



RISK MANAGEMENT ADVANTAGE

The Quarter Hour[®]

Managing Risk in the Legal Profession

Do You Represent Multiple Clients In the Same Matter?

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First Count Your Clients

As the calendar turns to the end of the school year and summer vacations start, we will find ourselves performing the time honored ritual of the head count. We count off each person traveling with us so that we do not leave anyone behind. The thrill of obtaining a multiple client assignment also imposes the responsibility of identifying the persons and interests that you will represent.

Overview of Model Rule 1.7

If attorneys have multiple clients in the same matter, they must disclose the existence of any current or potential conflicts, and where possible and proper, obtain waivers of such conflicts in compliance with the applicable rules of professional responsibility. See ABA Model Rule 1.7(a),(b). This discussion will focus on identifying conflicts between current clients in the same litigation or transaction. Remember, juries or courts who may later examine how we handled a file for multiple clients will not grant us much slack. No matter how complex the transaction, or how well intentioned the acts of counsel, attorneys should expect to be held to strict compliance with the rules that govern their representation of multiple current clients. In most instances, such rules will look similar to Rule 1.7 of the Model Rules for Professional Conduct.

The first portion of Model Rule 1.7 provides that:

(a) Except as otherwise provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client,

Model Rule 1.7 creates two categories for our analysis. First, does one client stand in direct adversity to another client? Second, do the circumstances of the multiple representation signal a risk that representation of one client will be substantially restricted by the duties owed to another client? These two broad categories support creating a database that lists each of the multiple clients, and contains fields for identifying the foes, interests, neutral parties and friends of each of the multiple clients. The intake process can create a roster of all the players and classify their roles. For example, if you have multiple clients through an LLC, your database can identify who are the constituent members of the LLC. In employment cases, your database can show if the clients have the same job title, or in product cases, whether they used the same product during a set time span. Some customizing of your client conflicts database may prove helpful and aid your internal office discussions about how to inform the multiple clients of the nature of the risks and potential conflicts that



can arise from your representation of multiple clients in the same matter. Model Rule 1.7, Comment at ¶¶18. Such discussions with the multiple clients should disclose that the attorney-client privilege does not apply between the clients, and that absent agreements to keep certain data confidential from some of the multiple clients, such as trade secrets, confidences will be shared between the multiple clients. Model Rule 1.7, Comment at ¶¶30-31.

Conflicts or client intake databases can also help you identify persons who may view you as their lawyer, even though they never signed a retainer agreement or paid you any money to represent their interests. You can build such databases so that they contain fields of data that detail which persons or firms already have counsel to represent their interests. Once your satchel is filled with such data, you can review the file and specify the persons whom you may want to inform in writing that you do not represent their interests and that they should hire separate counsel.

Another reason for performing the head count is that sometimes attorneys will find that certain conflicts between their multiple clients cannot be waived under their jurisdiction's version of ABA Model Rule 1.7(b). Such situations can occur not only in litigation, but in multiparty transactional work. Still, even with the increasing use of computers and databases by attorneys and their law firms, recent case law from a variety of jurisdictions instructs us that the primary task of counsel with multiple clients is to first "spot" the actual or potential conflicts.

Principal - Agent Conflict

A federal appeals court held that Rule 1.7 applied where client #1, the principal, told counsel that client #2, the agent had lied about a willingness to pay her share of the legal fees, leading to client #1 considering the need to cancel client #2's authority to act as his agent. This event was followed by client #1 informing counsel that client #2 had falsified a witness statement bearing client #1's name for use in other litigation. Client #1 also told counsel that client #2 was acting outside the scope of her authorization. Counsel told client #1 that their communications were secret and would not be disclosed to client #2. The court noted that the commentary accompanying the applicable version of Rule 1.7, (Comment 16), clarifies that joint representation "will almost certainly be inadequate" when such confidences are required. *So v. Suchanek*, 670 F.3d 1304, 1307-11 (D.C. Cir. 2012).

Over, please.

Transactional Conflict

Conflicts between multiple current clients also arise in transactional work. “Whether a conflict is non-consentible depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other...” ABA Model Rule 1.7, Comment 28; see also *CenTra, Inc. v. Estrin*, 538 F.3d 402, 417 (6th Cir. 2008). In *Centra*, the court explained that where a law firm represented a private client to procure funding for a bridge plan, and simultaneously represented a municipal entity who opposed the bridge plan, the law firm worked for two adverse parties on the same matter. Moreover, the private client’s general knowledge that the law firm had previously represented parties with adverse interests was not sufficient data to inform the private client that the law firm had a direct conflict of interest with two adverse clients.

Guardian - Ward Conflict

A lawyer violated a version of Rule 1.7(a)(2) by representing both the disabled adult and her niece in a guardianship proceeding. The court underscored that no matter how well intentioned the attorney was when filing the guardianship proceeding initiated on behalf of the niece, such a proceeding was necessarily adverse to the disabled adult client. Moreover, the disabled adult’s noted diminished capacity only further complicated any potential argument that the disabled adult was competent to execute a durable power of attorney or to give informed consent to the dual representation. *Dayton Bar Association v. Parisi*, 2012 Ohio 879 at ¶¶ 1-14, ¶¶ 37-38, 131 Ohio St. 3d 345, ___ N.E.2d ___, 2012 WL 752444 (Ohio March 8, 2012).

What if One Multiple Client Becomes A Third Party Defendant?

An attorney incurred a current conflict of interest by representing both the borrower and the mortgage broker upon filing suit against the lender. The mortgage broker was implicated in the borrower’s lawsuit, especially after the lender named the mortgage broker as a third party defendant. *In re Disciplinary Action Against Kalla*, ___ N.W.2d ___, 2012 WL 204529 (Minn. Jan. 25, 2012).

Testimonial Conflict

A concurrent conflict of interest existed because the lawyers represented a defendant corporation and its former counsel. The former counsel had advised the defendant corporation about a disputed trademark. The corporation’s former counsel gave testimony that conflicted with the testimony of the corporation’s president and business consultant. The corporate witnesses proclaimed that the corporation’s former counsel advised them that there was no problem with use of the proposed registration. In contrast, the former counsel testified that he had advised the president and business consultant that use of the mark at issue was “problematic” based on prior registration and use of the mark by plaintiff. *Wink, Inc. v. Wink Threading Studio, Inc.*, ___ F.Supp.2d ___, 2011 WL 3206915 (E.D. Va. July 26, 2011).

Conflict Between Criminal Co-Defendants

A criminal defense attorney was found to have a concurrent conflict under a state version of Rule 1.7. Neither of the two clients admitted to possessing a firearm found in a car. The police asserted a firearm was found in the car, and denial by one client at trial of possessing the firearm indirectly accused the other client of possessing the firearm. *In re Disciplinary Action Against Coleman*, 793 N.W.2d 296, 304-306 (Minn. 2011) (“The potential for conflict of interest in representing multiple defendants in a criminal case is so serious that a lawyer should, as a general rule, decline to represent more than one co-defendant.”).

Conflict Between Members of LLC

Legal relationships can be intertwined within a single entity. An LLC can contract with its members, or the members of its members. Therefore, when a dispute or disagreement arises over the interests controlled by one of the LLC members, attorneys may find themselves in a situation akin to representing a closely held corporation and a controlling shareholder. In those circumstances, an attorney can owe a fiduciary duty to the other shareholders, and in this instance, other members of the LLC. Such facts create the risk of potential liability exposure through unintended but potential breaches of fiduciary duty owed to the non-controlling members of the LLC. *Eternal Preservation Associates, LLC v. Accidental Mummies Touring Co., LLC*, 759 F.Supp.2d 887, 889-94 (E.D. Mich. 2011).

Potential Conflict Between Hospital and Physician Codefendants

Counsel represented a defendant hospital and a defendant physician in litigation. The physician’s acquisition and use of a drug, if relevant at trial, could be explained by the physician as having occurred after obtaining approval from the hospital’s in-house counsel. Such a conflict required resolution of whether the law firm would present evidence to support a potential reasonable reliance defense on behalf of the physician. In addition, even if no such defense would be asserted at trial, the court wanted confirmation that the physician had been made aware of the possible defense and had knowingly, voluntarily, and intelligently consented to not presenting the defense at trial. *Iacangelo v. Georgetown University*, 710 F.Supp.2d 83, 85, 92-95 (D.D.C. 2010).

Conclusion

All counsel with multiple clients in the same matter need to trace the interests of each of their clients. Only upon mapping out such interests can one see whether the interests of the multiple clients converge or conflict with the interests of all the other multiple clients. If you chart the interests of the multiple clients and discover conflicts, the time to seek an ethical consult has arrived.

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