

# Joint Representation: Analysis Required

*by Melody Nashan*

Two or more parties in the same matter sometimes seek to hire a single lawyer. Shared counsel can save money on legal fees, decrease the duplication of efforts, and serve to present a united front to the opposition. Joint representation also, however, presents risks to, and may impose disadvantages on, those same clients. When a problem arises, disciplinary complaints and malpractice actions may result. Lawyers should carefully analyze the facts and apply the Rules of Professional Conduct before agreeing to a joint representation.

The conflict of interest rules provide the framework for the analysis. In deciding whether to pursue a joint representation, lawyers should start with Rule 4-1.7. The comments to Rule 4-1.7 provide the steps a lawyer must take to address a conflict of interest problem:

- (1) clearly identify the client or clients;
- (2) determine whether a conflict of interest exists;
- (3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and
- (4) if so, consult with the clients affected under Rule 4-1.7(a) and obtain their informed consent, confirmed in writing. The clients affected under Rule 4-1.7(a) include both of the clients referred to in Rule 4-1.7(a)(1) and the one or more clients whose representation might be materially limited under Rule 4-1.7(a)(2).[1]

## ***Who Is the Client?***

Especially when a family or a corporation is involved, it is important to identify the client(s) precisely. Lawyers also should guard against acquiring an “accidental” client, a person with whom an attorney-client relationship is accidentally created.[2]

## ***Is There a Conflict?***

Next, lawyers should determine whether a conflict of interest exists between the potential clients. Are the potential clients directly adverse to each other? Is there a significant risk that the representation of a client will be materially limited by the lawyer’s responsibilities to another client?

Generally, clients whose interests are directly adverse do not want to share an attorney. Certainly, opposing parties in a lawsuit may not be jointly represented.[3] Clients, however, may not realize their interests are directly adverse. Further, during the representation, the clients’ interests may become adverse because their objectives change or new facts are revealed.

With regard to the “material limitation” conflict, lawyers must determine whether “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s

responsibilities to another client.”[4] The lawyer must perform adequate due diligence to measure the risk that his or her “ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”[5] To analyze this issue, the lawyer should question the prospective clients at the outset. The lawyer must be careful, however, not to prematurely create an attorney-client relationship. Lawyers should clearly state during this investigation that they are not yet representing the prospective client and disclose whether they already have a client in the matter.[6]

Of critical importance is the “likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.”[7] The lawyer’s investigation should include determining the interests and objectives of the potential clients, and the lawyer should consider strategies favorable to each client. A lawyer must be sufficiently apprised of the facts of the case to make an initial determination as to whether he will be able to provide competent representation to both clients. If, for example, the best strategy for Client A will (or may) harm Client B, the lawyer’s representation of Client A will be limited by his or her responsibilities to Client B.

### ***Is the Conflict Consentable?***

If there is at least a potential conflict, lawyers must determine whether the joint representation presents a consentable conflict. Not all conflicts of interest arising from the representation of current clients are consentable. Conflicts that are not consentable are (1) conflicts in which the lawyer cannot reasonably believe he can provide competent and diligent representation to each affected client,[8] (2) conflicts in which the representation is prohibited by law, and (3) conflicts in which the representation involves assertion of a claim by one client against another client in the same litigation or other proceeding.[9] If any one of the three is present, the issue of consent is not reached, i.e., that conflict cannot be waived by the clients. In joint representation situations, “the question of consentability must be resolved as to each client.”[10]

In *State ex rel. Horn v. Ray*,[11] the Missouri Court of Appeals analyzed whether a conflict was consentable where the lawyer sought to represent both the defendant and the alleged victim in the State’s prosecution of that defendant for second-degree domestic assault. The court found that the lawyer could not reasonably believe that he would be able to provide competent and diligent representation to both the defendant and alleged victim in the criminal prosecution.[12] The court also found that the lawyer couldn’t represent both the defendant and the alleged victim because, at least initially, the victim had asserted a claim when she reported allegations against the defendant to the police and sought the State’s protection.[13] The joint representation, therefore, also was prohibited by Rule 4-1.7(b)(3).

## ***Can You Obtain Informed Consent?***

If the lawyer determines that the conflict is consentable, then he/she must obtain each client's informed consent. The clients likely are focused on the cost savings from the shared representation; to be "informed," however, the clients must be educated regarding the risks and potential disadvantages of the joint representation. Rule 4-1.0(e) defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Lawyers should not substitute boilerplate language in an engagement letter for a true conversation with the potential client during which the potential client has an opportunity to ask questions.

"When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege and the advantages and risks involved." [14] The lawyer is required to be impartial between commonly represented clients. [15] If a long-term client is being jointly represented with a new client, the long-term client may have unreasonable expectations with regard to the impartiality of the representation. Also, the clients should be advised that since the lawyer must remain neutral as between them, the clients may be required to assume greater responsibility for their decisions than if they each had separate counsel. [16]

The attorney-client privilege is affected as between the joint clients. "With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised." [17]

The lawyer should discuss confidentiality, or the flow of information, amongst the parties. Confidentiality and communication obligation could conflict during the joint representation. The lawyer should describe the alternatives, keeping secrets or not keeping secrets, and the impact of each alternative. The parties and the lawyer should clearly decide whether he or she will be keeping each client's confidence or whether he will reveal anything material learned from one client to the other. The best practice is for the decision to be included in an engagement letter.

The comments to Rule 4-1.7 seem to encourage the lawyer to share information between clients. "The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." [18] The lawyer must be vigilant for developing conflicts. If material information is withheld, the lawyer's representation of one of the clients likely "will be materially limited by the lawyer's responsibilities" to keep the information confidential.

The lawyer should advise the potential clients of the advantages and disadvantages of the joint representation in sufficient detail so that each client understands why separate counsel may be preferable. There also may be situations where the lawyer simply cannot obtain informed consent because, for example, he cannot disclose information to one client because it is confidential information the lawyer has obtained from another client. If the lawyer must disclose confidential information from Client A to Client B in order for Client B to have adequate information to decide whether to consent to the conflict, the lawyer will have to obtain Client A's informed consent to disclose that confidential

information, per Rule 4-1.6(a). Again, the lawyer would have to fully disclose to Client A all the material risks of, and reasonable alternatives to, that disclosure by Client A of confidential information to Client B.

Further, the lawyer should advise the joint clients of the consequences of a failed joint representation. If the lawyer must withdraw, the clients may suffer delay, additional costs, and recrimination between the formerly joint clients.

The informed consent must be “confirmed in writing.”[19] “‘Confirmed in writing,’ when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.”[20]

Other issues that may arise from a joint representation include the payment of fees. If one of the joint clients is paying the attorney fees for another joint client, as often occurs with corporations and employees, Rule 4-1.8(f) requires the lawyer to obtain the non-paying client’s informed consent to the payment arrangement in order to ensure there is no interference with the lawyer’s independent judgment or the client-lawyer relationship, and to protect the confidentiality of the non-paying client’s information. Also, when a joint representation terminates, the lawyer owes both former clients duties pursuant to Rule 4-1.9.[21] This can be particularly relevant to situations where a lawyer jointly represents a corporation and one of its employees in a matter – that employee is now a former client to whom the lawyer owes duties.

Lawyers representing clients jointly often ask one of the clients to consent to the lawyer continuing to represent the other if the clients’ interests diverge and/or one of the clients revokes their consent to the joint representation. Rule 4-1.7(b) controls whether such a waiver is proper. “The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.”[22] Again, such a waiver requires the lawyer to educate the client regarding the reasonably foreseeable risks. Advance consent to withdraw from representing one client and to continue to represent the other client “cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under Rule 4-1.7(b).”[23]

During the course of the case or matter, the lawyer must remain diligent regarding the joint representation, and must evaluate whether conflicts have arisen that require withdrawal or disclosures and consent. If circumstances change and continuing the joint representation is no longer permissible, the lawyer should, generally, withdraw from the representation of both clients. If the lawyer has obtained an advance waiver of the conflict from one of the clients, and if that conflict is waivable and the waiver is proper, he/she may withdraw from the representation of one of the clients and continue representing the other. If the new conflict is consentable and the lawyer wishes to proceed with the joint representation, he or she must start the evaluation process again, make the necessary disclosures and seek the clients’ informed consent.

Lawyers who engage in the proper analysis before agreeing to jointly represent two or more clients may make better decisions as to whether joint representation should be accepted and, later, whether it should be continued or terminated.

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## Endnotes

1 Rule 4-1.7 cmt. [2].

2 See, e.g., *Yanez v. Plummer*, 164 Cal.Rptr.3d 309 (Cal. App. 2013). In *Yanez*, the lawyer, a corporate in-house counsel, attended the deposition of an employee witness. Before the deposition began, the employee “expressed concern about his job because his deposition testimony was likely to be unfavorable to the company” and he asked the company’s in-house counsel who would “protect” him at the deposition. The lawyer responded that he was the employee’s attorney for the deposition and that as long as he told the truth, the employee’s job would not be affected. During the deposition, an inconsistency in the employee’s testimony was elicited. The in-house counsel highlighted the inconsistency without giving the employee an opportunity to explain the discrepancy. The company terminated the employee based on the employee’s “dishonesty.” The employee sued the in-house counsel for malpractice. In denying the lawyer’s summary judgment motion, the court noted that the employee presented evidence that in-house counsel had not informed him about the conflict with his employer nor obtained his informed consent to the joint representation. *Id.* at 314. The court found that the employee presented “a triable issue of material fact that but for [in-house counsel’s] alleged malpractice, breach of fiduciary duty and fraud, [employee] would not have been terminated.” *Id.* at 315.

3 Rule 4-1.7(b)(3).

4 Rule 4-1.7(a)(2).

5 Rule 4-1.7 cmt. [8].

6 For example, if a lawyer already represents Corporate Client A, and an employee of the corporation is a witness and/or another party, the lawyer should make clear in the investigative/exploratory meeting with employee/Potential Client B that he/she only represents Corporate Client A at that point.

7 Rule 4-1.7 cmt. [8]. Lawyers also must comply with their duties to prospective clients. See Rule 4-1.18.

8 Rule 4-1.7(b)(1) specifies an objective test as to whether the lawyer “reasonably believes” he can provide competent and diligent representation to both clients. Rule 4-1.0(h) provides: “‘Reasonable’ or ‘reasonably’ when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.” One commentator succinctly explained: “Unless each client has the same opportunity to achieve a good result with the ‘conflicted’ lawyer as she would with an independent lawyer, the lawyer cannot represent both clients.” W. Bradley Wendel, *Professional Responsibility: Examples & Explanations* 296 (2d ed. 2007).

9 Rule 4-1.7(b)(1) – (3).

10 Rule 4-1.7 cmt. [14].

11 325 S.W.3d 500 (Mo.App. 2010).

12 *Id.* at 508.

13 Id. at 509.

14 Rule 4-1.7 cmt. [18].

15 See, e.g., *Nelson Bros. Prof. Real Estate, LLC v. Freeborn & Peters, LLP*, 773 F.3d 853 (7th Cir. 2014) (in a malpractice action, jury found in favor of and awarded in excess of a million dollars to a party to a joint venture that alleged a law firm representing the joint venture favored the other party and failed to advise them of potential conflicts of interest).

16 Rule 4-1.7 cmt. [32].

17 Rule 4-1.4 cmt. [30].

18 Rule 4-1.7 cmt. [31].

19 Rule 4-1.7(b)(4).

20 Rule 4-1.0(b).

21 See, e.g., *In re Neuhardt*, 321 P.3d 833, 838 (Mont. 2014) (lawyer who violated Rule 1.7 by representing husband and wife in drug investigation wherein wife implicated husband also violated Rule 1.9 when he continued representing wife after withdrawing from the representation of husband).

22 Rule 4-1.7 cmt. [22].

23 Id.

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