Alter Ego" Doctrine; *Instrumentality in General: Generally*, 18 C.J.S. Corporations § 23 (2015); 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41.10, at 132, 136-37 (perm. ed., rev. vol. 2006).

<sup>322</sup> *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 296 (S.D.N.Y. 2005).

<sup>323</sup> *Id.* at 287.

executives of DTT.<sup>324</sup> At the motion to dismiss stage, the *Parmalat* court accepted the plaintiffs' agency claims, but it firmly rejected their alter ego claims.<sup>325</sup>

The court agreed that the marketing materials and the existence of overlapping executives favored a finding of domination, but nonetheless held that an alter ego relationship could not be inferred from these alleged facts.<sup>326</sup> The court was troubled by the absence of any allegations that suggested "an intermingling of funds or a failure to adhere to corporate formalities."<sup>327</sup> The plaintiffs had to "do more than allege that [DT-USA] had the opportunity to dominate DTT. They [had to] allege that it in fact dominated DTT and used it in a relevant manner."<sup>328</sup> Otherwise, an alter ego relationship could be inferred between almost every parent and subsidiary.<sup>329</sup>

The same court also rejected an alter ego liability theory between member firms DT-USA and DT-Italy in a parallel lawsuit.<sup>330</sup> There, Dr. Enrico Bondi, who served as the Italian equivalent of a bankruptcy trustee, alleged that DT-USA and DT-Italy "commingled their assets, operated with centralized management, shared fees among individual member firms, and applied uniform standards."<sup>331</sup> The court first faulted Bondi's contention that the member firms commingled funds because the allegation stemmed only from the fact that "the Deloitte entities reported revenue on an aggregate basis and shared in compensation generated by the Parmalat engagement."<sup>332</sup> As the court aptly noted, that was "not what is meant by the 'commingling of funds.'"<sup>333</sup> The court also observed that the only alleged overlapping personnel actually existed between DT-USA and DTT, which shared the same chief executive.<sup>334</sup> Finally, and most significantly, there were no allegations that the two member firms "had overlapping personnel, failed to maintain

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<sup>324</sup> *Id.* at 296.

<sup>325</sup> *Id.* at 296–97.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 296.

<sup>328</sup> *Id.* at 297.

<sup>329</sup> *Id.*

<sup>330</sup> *In re Parmalat Sec. Litig.*, 377 F. Supp. 2d 390, 408 (S.D.N.Y. 2005).

<sup>331</sup> *Id.* at 407.

<sup>332</sup> *Id.* at 408.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 407.



corporate records or had inadequate capitalization,” or that one firm in fact controlled the other or used it as an instrumentality for a fraudulent purpose.<sup>335</sup> Given these deficiencies, the court concluded that it had no choice but to dismiss the alter ego claim.<sup>336</sup>

Law firm vereins should not sleep on the viability of an alter ego theory based on the *Parmalat* plaintiffs' inability to state alter ego claims. Certainly, advertising a close relationship between constituent firms in marketing materials and an overlap of some top leaders, without more, will not support an alter ego relationship.<sup>337</sup> Courts have articulated a variety of factors to assess whether one entity is the alter ego of another for purposes of piercing the corporate veil.<sup>338</sup> Common considerations include the entities' failure to adhere to corporate formalities; inadequate capitalization; overlap in officers, directors, employees, or ownership; intermingling of assets or funds; centralized accounting; the degree of business discretion displayed by the allegedly dominated entity; whether the dealings between the entities are at arm's length; whether the entities are treated as independent profit centers; whether both entities are engaged in the same business, or even related or supplementary enterprises; a common business name; payment of debts of the dominated entity by other entities in the group; common office space; and insurance under the same policy.<sup>339</sup>

The inherent difficulty for verein law firms defending against alter ego claims is that “[n]o single factor, either by its presence or absence, is dispositive” to the analysis.<sup>340</sup> The alter ego standard is flexible and heavily fact-specific, and often

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<sup>335</sup> *Id.* at 407–08.

<sup>336</sup> *Id.* at 408.

<sup>337</sup> *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 296–97 (S.D.N.Y. 2005).

<sup>338</sup> *Backus v. Watson*, 619 So. 2d 1342, 1345 (Ala. 1993); *Doughty v. CSX Transp., Inc.*, 905 P.2d 106, 111 (Kan. 1995); *In re New Orleans Train Car Leakage Fire Litig.*, 690 So. 2d 255, 257 (La. Ct. App. 1997); *Hoffmann v. Dandurand*, 180 S.W.3d 340, 348 (Tex. App. 2005); *Laura Hunter Dietz et al., Corporate Entity: Piercing the Corporate Veil*, 18 AM. JUR. 2D *Corporations* § 47 (2015).

<sup>339</sup> *Parmalat Sec. Litig.*, 375 F. Supp. 2d at 291–92; *Nuevo Mundo Holdings v. PriceWaterhouseCoopers LLP*, No. 03 Civ. 0613(GBD), 2004 U.S. Dist. LEXIS 780, at \*18–20 (S.D.N.Y. Jan. 22, 2004); *Thompson v. Bernard G. Janowitz Constr. Corp.*, 301 A.D.2d 588, 588–89, 754 N.Y.S.2d 50, 50–51 (2d Dep't 2003).

<sup>340</sup> *A & P Brush Mfg. Corp. v. NLRB*, 140 F.3d 216, 219 (2d Cir. 1998); *see also J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982).

presents a close question.<sup>341</sup> A verein adopting a cost-sharing approach to avoid the anticipated problems triggered by direct revenue-sharing automatically invites a commingling or pooling of funds challenge.<sup>342</sup> The presence of this factor, coupled with a combination of other relevant factors—such as one member firm having a majority of directors on the verein’s board of directors,<sup>343</sup> or an undercapitalized member firm—may leave a verein unable to win a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or a state equivalent. The firm’s defense costs will then escalate regardless of the alter ego claim’s ultimate merits.

### 3. Joint Venture and Partnership Theories

As liability theories of last resort, plaintiffs have attempted to convert vereins into joint ventures or partnerships. The line between joint ventures and partnerships is imprecise.<sup>344</sup> The terms are often used interchangeably,<sup>345</sup> and the same legal rules govern both joint ventures and partnerships.<sup>346</sup> The distinction between the two is that a joint venture is usually arranged for a limited purpose or single transaction, while a partnership is

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<sup>341</sup> NLRB v. Allcoast Transfer, Inc., 780 F.2d 576, 581 (6th Cir. 1986); NLRB v. Tricor Prods., Inc., 636 F.2d 266, 269 (10th Cir. 1980).

<sup>342</sup> See Johnson, *supra* note 1, at 75 (observing that although member firms are not restricted from directly sharing profits, this course of action “could undermine their status as independent legal entities and potentially expose them to various additional tax liabilities”).

<sup>343</sup> *But see* United States v. Bestfoods, 524 U.S. 51, 69–70 (1998) (stating that the mere fact that there are dual officers and directors making policy decisions and supervising the subsidiary’s activities is not enough, standing alone, to provide a basis for imposing liability on the parent for the wrongs committed by the subsidiary).

<sup>344</sup> Weiner v. Fleischman, 816 P.2d 892, 895 (Cal. 1991); *see also* *In re Groff*, 898 F.2d 1475, 1477 (10th Cir. 1990) (explaining that the “present trend is to include joint ventures as a recognized type of partnership, rather than a distinct but analogous business entity” (internal quotation marks omitted)).

<sup>345</sup> Donovan v. Harrah’s Md. Heights Corp., 289 F.3d 527, 529 n.3 (8th Cir. 2002) (applying Missouri law).

<sup>346</sup> See, e.g., Scholastic, Inc. v. Harris, 259 F.3d 73, 84 (2d Cir. 2001) (applying New York law); Transit Mgmt. of Se. La., Inc. v. Grp. Ins. Admin., Inc., 226 F.3d 376, 383 (5th Cir. 2000) (applying Louisiana law); *see* WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 266, at 445–52 (3d ed. 2001) (discussing the merging of partnership and joint venture law and stating that as a general rule joint ventures are governed by the same rules as partnerships); Adam B. Weissburg, Note, *Reviewing the Law on Joint Ventures with an Eye Toward the Future*, 63 S. CAL. L. REV. 487, 488 (1990) (stating that courts apply partnership principles to joint ventures); Karl Oakes, *Introduction: Employer and Employee*, 48A C.J.S. *Joint Ventures* § 5 (2015).

formed to conduct an ongoing business.<sup>347</sup> The general elements of both organizational forms are the sharing of profits and losses; joint control and management of the business; contribution by each party of property, financial resources, effort, skill, or knowledge; and the parties' intention to be partners or joint venturers.<sup>348</sup> The absence of any one element is fatal to a finding of a partnership or joint venture,<sup>349</sup> as the holding in *Howard v. Klynveld Peat Marwick Goerdeler*<sup>350</sup> demonstrates.

In *Howard*, the plaintiff sought derivative jurisdiction over the Netherlands-based association Klynveld Peat Marwick Goerdeler ("KPMG") by imputing the acts of its U.S. member firm under partnership theory.<sup>351</sup> Typical of many umbrella organizations, KPMG set standards for its member firms as conditions for using its brand name, collected annual dues from member firms, provided "general assistance upon request to member firms in obtaining professional literature and other information," distributed marketing materials indicating that KPMG was a "global firm or an international network of member firms," and did not itself provide any accounting or auditing services in the United States.<sup>352</sup> Concluding that this evidence was insufficient to prove a partnership, the court stressed the lack of any affirmative showing that KPMG and its U.S. member firm shared liabilities, profits, losses, property, or business skills, or jointly controlled or managed their general business activities.<sup>353</sup> As a final blow to the plaintiff, the court quoted KPMG's license agreement, which expressly stated that "[n]othing contained herein shall be construed to place the parties in the relationship of agents, partners or joint venturers, and the Member Firm shall have no power to obligate or bind [KPMG] in any manner whatsoever."<sup>354</sup>

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<sup>347</sup> *Sadelmi Joint Venture v. Dalton*, 5 F.3d 510, 513 (Fed. Cir. 1993); *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318, 1332 (3d Cir. 1992); *In re PCH Assocs.*, 949 F.2d 585, 599 (2d Cir. 1991); *Queen v. Schultz*, 888 F. Supp. 2d 145, 159 (D.D.C. 2012).

<sup>348</sup> *In re Parmalat Sec. Litig.*, 377 F. Supp. 2d 390, 403 (S.D.N.Y. 2005); *Kids Cloz, Inc. v. Officially for Kids, Inc.*, 320 F. Supp. 2d 164, 171-72 (S.D.N.Y. 2004); *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 662 (S.D.N.Y. 1997).

<sup>349</sup> *Kids Cloz, Inc.*, 320 F. Supp. 2d at 171-72.

<sup>350</sup> 977 F. Supp. 654.

<sup>351</sup> *Id.* at 662.

<sup>352</sup> *Id.* at 661-62.

<sup>353</sup> *Id.* at 662.

<sup>354</sup> *Id.* at 663 n.5 (alteration in original) (internal quotation marks omitted).

*Howard* underscores the heavy load that a plaintiff must carry to succeed on either a joint venture or partnership theory against a *verein*.<sup>355</sup> Well-crafted articles of association disclaiming the intent of the parties to form a joint venture or partnership should form the centerpiece of any defense.<sup>356</sup> The articles of association may also undercut the joint control or management element.<sup>357</sup> The fact that all member firms follow policies and procedures issued by the *verein* does not give rise to a reasonable inference that any one member firm can direct the policies and procedures of another member firm, let alone that each firm possesses an equal right to dictate the same.<sup>358</sup> Joint control and management is also difficult to prove when the plaintiff is primarily focused on an agency theory. By trying to establish that a *verein* or member firm controlled another member firm, or vice versa, a plaintiff ostensibly destroys any credible argument that the *verein* and its member firms possessed the right to direct and govern the conduct of each other.<sup>359</sup>

Relatively speaking, the *verein* structure is probably the most vulnerable on the profit- and loss-sharing element. At least at the motion to dismiss stage, a *verein* utilizing cost and expense-sharing techniques to sidestep the aforementioned drawbacks to direct profit-sharing may struggle to convince a court that the plaintiff cannot satisfy this factor.<sup>360</sup> In the end, however, joint venture and partnership theories present the least likely bases for imposing vicarious liability on a *verein* and its member firms.

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<sup>355</sup> See also *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1254 n.10 (S.D.N.Y. 1984) (determining that the fact that defendant firm's brochures and pamphlets described the firm as a "single cohesive worldwide organization" does not warrant a legal finding of partnership absent clear facts or an agreement establishing a relationship of partnership (internal quotation marks omitted)).

<sup>356</sup> See *id.*

<sup>357</sup> *Id.* at 1254.

<sup>358</sup> *In re Parmalat Sec. Litig.*, 377 F. Supp. 2d 390, 407 (S.D.N.Y. 2005).

<sup>359</sup> See *id.* at 401, 407 (finding that the plaintiff's allegations of control for purposes of establishing a joint venture between DTT, DT-USA, and DT-Italy were inadequate where the complaint was fashioned in such a way to focus on events exhibiting DTT's right to control its member firms).

<sup>360</sup> See *id.* at 406 (stating that, while the plaintiff's allegation that each member firm shared in compensation was "vague," the court could not conclude at the motion to dismiss stage that the plaintiff would be unable to prove facts showing that the "compensation mechanism in fact was a duty to share profits or losses").

C. *Subpoenas of U.S. Member Firms To Obtain Verein and Foreign Member Firm Documents*

Challenges to the verein structure have also arisen in third-party discovery. In at least two reported decisions, courts addressed disputes involving subpoenas to U.S. verein member firms for documents in the possession of sister firms in foreign jurisdictions.<sup>361</sup> In each case, the court recognized the legal separateness of the verein and its individual members for purposes of obtaining discovery under Federal Rule of Civil Procedure 45.<sup>362</sup>

First, in *In re Nortel Networks Corp. Securities Litigation*,<sup>363</sup> the district court addressed a motion filed by class action plaintiffs to compel Deloitte USA to produce documents in the possession and control of Deloitte Canada, both members of the Deloitte Touche Tohmatsu ("DTT") verein.<sup>364</sup> The plaintiffs argued that Deloitte USA had either the legal right or the practical ability to obtain certain audit materials that Deloitte Canada prepared, but never shared with Deloitte USA.<sup>365</sup>

Analyzing Deloitte USA's suggested legal right and practical ability to obtain Deloitte Canada's documents, the court focused on the verein charter agreement and Deloitte Canada's practice manual setting forth that firm's policies for handling, retaining, and disclosing documents.<sup>366</sup> The governing provisions in those two documents made it, at best, a discretionary decision on Deloitte Canada's part whether to provide documents to another verein member firm.<sup>367</sup> The evidence further indicated that Deloitte Canada did not make its documents routinely accessible to other verein members.<sup>368</sup> Rather, when Deloitte Canada assisted a sister firm with an audit, it shared only as much

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<sup>361</sup> See generally *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855(RMB)(MHD), 2004 U.S. Dist. LEXIS 19129 (S.D.N.Y. Sept. 21, 2004); *United States v. Deloitte & Touche USA LLP*, 623 F. Supp. 2d 39 (D.D.C. 2009).

<sup>362</sup> See FED. R. CIV. P. 45 (governing the issuance of subpoenas in federal cases).

<sup>363</sup> No. 01 Civ. 1855(RMB)(MHD), 2004 U.S. Dist. LEXIS 19129.

<sup>364</sup> *Id.* at \*2.

<sup>365</sup> *Id.* at \*2-3. Under Rule 45, a non-party may be required to produce for discovery documents which are in the non-party's "possession, custody, or control." FED. R. CIV. P. 45(a)(1)(A)(iii). "Control" has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought upon demand." *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471 (S.D.N.Y. 2000).

<sup>366</sup> *Nortel Networks Corp. Sec. Litig.*, 2004 U.S. Dist. LEXIS 19129, at \*4.

<sup>367</sup> *Id.* at \*4-5.

<sup>368</sup> *Id.*

information with the other firm as was necessary to permit that firm to carry out its assigned tasks on the specific audit.<sup>369</sup> Based on Deloitte USA's inability to demand access to other members' documents, and the absence of any evidence that Deloitte Canada previously disclosed the desired documents to Deloitte USA, the court squarely rejected the class plaintiffs' proposal that "member firms all own and control each others' documents."<sup>370</sup> The court held that the class plaintiffs failed to establish that Deloitte USA possessed either an enforceable legal right, or practical ability, to obtain the documents from Deloitte Canada.<sup>371</sup>

Deloitte USA again found itself in the middle of a discovery battle in *United States v. Deloitte & Touche USA LLP*.<sup>372</sup> This time, the government moved to compel Deloitte USA to produce documents kept by member firm Deloitte Switzerland.<sup>373</sup> Stressing the entities' close working relationship during a specific audit, the government maintained that Deloitte USA had sufficient control over the documents maintained by Deloitte Switzerland, as well as the practical ability to obtain them.<sup>374</sup> The government fared no better than the plaintiffs in *Nortel Networks*. Rejecting the government's position, the court held that "[c]lose cooperation on a specific project does not, per se, establish an ability, let alone a legal right or authority . . . to acquire documents maintained solely by a legally distinct entity."<sup>375</sup> Notably, the opinion is silent as to whether Deloitte Switzerland ever shared the targeted documents with Deloitte USA during the particular audit assignment.

These two decisions illustrate courts' acknowledgement that verein member firms are legally separate entities for subpoena purposes. The fact that two firms are members of a verein, or work together on a matter, should not automatically satisfy a subpoenaing party's burden to show the existence of a firm's legal right or practical ability to obtain documents from a sister firm. On the other hand, the subpoenaing party's burden will lighten if: (1) the governing verein documents specifically provide for

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<sup>369</sup> *Id.* at \*10.

<sup>370</sup> *Id.* at \*7.

<sup>371</sup> *Id.* at \*11–12.

<sup>372</sup> 623 F. Supp. 2d 39 (D.D.C. 2009).

<sup>373</sup> *Id.* at 40.

<sup>374</sup> *Id.* at 41.

<sup>375</sup> *Id.*

shared ownership, control, or access to each member's documents; (2) member firms exchange or share files in the ordinary course of business; or (3) member firms previously shared the subject documents.<sup>376</sup> Ordinarily, the only ground for allowing a litigant to pursue discovery from an entity not in possession of documents is that the entity can more readily obtain the documents from the custodian than the discovering party.<sup>377</sup> If that is not the case, the litigant must pursue the discovery from the entity with custody and control over the documents.<sup>378</sup>

#### *D. Integration Leading to One-Firm Liability?*

For law firms looking to expand globally, the liability protection the *verein* structure offers is often said to be a prominent feature favoring its selection as an organizational form.<sup>379</sup> The *verein* structure arguably would lose appeal, and law firm combinations might be retarded, if plaintiffs could regularly reach into *vereins'* wallets and those of all their members based on the alleged misconduct of a single constituent firm. Indeed, if a tribunal held a U.S. law firm liable for the conduct of another *verein* member firm practicing in another country under a different set of legal rules, the U.S. firm would be subjected to potentially unlimited liability for conduct that it could know nothing about and could not control. Relying on traditional vicarious liability theories, plaintiffs seeking to hold a *verein* and its members liable for the acts of a single member have, with a few notable exceptions, fallen short. Courts have also rejected the one-firm "unified company theory" based on bare-bone allegations that a global *verein* and its member firms act as a worldwide organization.<sup>380</sup>

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<sup>376</sup> See generally *id.*; *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855(RMB)(HMD), 2004 U.S. Dist. LEXIS 19129 (S.D.N.Y. Sept. 21, 2004).

<sup>377</sup> *Nortel Networks Corp.*, 2004 U.S. Dist. LEXIS 19129, at \*9 n.5.

<sup>378</sup> *Id.*

<sup>379</sup> Johnson, *supra* note 1, at 74.

<sup>380</sup> See, e.g., *Rocker Mgmt. L.L.C. v. Lernout & Hauspie Speech Prods. N.V.*, No. 00-5965(JCL), 2005 U.S. Dist. LEXIS 16776, at \*22-23 (D.N.J. June 8, 2005) (internal quotation marks omitted) (declining to adopt a "one firm theory" against global accounting giant KPMG (internal quotation marks omitted)); *Skidmore Energy, Inc. v. KPMG*, No. 3: 03-CV-2138-B, 2004 U.S. Dist. LEXIS 28396, at \*10 (N.D. Tex. Dec. 28, 2004) (citing decisions requiring a plaintiff to allege "substantially more than a bare bones 'unified company theory'").

Despite its intended purpose, the verein structure may one day create the opportunity for a plaintiff to proceed on a one firm, unified company theory of liability. Recent literature suggests that many verein law firms are moving toward tightly-orchestrated, comprehensive global practices.<sup>381</sup> If a verein holds itself out to the world as one firm with lawyers in offices worldwide, and in reality is a fully-integrated firm, a court might recognize a collective liability theory and thereby jeopardize the concept of a verein and its member firms as distinct legal entities.<sup>382</sup> In other words, in some cases, a coordinated and integrated international legal practice might be *too* coordinated and integrated.

Recently, in an article focused on vereins, the *American Lawyer* magazine formulated thirteen criteria to assess whether global law firms are well-integrated: (1) a shared global name brand in all jurisdictions that is also used on a common website and for all marketing purposes; (2) a global management body responsible for devising and executing firm-wide strategies; (3) a single set of global executive officers who report to the global management body; (4) a global practice structure with single heads for each global group and which reports to the global management body; (5) a centralized global profit pool without regional profit centers; (6) a scheme whereby all equity partners share the cost of firm investments, such as new offices or new technology, regardless of where the investment is made; (7) a common partner compensation system that applies the same measures to all equity partners and is controlled by a single global management body; (8) a partner compensation system that rewards equity partners for sharing work and clients between offices; (9) a united approach to lateral hires, promotions to partner, and partner performance review shared across all offices and managed at a global level; (10) all equity partners possess equal voting rights on all firm matters; (11) a single conflict-checking system used by all offices and for all matters globally without exception, and with conflicts of interest managed at a global level; (12) all offices use common

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<sup>381</sup> Johnson, *supra* note 1, at 76–77.

<sup>382</sup> See Reeser, *supra* note 5 (questioning how far a law firm can “push the integration of branding and sharing operational economies as well as shared objectives, before the limits of association are tested and perhaps the liability segregation is jeopardized”).



information technology and support systems and lack internal firewalls between offices; and (13) a global key-client management program utilized by all offices.<sup>383</sup> The *American Lawyer* surveyed several law firm vereins to compare their practices and procedures against this list.<sup>384</sup> The firms that responded to the survey all said they had twelve of these thirteen structures in place.<sup>385</sup> The lone exception was the presence of a unified profit pool, which is not surprising given the verein concept overall.<sup>386</sup>

Without question, financial integration through the sharing of direct profits between a verein and its member firms presents the clearest path to potential collective liability. But at the same time, it is currently unknown whether verein firms replicating the existence of a single profit pool through cost-sharing methods would fare better in court. When defending a plaintiff's challenge to the legal separateness of a verein and its member firms, reliance on a virtual single profit pool rather than an actual one may represent an exercise in form over substance. Furthermore, and consistent with our prior warning that at some point a coordinated and integrated international legal practice might become *too* coordinated and integrated for law firms organized as vereins to avoid alleged collective liability, at least at the motion to dismiss stage, some combination of the other *American Lawyer* factors may be sufficient to convince a court to permit a plaintiff to pursue a collective liability theory.

Beyond the factors on the *American Lawyer's* checklist, one might expect a global verein law firm to foster integration through other means.<sup>387</sup> One possibility is secondments between

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<sup>383</sup> Johnson, *supra* note 1, at 76–77.

<sup>384</sup> *Id.* at 74.

<sup>385</sup> *Id.* at 74, 76–77.

<sup>386</sup> *Id.* at 74.

<sup>387</sup> Some verein law firms, such as Squire Sanders before it became Squire Patton Boggs, reportedly have procured a “global professional liability insurance policy.” *Id.* at 79. A global insurance policy is yet another device that may unintentionally suggest the existence of a single entity for liability purposes. *See, e.g.,* Thompson v. Bernard G. Janowitz Constr. Corp., 301 A.D.2d 588, 588, 754 N.Y.S.2d 50, 50 (2d Dep’t 2003) (concluding that workers’ compensation and general liability coverage issued under the same policies, among other relevant factors, supported the existence of a corporate “alter ego” relationship); Carty v. E. 175th St. Hous. Dev. Fund Corp., No. 307553/08, 32 Misc. 3d 1217(A), 2010 N.Y. Misc. LEXIS 6652, at \*6–7 (Sup. Ct. Bronx Ctny. Mar. 11, 2010), *aff’d*, 83 A.D.3d 529, 921 N.Y.S.2d 237 (1st Dep’t 2011) (holding to the same effect); Simon v. PABR Assoc. LLC, No. 3108/04, 18 Misc. 3d 1117(A), 2008 N.Y. Misc. LEXIS 120, at \*2 (Sup. Ct.

member firms. Secondments ordinarily entail loaning individual lawyers to a host organization to gain experience, absorb the host's culture and work habits, and cement the bond between the firm and the organization.<sup>388</sup> It is fair to ask, however, whether secondments should support collective liability or whether they weigh against it. On the one hand, secondments support integration between the firms and thus collective liability. On the other hand, the mere need for secondments suggests separateness. The seconded lawyer will at some point return to the lawyer's own law firm.<sup>389</sup> Law firms regularly second lawyers to institutional clients and vice versa, yet no court would ever suggest that the client and law firm are one as a result. In the end, the effect of a secondment on a court's analysis of law firm collective liability will depend on the nature of the particular arrangement and the facts of the case.

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N.Y. Cnty. Jan. 14, 2008), *aff'd*, 61 A.D.3d 663, 877 N.Y.S.2d 356 (2d Dep't 2009) (holding to the same effect). When focusing on insurance, the inclusion of a non-cumulation or similar "other insurance" clause in a policy limiting liability for an occurrence to a maximum aggregate amount, or otherwise providing that individual firms' policies are separate, is evidence that the firms are separate entities for liability purposes, but it is not necessarily dispositive. *See generally* Hercules Inc. v. Aetna Cas. & Sur. Co., Nos. 92C-10-105, 90C-FE-195-1-CV, 1998 Del. Super. LEXIS 459, at \*5 (Del. Super. Ct. Sept. 30, 1998) (stating that "a non-cumulation clause is an insurance provision stating that if the insured is entitled to recover under the policy, the insured may not recover more than once for the loss"); Spaulding Composites Co. v. Aetna Cas. & Sur. Co., 819 A.2d 410, 420 (N.J. 2003) (contrasting "other insurance" and non-cumulation clauses, and explaining that "a non-cumulation clause governs successive policies and prevents the accretion of limits when the policies have been triggered by a single occurrence"). In fact, the presence of a global insurance policy, standing alone, should not support collective liability; rather, it is at most one factor for a court to consider in deciding whether law firms within a verein should be treated separately or singularly. In addition, individual law firms within a verein may purchase separate policies specific to the jurisdictions in which they practice. In some instances, the law of a jurisdiction may require a law firm doing business there to purchase an insurance policy from an insurer admitted to do business in the jurisdiction. The presence of such firm-specific local compulsory coverage should be held to constitute evidence that the firms within the verein should not be treated as a single entity or otherwise be aggregated for liability purposes.

<sup>388</sup> *See* Ass'n of the Bar of the City of N.Y., NYC Eth. Op. 2007-2, 2007 WL 758154, at \*1 (2007) [hereinafter NYC Eth. Op. 2007-2] (discussing the secondment of lawyers by law firms to host organizations, such as clients, government agencies, or charities); Comm. on Prof'l and Judicial Ethics, *Formal Opinion 2007-02: Secondment of Law Firm Attorneys: Association with a Law Firm*, THE RECORD, 2007, at 155, 156 (discussing some benefits of law firm secondments).

<sup>389</sup> *See* NYC Eth. Op. 2007-2, *supra* note 388, at \*1 (noting that a seconded lawyer serves the host organization "temporarily").

ABA Formal Opinion 94-388 may further cloud the picture. ABA Formal Opinion 94-388 cautions that "the use of the same name by all the firms in a network will effectively represent that they are all offices of one and the same firm."<sup>390</sup> In other words, if a law firm "licenses its name to other firms, all firms so licensed must, in fact, operate as a single firm and be treated as part of a single firm for all purposes under the Model Rules."<sup>391</sup> Although one entity status under the Model Rules is distinct from one entity status as a liability mechanism, the ABA position injects another variable to the equation.

The chances of a plaintiff tagging a *verein* and its members on a collective liability theory inevitably increases with each checkmark placed next to a standard criterion for law firm integration.<sup>392</sup> In *Ramnarine v. Memorial Center for Cancer and Allied Diseases*,<sup>393</sup> the court held that evidence establishing that four entities operated as one by sharing corporate officers, a common budget, a single insurance policy, a single human resources department, and other essential aspects of their operations, demonstrated that even entities with separate certificates of incorporation may be alter egos.<sup>394</sup> *Ramnarine* arose in a different context, but it is easy to extend its basic logic to a *verein* and its member firms. Global law firms that achieve business integration through market branding, the adoption of global standards for the delivery of legal services, the internationalization of practice groups and client service teams, firm-wide technology and accounting systems, and the establishment of a single intake and conflicts system, for example, potentially lay the foundation for collective liability. Firms that financially integrate and treat themselves as one economic unit through a single profit pool, shared partner

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<sup>390</sup> ABA Formal Op. 94-388, *supra* note 49, at 7; *see also* ABA Formal Op. 84-351, *supra* note 50, at 11 ("When a firm elects to affiliate or associate another with it and to communicate that fact to the public and clients, there is no practical distinction between the relationship of affiliates under that arrangement and the relationship of separate offices in a law firm.").

<sup>391</sup> ABA Formal Op. 94-388, *supra* note 49, at \*1.

<sup>392</sup> *See also* Vetula, *supra* note 21, at 1189 (asserting that law firms favoring the *verein* organizational form should "carefully consider how the policies and procedures they are considering adopting would appear both to the courts and to the ABA to ensure that the limited liability that they desire vis-à-vis member firms and the Swiss *verein* would be found to exist").

<sup>393</sup> 281 A.D.2d 218, 722 N.Y.S.2d 493 (1st Dep't 2001).

<sup>394</sup> *Id.* at 218-19, 722 N.Y.S.2d at 494-95.

compensation measures, or a single global insurance policy, creep even closer to the edge. If a verein behaves as one firm, then a court may treat it as one firm for all purposes—including professional liability.

For some law firms, the threat of unitary liability may be of relatively little concern. If a firm organized as a verein has selected that structure principally for its flexibility and the ability to avoid the practical difficulties that can accompany mergers or other combinations—rather than the capability of isolating sister firms' liabilities—the cultural, financial, and client relations benefits that flow from thorough integration may outweigh liability concerns. It is surely true that among the law firms that have gone the verein route, some have engaged in just such cost-benefit analysis and concluded that the benefits of meaningful integration outweigh related professional liability risks because they believe those risks are minimal, manageable, or insurable. That is a perfectly reasonable business decision that the leaders of any law firm are entitled to make.

#### CONCLUSION

Driven by the ever-increasing globalization of legal services and the practical hurdles frequently associated with traditional mergers, large law firms have identified the Swiss verein as a preferred organizational structure for international expansion. The Swiss verein offers compatible firms the flexibility to structure themselves as a collection of independent firms operating under one brand, a cohesive unit functioning as one fully integrated global enterprise, or something in between. Vereins may present law firms with opportunities for improved marketing and enhanced business development, elevated and expanded client relationships, diminished liability exposure, and, presumably, increased profitability. At the same time, firms must also appreciate potential professional responsibility and liability ramifications that may flow from organizing as Swiss vereins. Courts generally resolve uncertainties about lawyers' responsibilities under the Model Rules of Professional Conduct in the client's favor.

With respect to civil liability, verein member firms can take solace in the fact that past attempts by plaintiffs to reach the pocketbooks of global accounting firms organized as vereins have enjoyed limited success. But as demonstrated by the *Cromer* and

*Parmalat* cases, vicarious liability theories are not always amenable to early dismissal, forcing vereins and their member firms to incur enormous expense to defend or even settle related litigation, regardless of the merits of the litigation. Law firms operating as vereins may also inadvertently expose themselves to a viable one-firm theory of collective liability depending on how far they advance their integration efforts. For some law firms, of course, the threat of unitary liability may be of relatively little concern. If a firm organized as a verein has selected that structure principally for its flexibility and the ability to avoid the practical difficulties often associated with mergers or other combinations rather than the capability of isolating affiliates' liabilities, the many perceived benefits that flow from integration may outweigh liability concerns. It is surely true that among the law firm vereins, some have engaged in precisely such cost-benefit analysis and concluded that the benefits of meaningful integration outweigh related professional liability risks. That is the sort of reasonable business decision that law firm leaders are entitled to make.

There is much we do not yet know about the efficiency or durability of the Swiss verein as an organizational form for law firms. Some law firms that have cast themselves as vereins probably are still developing as organizations. But whatever the uncertainties that accompany law firm vereins or the potential for their evolution over time, the Swiss verein is now an important mechanism for law firms eager to expand their global practices. It will undoubtedly remain one for the foreseeable future.