

One Lawyer Representing Multiple Clients Sitting on the Same Side of the Table

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A conflict of interest common in transactional matters occurs when a lawyer is asked to represent several people on the same side of a transaction; for example, when several people ask a lawyer to represent them in forming, buying or selling a business. This situation is referred to as a concurrent conflict of interest due to the lawyer's common or multiple representation of two or more clients in the same matter.¹

The first part of this article reviews the pertinent Rule of Professional Conduct as well as other authorities, such as the Restatement (Third) of the Law Governing Lawyers and the comments to the ABA Model Rules of Professional Conduct, and presents hypothetical fact patterns, to identify when such conflicts of interest typically occur. The next part of the article reviews the pertinent Rule of Professional Conduct and other legal authorities concerning the concept of informed consent to determine when a lawyer may undertake multiple representation in the face of a concurrent conflict of interest. Finally, the article suggests a form letter to be signed by clients to provide their informed consent, in writing, to the multiple representation, this letter also serves to protect the lawyer from any allegation that he or she violated the Rules of Professional Conduct by representing two or more clients in the same matter.

Identifying Concurrent Conflicts of Interest

Under Rule of Professional Conduct 1.7(a)(2), a concurrent conflict of interest occurs when "there is a significant risk that representing one or more clients will be materially limited by the lawyer's responsibility to another client..."² For example, a concurrent conflict of interest exists when one lawyer represents two or more clients on the same side of a transaction, such as the formation of a business entity.

The two things to understand under RPC 1.7(a)(2) are the concepts of "material limitation" and "significant risk," which are, necessarily, inextricably intertwined and somewhat subjective. It is appropriate to consult the ABA comments to the model rules for guidance in interpreting and understanding these concepts because New Jersey has largely adopted ABA Model Rule 1.7.³

The ABA comments explain when a lawyer's representation may be materially limited:

...a conflict of interest exists if there is a significant risk that a lawyer's 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. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are 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.⁴

There must also be a “significant risk” that the lawyer’s representation of multiple clients will be materially limited. The ABA comments explain the term “significant risk” as follows:

...Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer’s relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict....⁵

Whether a limitation is material and a risk significant can be viewed as subjective standards. However, a review of several common fact patterns and an examination of the legal authorities confirm that it will not take much for a significant risk of a material limitation to exist when a lawyer represents two or more clients in the same matter.

A lawyer will understandably be excited when he or she has two or more clients who want to retain him or her to form a new business or to represent them in the acquisition of a business. Following is a typical fact pattern:

Friends and business associates A, B, and C decided to form a partnership to manufacture and sell computers to small businesses. According to their plan, each of the three will make different contributions to the venture: A has technical expertise, B has access to the necessary capital, and C has a strong background in management marketing.

The three participants had a rough idea of how they would further divide responsibilities as the business developed, and also how they would divide the hoped-for profits. Together, the three sought to retain lawyer L to

finalize and formalize their agreement, as well as to take the necessary steps to form the partnership....⁶

A lawyer, however, may not know or appreciate that such a situation presents a concurrent conflict of interest if he or she undertakes the representation of two or more clients in the same transaction. The conflict becomes a little clearer when the following is considered:

...The different contributions to be made to the partnership alone indicate that the prospective partners have conflicts of interest with respect to the structure and governance of the partnership....With the informed consent of each..., Lawyer may represent all three clients in forming the business. Lawyer may assist the clients in valuing their respective contributions and suggest arrangements to protect their respective interests....⁷

In some situations, the conflict of interest may be immediate, actual and apparent. In other situations, it may be “significant and plausible, even if it is not certain or even probable that it will occur.”⁸ In other words, a conflict of interest that *may* occur in the *future* must be addressed in the present. Consider the following example:

...Lawyer is satisfied that [the] clients are committed to forming the enterprise and that an agreement can be prepared that will embody their common undertaking. Nonetheless, because a substantial risk of future conflict exists in any such arrangement, Lawyer must explain to the clients that because of future economic uncertainties inherent in any such undertaking, the clients’ interests could differ in material ways in the future. Lawyer must obtain informed consent...before undertaking the common representation.⁹

Professors Geoffrey Hazard Jr. and W. William Hodes, two prominent commentators on legal ethics, have noted that “common representation is permissible where the clients seek a common goal, yet recognize that they also have (some) competing interests in the matter...”¹⁰ Thus, “...joint or common representation of all three clients by L is proper, assuming that L first makes adequate inquiry about the relationship of the parties and determines that only a small risk exists that serious differences between them could eventuate.”¹¹

The ABA comments likewise note:

...common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs [or] working out the financial reorganization of an enterprise in which two or more clients have an interest....The lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.¹²

Informed Consent

When there is a significant risk that a lawyer’s representation of two or more clients on one side of a transaction will be materially limited, a natural reaction would be that the lawyer cannot represent all of the clients. The Rules of Professional Conduct recognize, however, that other factors may come into play,

including the clients' right to select the lawyer of their choice. Therefore, the Rules of Professional Conduct allow one lawyer to represent multiple clients in the same matter, provided that certain conditions are met.

As long as the representation is not otherwise prohibited by law, a lawyer may represent two or more clients in the same business transaction while there is a concurrent conflict of interest when:

1. each client gives informed consent, which is confirmed in writing, after full disclosure and consultation;
2. the lawyer's consultation with the clients includes an explanation of the common representation and the advantages and risks involved; and
3. the lawyer reasonably believes he or she will be able to provide competent and diligent representation to each client.¹³

The Rules of Professional Conduct define "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."¹⁴ The ABA comments explain the term as follows:

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks involved. 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....¹⁵

Professors Hazard and Hodes have written the following about the issue:

Multiple client representation of this kind is permissible, so long as the requisite precautions are taken to safeguard confidential client information... and to assure that each common client is aware of the risks and gives informed consent.

Each of the parties involved in these situations is equally a current client of the same lawyer. Each client therefore faces the risk that the shared lawyer's ability to provide loyal representation will be "materially limited," because of responsibilities owed to one or more of the other current clients....As in any concurrent conflict of interest situation, therefore, the shared lawyer must first make an independent determination that the representation is "consentable," and can be conducted competently and diligently with respect to each client. If that threshold is satisfied, the lawyer is then required to explain the risks and benefits of joint representation, including the impact on confidentiality concerns and on the attorney-client privilege...and obtain the informed consent of each affected client.¹⁶

With regard to the attorney-client privilege, the lawyer must advise the clients that "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

With regard to confidentiality, the lawyer must advise the clients that

information received from one may be shared with the others if the information is relevant to the common representation, "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 reasoning is that "the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit."¹⁹

However, there is some flexibility with regard to confidentiality:

In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.²⁰

In addition to obtaining the informed consent of the clients, a lawyer must also "reasonably believe" that he or she will be able to provide "competent and diligent representation" to each client.²¹ The term "reasonably believes" means "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."²² This is an objective rather than a subjective standard.²³ The lawyer's representation must be competent and diligent. Regarding competence, it is based upon a lawyer's "legal knowledge, skill, thoroughness and preparation."²⁴ In other words, the lawyer must reasonably believe that he

or she will be able to provide competent and diligent representation to each client based upon his or her legal knowledge, skill, thoroughness and preparation.

To summarize, in order for a lawyer to represent two or more clients in a business transaction, the lawyer must first “reasonably believe” that he or she will be able to provide “competent and diligent representation” to *each* client.²⁵ If so, he or she must fully disclose the conflict of interest to each client with an explanation of “the common representation and the advantages and risks involved” in one lawyer representing multiple clients in one matter.²⁶ Each client must have “reasonably adequate information about the material risks” of the joint representation.²⁷ The information should include the material and reasonably foreseeable ways the conflict could adversely affect the clients’ interests, including the effect on confidentiality and the attorney-client privilege. Finally, the lawyer must confirm the “informed consent” from each client in writing.²⁸ A lawyer must do the foregoing to protect him or herself from violating Rule of Professional Conduct 1.7.

Form of Joint Representation Letter

A lawyer must advise clients of the concurrent conflict of interest and confirm the informed consent in writing. Typically, the lawyer advises the clients in a letter that he or she requests them to countersign, which will signify their acknowledgement of the conflict of interest and their consent to the multiple representation in the matter. The lawyer may introduce the clients to the issue by starting the letter as follows:

We have been asked by each of you to represent both of you in the formation of a limited liability company. We are happy to have the opportunity to represent you, and appreciate your decision to retain us in this matter.

The purpose of this letter is to advise you that when we represent two or more clients in the same matter, we are required to advise clients of the existence of a conflict of interest between them and obtain their consent to allow us to represent them in the same matter. For example, although both of you have a common interest in forming a successful limited liability company, you each may have different and conflicting interests with regard to the content and future impact of the company’s operating agreement.

As long as we believe that the differences are minor, or can be resolved between you, we can represent both of you in this matter. However, we are required to obtain your written consent in order for us to represent both of you in this matter.

The lawyer should then address the advantages and risks involved in the common representation. For example:

As you know, the obvious advantage of one attorney representing both of you in this matter is that you avoid the cost of involving two lawyers in the matter. However, there are also a number of risks involved.

For example, there may be a lack of confidentiality. If one of you provides us with any confidential information that is relevant to the common interests of both of you, we will disclose it to the other so each of you can make informed decisions about the matter. Otherwise, we will not disclose any confidential information received from one of you to the other, and neither one of you will request us to disclose such information of the other.

Further, there may be a waiver of the attorney-client privilege. If in the future there is a lawsuit between the two of you concerning this matter, the attorney-client privilege may be

unavailable to prevent us from disclosing the communications that each of you made to us as your common lawyers in this matter.

The lawyer should also advise the clients that the common representation may end sooner than anticipated if the lawyer determines that he or she cannot continue to represent one or both of the clients in the event of a dispute:

If an actual dispute develops between you and/or it becomes necessary for us to take an adverse position on behalf of one of you against the other, we may not be able to continue further representing either of you without a further waiver from both of you. Indeed, no such waiver may be possible or practical, in which case each of you may be required to obtain the services of other counsel. Likewise, if during the matter we believe that we cannot continue to represent both of you fairly and effectively, we will have to withdraw from representing both of you in this matter.

The lawyer should close the correspondence with a request for the clients to sign and return the letter acknowledging that they understand the issues and consent to the common representation as set forth in the letter:

We ask you to please sign and return the enclosed copy of this letter acknowledging the conflict of interest and consenting to this firm representing both of you in this matter. Please contact us if you have any questions about the contents of this letter.

Finally, the letter may include the following language immediately above the spaces where the clients will countersign the letter:

We have each read and we each

understand this letter. We each consent to the firm representing both of us in this matter in accordance with the terms of this letter.

A letter such as the one above will communicate the conflict of interest to the clients and serve as the vehicle to obtain the required informed written consent from the clients.²⁹ As an alternative to a separate letter, the above language may be incorporated into a retainer agreement between the lawyers and his or her clients.

Conclusion

A lawyer must identify and deal with conflicts of interest when presented with the pleasant circumstance of being asked by two or more clients sitting on the same side of the table to represent them in a business transaction. The lawyer must also know how to properly communicate the conflict of interest to clients and confirm their informed consent in writing to undertake the common representation.

Endnotes

1. See RPC 1.7(a). This article does not address "directly adverse" concurrent conflicts of interest under RPC 1.7(a)(1), meaning situations where one lawyer represents multiple clients on opposite sides of the same transaction; for example, representing both the buyer and the seller of a business.
2. See RPC 1.7(a)(2).
3. Note that the New Jersey Supreme Court adopted ABA Model Rule 1.7 with some additional language added to RPC 1.7(b)(1).
4. Comment 8 to ABA Model Rule 1.7.
5. Comment 26 to ABA Model Rule 1.7.
6. See 1 Geoffrey C. Hazard Jr. and W. William Hodes, *The Law of Lawyering* (3rd ed.), §11.14, Illustration 11-11, at 11-43.
7. Restatement (Third) of the Law

Governing Lawyers, §130, Comment (c), Illustration 4 (ALI 2000), at 360. Obviously, the same concerns are raised and the same analysis is performed regardless of the type of business entity to be formed by the clients.

8. *Id.*
9. *Id.* §121, Comment (c)(iii), Illustration 3, at 249.
10. Hazard and Hodes, §11-14, at 11-41.
11. *Id.* §11-14, at 11-43 to 11-44.
12. Comment 28 to ABA Model Rule 1.7.
13. RPC 1.7(b)(1)-(3).
14. RPC 1.0(e).
15. Comment 18 to ABA Model Rule 1.7.
16. Hazard and Hodes, §11-14, at 11-39 (emphasis in original).
17. Comment 30 to ABA Model Rule 1.7.
18. Comment 31 to ABA Model Rule 1.7. Under RPC 1.6(a), each client must consent to a lawyer revealing (*i.e.*, sharing) information with co-clients. See also *A. v. B.*, 158 N.J. 51, 61 (1999) (suggesting that a lawyer should have an agreement with his or her clients addressing the sharing of confidential information).
19. *Id.*
20. *Id.*
21. RPC 1.7(b)(2).
22. RPC 1.0(j).
23. *Whitman v. Estate of Whitman*, 259 N.J. Super. 256, 263 (App. Div. 1992) ("In determining reasonableness, the court applies an objective test and is not bound by [the lawyer's] professed subjective beliefs concerning the propriety or effect of his conduct.").
24. ABA Model Rule 1.1. As to competence, the rule as adopted in New Jersey does not provide much guidance in the context of a concurrent conflict of interest; thus, the language of the ABA Model Rule 1.1 should be followed for guidance. See

RPC 1.1 ("A lawyer shall not (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence. (b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally."). As to diligence, see RPC 1.3.

25. RPC 1.7(b)(2).
26. RPC 1.7(b)(1).
27. See restatement, §122(1) & §130.
28. RPC 1.7(b)(1).
29. Some parts of this form letter have been used by the author for years, other parts have been borrowed and modified from several sources, primarily the two noted in this note. See *The M&A Process—A Practical Guide for the Business Lawyer* (ABA 2005), Appendix 2-A. Chapter 2 of this text, titled "Managing the Client Relationship and Other Ethical Issues," including the form of engagement letter for joint representation found in Appendix 2-A, is available on the ABA website to members of the Business Law Section. They may be found in the Online Materials Library under the title "Ethical Issues in M&A Transactions." See www.abanet.org/business-law/home.shtml. A number of similar letters for a variety of conflict of interest situations may be found on the website of William Freivogel, a lawyer providing advice on legal ethics. See www.freivogelonconflicts.com/new_page_38.htm.

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