

# The Ethics of Joint Representation

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We all do it. We all ought to be capable of doing it. But we all ought to do it more carefully.

From time to time, lawyers are called upon to represent more than one client in the same matter. Call it joint representation or call it multiple representation, it is an essential, everyday capability that we simply must have in our repertoires. For that reason, we all need regular reminders about how to do it ethically and prudently.

Let's start with a fundamental principle: Before, during, and after a joint representation, treat all joint clients equally in all respects, including loyalty, confidentiality, communication, and decision making.

Although simple to state, the principle is often hard to execute. It's hard when one of several clients is a long-time client or sends the lawyer's firm much work or is the one paying the freight on this joint representation. The principle is equally difficult to implement when one client is the articulate spokesperson for the client group or the most knowledgeable about the facts. It's often easy to forget there are multiple clients who must be honored equally.

Try not only to treat joint clients equally but to make special efforts to show it. Think about how your communications and conduct will look in retrospect. For example, even if one of five clients is the designated spokesperson for the group, consider finding a diplomatic way to direct regular (maybe all)

communications to all the clients, perhaps in a way visible to all—for example, a letter or email with all the clients as equal addressees.

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## Minding the Model Rule

Any lawyer's first conversation about a possible joint representation should trigger a simple question: "Can I ethically do this?" Assuming that taking on the proposed joint clients would not place the lawyer directly adverse to an existing client or materially adverse to a former client in a matter substantially related to the lawyer's prior work for the former client, the key ethics rule for assessing multiple representation is ABA Model Rule of Professional Conduct 1.7. Section (a)(2) of the rule says that a conflict exists if "there is a significant risk that the representation of one client"—here, each client in a joint representation—"will be materially limited by the lawyer's responsibilities to another client."

Model Rule 1.7(b) says that, even if a lawyer does have a "material limitation" conflict—for example, because representing both defendants in a particular product liability case will mean that some defenses are off-limits to each joint client—the two clients may still consent to the joint representation if each client is fully informed about the risk and benefits of joint representation,

if they each give informed consent, if the two clients are not asking the same lawyer to assert claims against each other in litigation, and if the lawyer “reasonably believes” that he or she “will be able to provide competent and diligent representation to each affected client.” (This article uses “consent” and “waiver” interchangeably.)

If a lawyer’s joint representation of two parties in litigation would force one or both to give up the opportunity to pursue some particular claim or defense so essential to that client that it would be less than competent and diligent representation not to raise it, then that client is not permitted to consent to the joint representation, and the lawyer cannot ethically ask for consent. Perhaps in a product liability case, a lawyer might conclude that it would be less than competent representation to allow a retail seller, as the price of a joint representation, to walk away from a potential defense that the manufacturing defendant was guilty of poor design. If so, the conflict is “nonconsentable,” and there can be no joint representation.

In the transactional context, a commonly cited example of a non-consentable joint representation is the proposed representation of the buyer and seller of a business, where a lawyer representing both parties would be unable to advise either buyer or seller about some highly material point on which they had not yet agreed and still needed to negotiate—perhaps the inclusion or scope of a noncompete provision restricting the seller. Would it be competent and diligent representation to leave the parties to their own devices to resolve that issue, removing it from the scope of the representation? If not, it’s nonconsentable.

Any decision about what constitutes competent and diligent representation is extremely fact-intensive. If the potential claim between the parties is dubious on the merits, if the business or family relationship between the potential clients is strong, or if the amount in controversy is small, it may well be that “competent and diligent representation” would permit the potential clients to set aside any issues or claims between themselves and ask one lawyer to represent them ably in a carefully and consciously limited manner.

Whether a conflict of interest, inherent in almost any joint representation, is consentable or nonconsentable may well also depend on the practice area or procedural context in which it arises. Courts are traditionally extremely wary of joint representations of criminal defendants, due to each defendant’s constitutional right to the effective assistance of conflict-free counsel and the full knowledge of the intense judicial scrutiny given later claims of ineffective assistance. In contrast, business lawyers and civil courts often take a much more relaxed view of what is consentable, particularly when sophisticated commercial parties are involved.

In some jurisdictions, and in some practice areas, special rules or doctrines prohibit or limit joint representation. In criminal

cases, the Federal Rules of Criminal Procedure (appropriately) put a thumb on the scales against joint representation (Fed. R. Crim. P. 44(c)), placing an express obligation on the court to inquire into and justify any proposed joint representation, for reasons discussed above. Some jurisdictions (for example, New Jersey) ban joint representations of buyers and sellers in real estate transactions. Check your rules carefully and consider the need to draft engagement agreements appropriately.

No lawyer needs an ethics expert to tell him or her that many joint representations that are perfectly ethical to undertake are, in practice, unwise. No matter the care taken up front to evaluate a prospective multiple representation and to expose all relevant facts, they almost always change over the life of a case. Just as significantly, the feelings, attitudes, and business positions of clients can also change unexpectedly. And in a joint representation, the lawyer can be left holding the bag.

The faithful employee whose joint defense was happily undertaken at the employer’s expense later turns out to have secretly committed sexual harassment. Or the employee turns out to be a disloyal ingrate, running off to work for the competition in the midst of litigation. Or the borrower and lender who had worked out all the details of a loan and desperately wanted to keep legal costs to a minimum realize only far into the deal that they disagree over the need to enhance the collateral after an appraisal comes back lower than expected.

Veteran lawyers know that it’s always a headache when joint clients become unhappy about their “jointness,” for whatever reason. Moreover, no two lawyers have identical tolerances for risk. Prudent lawyers always take these factors into account.

Some factual scenarios consistently have a greater tendency to end up in discord and stickiness. These especially include situations where a serious power imbalance exists between clients or where the consequences of one client losing the services of the lawyer are very high, such as where the lawyer has a 20-year relationship with one client and knows intimately that client’s business affairs and needs. Certain types of claims and litigation, or certain kinds of transactions, carry known patterns of unforeseen twists and turns that can lead to conflicts: representing the injured passenger and driver in certain kinds of auto accidents, representing the employer and supervisor in certain kinds of employment discrimination claims, or representing the buyer and seller in most business acquisitions.

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## Avoiding “Accidental Clients”

Before turning to structuring a joint representation, we briefly detour to the land of “accidental clients.” That memorable phrase was coined by Professor Susan Martyn of the University of Toledo College of Law to describe situations in which a lawyer

has little or no idea that a client relationship even exists—at least not until it's too late. How is that possible?

If a lawyer acts in a way that leads a person to reasonably believe that a lawyer-client relationship exists between them, and the person relies on this conduct, then the law will generally impose one, even without any express agreement or mutual consent. Section 14 of the *Restatement of the Law Governing Lawyers* confirms this principle, as do many cases.

Joint-representation-by-accident can occur, for example, if while investigating a claim against the company, the company lawyer interviews a key corporate player, and the interviewee concludes, reasonably under the circumstances, that the company lawyer also represents the interviewee. While forming a corporation for a new business, the lawyer for the primary organizer deals frequently with both the key salesman for the new business and the genius employee whose software will power its website, only to discover much later that the key salesman or the software genius reasonably believed that the lawyer was looking out for him in connection with the minority equity interests they were to receive.

Careful, thoughtful, and complete communication is the key to reducing the risk of becoming a lawyer by accident. No supposed client can reasonably believe he is your client if you clearly and unequivocally assert to him that you do not represent him. A disclaimer precludes a claim of reasonable reliance.

Thus, the company lawyer interviewing key corporate personnel can, and should, carefully explain to interviewees that he is the company's lawyer, not their lawyer, that anything they say to him will be passed on to the company, and that their statements are not confidential. Proving up an accurate "corporate *Miranda*" warning should defeat any later claim that the interviewee was a client.

The business lawyer forming the new company can, and should, explain to the key salesman and the software genius that he is only representing the primary organizer, not them, and that they may want to talk with their own lawyers. Oral is good; written is better. Hence, the "I'm-not-your-lawyer" letter or email. Judiciously employed, it can save a lawyer from the accidental client and prevent the accidental joint representation.

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## Informed Consent Is a Process

Not every joint representation creates a conflict of interest. But look at the language of Model Rule 1.7(a)(2): There is a conflict of interest if "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." Comment [8] to the rule helps a little:

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.

Many lawyers do not adequately consider the rule's contemplation that there may be no present material limitation at all, merely the possibility of a material limitation in the future, and that this risk may be great enough to create a conflict of interest in the here and now.

So, yes, there are joint representations where there is no conflict of interest under the stringent analysis of this rule—two happily married parents suing for the wrongful death of a child or a company and its sole individual owner defending contract

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## Treat joint clients equally and make it show.

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and tort claims arising from the same incident. If joint clients' interests are so well aligned, then no ethics rule requires any waiver of any conflict of interest. Still, simple prudence usually dictates an intelligent discussion with the clients or a confirmation of the conversation in writing. Cases and other representations take altogether unpredictable factual turns. So do clients: Happy marriages sour, individuals die, and companies fail or are sold. And at that point, what has now actually happened appears, in retrospect, ever so much more likely to have been foreseeable.

Draft a letter using simple terms such as, "We do not believe that a conflict of interest exists in our proposed joint representation of you, but we have nevertheless discussed with you the possibility that one could arise in the future and what might happen if one does arise."

Still, informed consent is a process, not a letter. Careful lawyers have always done their best to get consent to joint representations in writing. In 2002, the ABA amended the Model Rules of Professional Conduct in numerous respects, and one of the most important was the addition of a requirement that all waivers of conflicts of interest must be confirmed in writing.

Who should consent? With individuals, an easy question; with organizations, not always so. Authority to consent is almost exclusively established by law outside the ethics rules—law concerning the governance of the type of organization in question. The limited advice on this subject in Model Rule 1.13(g) merely

tracks most governance law in advising that, where the conflict arises from joint representation of an organization and one of its officers or employees, someone other than the involved officer or employee has to give consent for the organization.

Further, whether the client is an individual or an organization, it is almost always in the lawyer's personal interest, and usually in the client's interest, for the lawyer seeking consent to obtain it from or through another lawyer for the individual or organization, if one is available—for example, in-house counsel.

Who should be involved in or present for communication about consent? Does the client's president need to be involved in the discussions, even though she has delegated the handling of the matter to the sales vice president? If husband and wife, both with children and assets from before their marriage, seek estate planning advice, or if company and line employee are both to be represented in a lawsuit, should both be in the room for the discussion? Savvy estate planning or employment lawyers advise that separate one-on-one meetings with each spouse, or with only the employee present, significantly improve the chances of candor and client understanding.

The key topics for discussion are the risks and benefits of joint representation and the alternatives to it. The goal under Rule 1.7(a)(2) is "informed consent." Model Rule 1.0(e) defines the "informed consent" needed 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." Comments [6] and [7] to Model Rule 1.0 explain that the information and explanation needed vary dramatically, based on the decision to be made, the information the client already had, and the client's understanding, experience, and sophistication.

Comments [18] and [19] to Rule 1.7 make it clear that the lawyer must discuss with the potential joint clients such matters as "the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." Of course, the lawyer should also discuss the alternative—separate representation—and its costs and benefits.

Comment [29] to Rule 1.7 points to the single greatest risk of joint representation—the possibility that joint representation will fail and the clients will have to obtain new lawyers: "[T]he result can be additional cost, embarrassment and recrimination." Clients clearly need to hear and consider this.

A candid discussion about confidentiality is absolutely critical to any client discussion about a joint representation, especially where a conflict waiver is needed.

Under the prevailing interpretation of the attorney-client privilege in most U.S. jurisdictions, without some different agreement between two joint clients, a lawyer may share with either client information provided to the lawyer confidentially by

the other client. Put another way, there are no secrets between joint clients—at least none to which their lawyer is privy—but the privilege remains intact as to the rest of the world.

Model Rule 1.4 on communications with clients requires a lawyer to keep a client informed about all material aspects of the representation, but what if one of two joint clients instructs a lawyer not to share some particular information with a joint client? Under Rule 1.6, that instruction seals the lawyer's lips. What to do?

Comments [30] and [31] to Model Rule 1.7 strongly and wisely caution the lawyer to obtain agreement in advance from joint clients to share all confidential information concerning the representation with the other joint client.

Some clients simply don't understand that everything they tell their lawyer may be shared with their co-client. Some clients think they can share some private thought or fact with their lawyer without their lawyer sharing it with the other joint client. There is no substitute for clear education by the lawyer and understanding by clients of this point before the representation begins or for a short, clear paragraph in a confirming letter that lays out the rules of the road on confidentiality.

Despite clear discussion and agreement on this point, a client may still insist that a lawyer withhold information from another client. Even so, the early identification, discussion, and agreement in writing on this issue reduces the likelihood of this happening. If that uncomfortable situation does arise, the fact of the earlier discussion and a confirming writing can be powerful tools to convince a recalcitrant client to do the right thing.

One further word about the consent process: Listen.

Many lawyers are wonderful listeners, and this talent is justly prized by clients. All lawyers need to listen to and watch their potential joint clients very closely during the process of obtaining consent to a joint representation.

When one potential joint client says yes to the representation but in a hesitant tone that reveals unspoken concerns, the careful lawyer explores those concerns. Indeed, one of the most powerful arguments for an in-person conversation about joint representation is that the lawyer may not only listen to the client's words and tone but may also see each client's body language, including the clients' personal interaction with one another.

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## Advance Waivers: A Useful Tool

Perhaps the most common question that ethics lawyers hear about joint representation is whether a lawyer may ethically structure the representation so that, if the two clients come to blows, the lawyer can withdraw from representing one and continue representing the other. What's contemplated here is an advance waiver of a conflict of interest. Authority on the use of advance waivers in this context is limited, but many informed

students of legal ethics believe this is both possible and appropriate in at least some circumstances.

Comment [29] to Model Rule 1.7 seems to contemplate this possibility—and certainly does not foreclose it—by stating that, “[o]rdinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.” This clearly suggests that there are some non-ordinary circumstances in which this would not be true. Moreover, Comment [22] to Model Rule 1.7 clearly establishes ground rules under which advance waivers of this general type are permissible and enforceable.

At least four cautions are in order. First, the comments to Model Rule 1.7 and the case law clearly teach that an advance waiver of a conflict of interest is only as good as the ability of the parties to predict with accuracy, up front, the conflict that actually later arises. The closer the parties come to predicting the conflict or type of conflict that actually arises, the likelier that any advance waiver will be effective. Clear discussion with the client is essential, and clear documentation that this discussion took place is the only effective antidote to amnesia.

Second, some courts, some scholars, and some lawyers are plainly hostile (some irrationally so) to almost all advance waivers, and especially so to this type of joint-representation advance waiver. Inevitably, contests on this issue arise where the complaining party claims to have been in a position of weakness relative to the other client. If the question comes up in front of the wrong judge on the wrong facts, the odds that an advance waiver like this will be upheld can become long indeed, regardless of what the law allows. For this reason, no lawyer should seek this type of advance waiver without understanding that it may not ultimately be upheld. It is wise to discuss this, in advance, with all parties, especially the client who would be the beneficiary of this waiver.

Third, any such waiver must deal clearly with confidential information. In most circumstances, it would be impossible to continue to represent only one of two formerly joint clients, and to be adverse to the other former joint client, unless the lawyer could freely use any confidential information obtained from the former joint client in any way he or she wished in the continuing representation. Being unable to use such confidential information that came from the former joint client might well doom the lawyer’s ability to continue in the matter. Therefore, the advance waiver must be clear that the lawyer is authorized by the former joint client to use that client’s confidential information, even in a way that may be directly adverse to that client.

Fourth, even the best-drafted provision of this type must be evaluated afresh if and when a conflict actually arises. If a conflict arises, a collaborative decision must be made between the lawyer and the client who wishes to have the lawyer continue to represent it about whether the waiver is likely to be upheld. In many situations, the conflict that actually arises may differ, either a little or a lot, from what was discussed or described in

writing, and it is those differences that will most likely decide the waiver’s enforceability. Despite full discussions and brilliant drafting, some conflicts, when they ultimately appear, just turn out to be so difficult or serious that a waiver that looked perfect in the headlights looks chancy in the rearview mirror.

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## Drafting a Conflict-Waiver Letter

Although careful lawyers everywhere have been using conflict waiver letters for years, the profession and the courts generally have only a few years’ experience in drafting and interpreting them. Still, we know a few things already.

Must the client sign the letter? Under the Model Rules and in the overwhelming majority of U.S. jurisdictions, the answer is “no.” The writing must memorialize the consent, and it must be transmitted to the client, but it need not be signed by the client for the lawyer to avoid discipline.

Should the client sign the letter? Most authorities would say “yes.” Asking someone to sign a document concentrates the person’s mind on its subject and emphasizes the subject’s seriousness. The existence of a signed waiver is also the perfect antidote for any signer’s later amnesia.

Will email do the job? Certainly. Model Rule 1.0(n), defining “writing” and “written,” makes this clear. And an approving email response from the client is every bit as powerful as a handwritten signature in ink.

When must the writing be done? Within a reasonable time after the client gives informed consent, under Model Rule 1.0(b) and its comment [1].

Should the lawyer write one letter to all the potential clients or separate letters to each? Although this is largely a matter of personal style, our cardinal principle of equality among joint clients counsels strongly in favor of similar communications and perhaps a joint letter.

What must or should the writing say? Not completely clear. The ethics rules are not explicit about this, largely because the drafters of the new ABA “confirmed in writing” requirement did not want to make a then-controversial new burden more onerous than necessary.

The primary guidance on this point in the rules is in comment [20] to Model Rule 1.7, which notes that “[s]uch a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent.” The comment indicates that the writing requirement generally

does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well

as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon a client the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

All of which suggests that a perfect conflict-waiver discussion, followed by a one-line confirmation to the client, would comply with the ethics rule and avoid discipline. On the other hand, a careful lawyer might well want to go further.

The purposes of a conflict-waiver letter, apart from meeting the minimal standards of Rule 1.7 are, first, to inform and educate the client and, second, to provide a record of the consent that will remind both the lawyer and client, and demonstrate to any third party, what was agreed. None of us has yet found the perfect formula for depth and detail, but a letter that understandably informs the client and also looks good in the rearview mirror is the goal.

Finally, although written engagement letters are not always required by ethics rules, any lawyer undertaking a joint representation, and already investing time and energy in a conflict-waiver letter, would be well advised to treat the letter as an engagement letter and include in it all other pertinent terms of the engagement.

A well-drafted waiver letter can also serve as a tool for a lawyer to organize and confirm his or her thoughts about the propriety and mechanics of the joint representation. If done early enough, it can also serve as a script for a thorough discussion with the client.

On this premise, drafting the letter becomes one of the first tasks in the consent process—even before any conversation with clients—on the theory that it helps the lawyer concentrate on the terms and structure of the representation and on what ought to be discussed with the clients.

Some lawyers draw up the waiver letter before meeting with the clients for this purpose, then share the letter during the meeting, allow the clients ample time to read it, and use it as a guide to the discussion. Other lawyers prefer to draft the letter before the discussion, but send the letter afterward, on the theory that it allows clients who take in information better orally, and clients who take in information in written form, each to have a full opportunity to understand the subject. Techniques vary, but think about the approach that best fits the circumstances of the particular joint representation.

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## Decisions Reserved for Clients

Fees and expenses cause misunderstandings and disputes between lawyers and clients, and joint representations open up additional avenues for misunderstanding about who is responsible

for payment. Is each of three joint clients responsible for a third of the lawyer's fees and expenses? Even if they each will pay a third, is each also responsible, jointly and severally, for the whole amount?

Use the opportunity of any writing concerning a joint representation to confirm the parties' understanding about fees and expenses. And don't forget, of course, that some representations, joint or not, already require some sort of writing—for example, contingent fees in almost every jurisdiction, or flat or fixed or nonrefundable fees in a number of jurisdictions.

Some important decisions to be made during a representation are reserved to the client, whether the representation is joint or not, including, for example, the decision to settle claims. Case law and Model Rule 1.2(a) strongly support this notion. Honoring this principle, together with the cardinal rule of equality of joint clients, sometimes renders the negotiation and settlement of claims for joint clients fraught with peril. Clients may view a settlement differently, based on differing economic or noneconomic interests (perhaps reputational), or simple differences in temperament and negotiating style.

A lawyer for joint clients should also be aware that every jurisdiction has a version of Model Rule 1.8(g), which imposes specific requirements on aggregate settlements, including a requirement that each client separately give informed consent to the settlement, in a writing signed by the client. (The Model Rule also applies to the handling of guilty and nolo contendere pleas in criminal cases for joint clients.)

The Model Rule also requires that the lawyer disclose to all joint clients “the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.” Thus, each joint client needs to know about the other joint clients' claims and settlement. These disclosure and consent requirements of Model Rule 1.8(g) probably also apply even to “plain-vanilla” joint representations of, for example, an employer and employee, where the employer pays the costs of joint representation and settlement, and the employee has little true exposure.

The net result: In most jurisdictions, in almost all circumstances, decision making on the ultimate settlement of claims is a decision that a client cannot delegate to another client. Bear in mind, however, that the ethics rules and other law have typically honored provisions in liability insurance policies by which an insured grants the insurer an unfettered right to settle claims.

If developments occur during a joint representation that may give rise to a conflict, the rules are clear that a lawyer must promptly investigate, and if there is, the lawyer must do all he or she can to cease work and address the conflict before continuing the representation.

Remember that the basic conflict rule discussed above, Model Rule 1.7(a), says that “a lawyer shall not represent a client if” a conflict exists. Thus, if a conflict arises, the rule prohibits the

## JOINT REPRESENTATION CHECKLIST

1. Identify with precision your clients and the matter in which you will be representing them.
2. Identify anyone in the vicinity who is not a client (but who might somehow think they are), and tell them you are not their lawyer, preferably in writing.
3. Evaluate whether any conflict of interest exists in jointly representing these clients in this matter.
  - a. If there is a conflict, evaluate whether the clients may ethically waive it, watching out for any prohibited joint representations.
    - i. If the conflict is one that may be waived, consider whether, under all the circumstances, a waiver is prudent, both for you as the lawyer and for the clients.
    - ii. If so, work through the consent process to obtain a waiver from the clients.
    - iii. Memorialize the waiver in writing.
  - b. Even if there is no conflict of interest, seriously consider discussing with the clients the possibility that a conflict may arise down the road.
4. Regardless of whether there is a conflict of interest, consider whether, under all the circumstances, joint representation is prudent, both for you as the lawyer and for the clients.
5. Discuss with the clients how confidentiality works in a joint representation; obtain their agreement to your sharing confidential and privileged information between or among them; and consider memorializing the agreement in writing.
6. Establish clearly with all clients who is obligated to pay your fees and expenses, including the specifics of any shared obligation, and seriously consider putting it in writing.
  - a. If someone other than the clients is obligated to pay your fees and expenses, confirm with all the clients and this third person that this third person is not your client; that this third person cannot direct or control your work, unless the clients agree; and that you cannot share information about the matter with this third person, unless the clients consent. Consider putting all this in writing.
  - b. If the ethics rules require that the fee agreement be in writing, put it in a form that complies with the rules.
7. Consider whether you should discuss and reach agreement with the clients on a plan for your continued representation of fewer than all the clients if a conflict of interest does arise later. If this is a good idea under the circumstances, discuss and memorialize the discussion and agreement.
8. Before, during, and after the representation, treat all of the clients equally in all respects, including loyalty, confidentiality, communication, and decision making.
  - a. Comply with the specific applicable ethics rules on aggregate settlements, if necessary.
9. Throughout the joint representation, be aware of the possibility of conflicts of interest arising, and carefully monitor developments that may lead to conflicts, including changes in the facts and procedural posture of the matter, the positions of the clients concerning the matter, and relationships among the clients.
10. If a conflict of interest arises in the midst of the representation, evaluate and address it promptly before continuing in the representation.

lawyer from continuing the representation, unless the conflict can be waived and unless there is a waiver. Thus, clear disclosure of the conflict is required by this rule, and probably by Model Rule 1.4, which generally requires a lawyer to tell his or her client about material developments in the representation. Further, absent some form of consent, a conflict generally means that the lawyer must withdraw from the representation of all joint clients.

It may be possible for the lawyer to stay in the matter,

representing fewer than all the joint clients by way of informed consent. Conflicts arising mid-representation are just like all other conflicts—some can be waived; some cannot—and asking for a waiver of some would just be imprudent. All the same analysis discussed above must be done anew.

Prudence (and probably the law) mandates that any advance consent the lawyer obtained against just such a possibility be evaluated afresh against the conflict that actually developed.

Where the joint clients have a common payor shouldering the cost of the representation, obtaining separate counsel who might then cooperate in a formal or informal joint prosecution or defense could satisfy the common needs of all the formerly joint clients.

Confidentiality is often the key concern. Frequently, it would be impossible for the lawyer to continue for any of the clients without a very clear understanding from the formerly joint clients that the lawyer is free to use any confidential information from or about them in any way the continuing clients may see fit. Regardless of the lawyer's conclusion, however, prudence argues that he or she should have clear conversations with the soon-to-be-former clients about confidentiality, reach agreement, and document the agreement in writing.

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## The Withdrawal Dance

If a lawyer chooses to withdraw from a joint representation or is required to do so, he or she needs to review and comply with the jurisdiction's version of Model Rule 1.16(c) and (d), which address a lawyer's obligations on withdrawal.

Little differs in withdrawing from a joint representation than the representation of a single client, but the cardinal principle of equal treatment must rule. Each former joint client has an equal right to client file materials, for example, and the lawyer doubtless has an equal obligation to each former client to assist in transitioning the representation, for example, by briefing new counsel.

Experience also teaches that the appearance of equality is often as important as the reality. Consider simple expedients such as providing a duplicate copy of the file to each former joint client.

Withdrawal from almost any litigation matter requires court approval, and the withdrawing lawyer should be very sensitive to the reasons publicly cited to the court and opposing counsel for withdrawal. From an ethical point of view, Model Rule 1.6 and its state analogues restrict how much a lawyer can say when withdrawing. After all, under the broad sweep of confidentiality rules in most jurisdictions, it's quite likely that some or all of the facts that gave rise to the need to withdraw are confidential. Moreover, in many situations, a lawyer's disclosure to the opposition and the court that a conflict of interest has arisen between joint clients can have serious adverse consequences for a client. Of course, sometimes, it will simply be necessary to disclose the existence of a conflict; in other situations, it may be obvious to any observer of the withdrawal.

As a precaution, consider obtaining client approval of what is disclosed in aid of a motion to withdraw—or even approval from new counsel for the client—by providing a draft of the intended motion to withdraw.

Not every withdrawal is harmonious, and disputes among former joint clients can create complications. Objections by one former client to the former lawyer's cooperation with another former client, or even to the former lawyer providing some or all client file materials to another former client, are not unheard of. Once again, focus on the cardinal rule of equality. A withdrawing or former lawyer caught between conflicting instructions of former clients simply has no real discretion to choose whose instructions to follow. Just as when a lawyer possesses disputed funds or property (a client file is property of a sort, after all), the lawyer must remain neutral and allow the disputants to sort out their dispute, while doing his or her best to cause no harm and preserve confidentiality.

Even after a joint representation is concluded—happily or not—the nature of the former representation as joint remains important. The nature, extent, and length of a lawyer's obligation (if any) to retain client file materials from a concluded representation is a topic entire unto itself, but the cardinal rule of equal treatment shapes the response of a lawyer to requests from one of several joint former clients. Whatever right a former client may have to information or client file materials, each of several former joint clients likely has that same right.

The (former) jointness of the representation, however, can add a wrinkle. The mandate to treat joint clients equally, and to appear to do so, often leads prudent lawyers to communicate with current clients jointly—letters and emails addressed to all of several joint clients are common from prudent lawyers. So, when one client asks for a copy of the file six months after the matter is over, should the lawyer let the other joint client know of the request and how it has been honored? It is not at all clear that the ethics rules or any other legal duty requires this, but in some situations, prudence may support continued common communication. For example, if the lawyer knows that the two former clients are hostile to each other concerning the former matter, the lawyer may well want to adopt a tone of cool neutrality while honoring his or her obligation to provide materials from the file. After all, were one of these former clients to instruct the former lawyer not to inform the other of the request, how would honoring that request be consistent with a lawyer's duty of loyalty to both clients?

Representing clients jointly is an important aspect of most lawyers' practices. Yet it is potentially a very delicate area, and we all need to do it more carefully. ■