INTRODUCTION

There are obvious advantages to joint representation of plaintiffs in employment litigation. Because of economies of scale, joint representation will typically result in significantly lower legal costs. It may allow for better coordination of litigation strategy, and expand the scope of discovery plaintiffs are permitted to conduct. At the same time, joint representation complicates the attorney-client relationship, and poses risks and challenges, both strategic and ethical. Because each client’s expectations and desires will affect counsel’s ability to loyally and ethically represent other plaintiffs, litigation plans and goals must be carefully considered, not only at the outset of representation, but continuously through the matter.

GENERAL ETHICAL PRINCIPLES GOVERNING JOINT REPRESENTATION

Model Rule of Professional Conduct 1.7 governs conflict of interest in representing multiple current clients:

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1 An earlier version of this article originally appeared in “Practical Strategies for Avoiding Conflicts,” Center for Advanced Legal Studies, Suffolk University Law School, May 2007.

2 Messing, Rudavsky & Weliky, P.C. is a Boston law firm that concentrates its practice in the representation of employees and unions in labor and employment litigation, including wrongful termination, discrimination, contract, sexual harassment, and public employee matters.

3 The authors gratefully acknowledge the assistance of Messing, Rudavsky & Weliky associate Kevin C. Merritt and law clerk Christopher J. Donnelly in researching updates for the 2010 version of this article, and law clerk Alison Asarnow for research for the 2007 version.
(a) Except as 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 a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

As part of its 2002 revisions to the Model Rules, the ABA reorganized Rule 1.7, but did not substantively change it.4 Instead, the ABA rewrote the paragraphs so that the first defines the existence of a conflict, and the second paragraph addresses consent and consentability.5 The following commentary accompanying the 2002 version of Rule 1.7 provides substantial additional guidance designed to “clarify” conflicts doctrine and to address a number of recurring situations:

“Directly adverse” interests. “[A]bsent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. . . . Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.” Comment [6] to Rule 1.7.

“Materially limited.” Even in the absence of directly adverse interests, “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. . . . The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interest 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


5 Because most states have adopted some variant of either the 2002 version of the Model Rules or the previous version, and there is little substantive difference between the two versions, this discussion will focus on the 2002 version. Unless otherwise noted, all references to the Model Rules herein refer to the version as most recently amended by the ABA in 2002, available at http://www.abanet.org. As of 2010, the only state still adhering to the Model Code of Professional Responsibility (or some variant thereof), is California, and the California State Bar Association has issued proposed rules based largely on the Model Rules.

reasonably should be pursued on behalf of the client.” Comment [8] to Rule 1.7. “An
impermissible conflict may exist may exist by reason of substantial discrepancy in the parties’
testimony, incompatibility in positions in relation to an opposing party or the fact that there are
substantially different possibilities of settlement of the claims or liabilities in question.”
Comment [23] to Rule 1.7.

Consentability. Ordinarily, clients may consent to representation in the event of a conflict.
However, there are some conflicts that are unconsentable, “meaning that the lawyer involved
cannot properly ask for such agreement or provide representation on the basis of the client’s
consent. When the lawyer is representing more than one client, the question of consentability
must be resolved as to each client.” Comment [14] to Rule 1.7.

Informed consent. 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.” Comment [18] to Rule 1.7.

The requirement that consent be confirmed in writing is new to the 2002 version of Rule 1.7.
However, some states already require such written confirmation. “Such 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. . . . If it is not feasible to obtain or transmit the writing at the
time the client gives informed consent, then the lawyer must obtain or transmit it within a
reasonable time thereafter.” Comment [20] to Rule 1.7.

Client-lawyer confidentiality and the attorney-client privilege. As between commonly
represented clients, the attorney-client privilege does not attach. Comment [30] to Rule 1.7. “As
to the duty of confidentiality, continued common representation will almost certainly be
inadequate if one client asks the lawyer not to disclose to the other client information relevant to
the common representation. This is so because 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 . . . 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.” Comment [31] to
Rule 1.7

Settlements and Aggregate Settlements. Model Rule 1.8(g) speaks to aggregate settlements in
joint representation:

7 The ABA Reporter’s Explanation of Changes to Rule 1.7 notes that the experience in those states “indicates that
the requirement is not overly burdensome or impractical.” Available at http://www.abanet.org/cpr/e2k/e2k-
rule17rem.html.
A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.8

Under Model Rule 1.2(a), a lawyer must abide by a client’s decisions concerning the objectives of representation and whether to accept an offer of settlement.

Withdrawal. If in the course of representation, a conflict of interest does arise, the lawyer must ordinarily withdraw. “[B]ecause the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients’ interests can be adequately served by common representation is not very good.” Comment [29] to Rule 1.7. “If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of [Rule 1.7(b)]. . . . Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client.” Comment [4] to Rule 1.7.

JOINT REPRESENTATION IN EMPLOYMENT LITIGATION

A conflict of interest is not ordinarily presented when an attorney represents two or more plaintiffs asserting claims against an employer. And there are cases in which it can be especially beneficial for plaintiffs to team up, such as where the employees are victims of a pattern of discrimination, where they have been harassed by the same perpetrator, or where working together they can increase the pool of friendly co-workers who might be helpful to the case.

Nevertheless, counsel must carefully assess the risk that such a conflict might arise in the facts of a particular case, either because of directly adverse interests or because the joint representation poses a significant risk that counsel’s ability to appropriately represent either client will be materially limited.

The clients might have interests that are directly adverse where, for instance, one client was the other client’s supervisor and might be liable for some of the events about which the plaintiff complains (e.g., for failure to take action to stop sexual harassment). Or adversity might arise where two clients are suing the same employer for discrimination in a failure-to-promote case, under circumstances where it might be in the interest of each plaintiff to demonstrate that she, and not her co-plaintiff, was better qualified and should have been selected for the position.9

8 The only change to the text of Rule 1.8(g) in 2002 was the addition of the requirement of informed consent, in a writing signed by the client.

9 See, e.g., D.C. Ethics Comm., Op. No. 248 (June 21, 1994) (lawyer could not represent two clients suing the same employer for discrimination under circumstances where it might be in the interest of each plaintiff to demonstrate
There are other cases in which the differences in the clients’ goals or expectations might create a significant risk that counsel’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 joint representation. For example, one plaintiff might want to characterize the facts differently, making it difficult for counsel to develop a “story” of the case that will work well for the other clients. When one claim is stronger than the other or one client presents a more compelling or credible witness, the result might be that the better claim might suffer by comparison.

A common source of potentially differing interests arises around issues of whether, when, and on what terms to settle the case. Not all co-plaintiffs will have the same settlement objectives. One plaintiff might want a quick, quiet settlement. Another might want to “go public” by taking the case to trial. One client might put a large value on non-monetary relief, such as reinstatement, while another might just want the cash. At the same time, the total amount of money the defendant may be willing to pay as part of a global settlement might be less than the total amounts it is willing to pay for claims brought by litigants in separate actions, or there might be a limited pool of funds to distribute.10

Although many such cases pose the potential of a conflict of interest, attorneys should recognize that even if there is a conflict of interest under Rule 1.7, counsel may still undertake the joint representation if all the criteria in Rule 1.7(b) are met. That is, unless the representation is prohibited by law or the representation involves claims between the clients themselves, the lawyer can still represent all parties if s/he reasonably believes that s/he will be able to provide competent and diligent assistance to each client, and if all parties give informed consent.11

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10 See, e.g., N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. No. 639 (Dec. 7, 1992) (a lawyer may not represent all plaintiffs in an automobile accident case where the assets are not sufficient for the full satisfaction of all potential claims and a recovery by one plaintiff would reduce the assets available for the satisfaction of the others); North Carolina v. Whitted, 347 S.E. 2d 60 (N.C. App. 1986) (holding that it was improper to undertake representation of two wrongful death claimants in obtaining settlement from limited fund; any apportionment would benefit one client to other’s detriment); Hilti, Inc. v. HML Dev. Corp., 2007 Mass. Super. LEXIS 66 (Mass. Super. Ct. 2007) (conflict of interest where attorney/receiver of HML’s estate simultaneously represented two of HML’s unsecured creditors; since creditors were competing for limited funds in estate, receiver’s duty to insure fair treatment for all creditors conflicted with his obligation to zealously advocate for named creditors). But see Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (counsel’s representation of settling class plaintiffs in asbestos personal injury/wrongful death litigation not materially limited by concurrent representation of non-settling plaintiffs).

11 Gustafson v. City of Seattle, 941 P. 2d 701 (Wash. App. 1997) (counsel may represent both passenger and driver in an auto collision case, but must get each to consent after full disclosure if it reasonably appears that other parties might claim that the driver’s negligence contributed to the passenger’s injuries); Hamilton v. Merrill Lynch, 645 F. Supp. 60 (E.D. Mich. 1986) (with full disclosure and consent, counsel may represent multiple plaintiffs in securities fraud litigation, even when a defendant counterclaims against one of the plaintiffs); Keohane v. Keene, 2006 U.S. Dist. LEXIS 26987 (D. Ga. 2006) (in ERISA case, counsel may represent two defendant plan fiduciaries after determining that defenses were not inconsistent, with informed consent). In deciding issues of consentability, courts give substantial deference to the plaintiffs’ choice of counsel. Courts disfavor motions to disqualify opposing
INFORMED CONSENT

Getting consent that is sufficiently “informed” under Rule 1.7 is a substantial challenge, and requires counsel to make thoughtful decisions tailoring disclosures to the specifics of each individual case. Blanket or form “consents” are not effective. Rather, counsel are obligated to make each of the clients involved aware of “the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.” Included in the information must be “the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.” The discussion should include all the “what-ifs” that are foreseeable, and then discuss what will happen should such conflicts arise, including the circumstances under which counsel must withdraw, and the consequences of withdrawal. The effectiveness of a waiver of potential future conflicts chiefly turns on the extent to which the client reasonably understands the material risks that the waiver entails. So, the “more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater likelihood that the client will have the requisite understanding.”

Counsel, recognizing that such motions are often used for tactical purposes, to harass opposing counsel, to delay the litigation, or to intimidate an adversary into accepting undesirable settlement terms. See Gabayzadeh v. Taylor, 639 F. Supp. 2d 298, 300-01 (E.D.N.Y 2009); Shaffer v. Farm Fresh, Inc., 966 F. 2d 142, 146 (4th Cir. 1992); Zador Corp. v. Kwan, 31 Cal. App. 4th 1285, 1302-03 (1995); Hamilton, 645 F. Supp. at 61.

See, e.g., Ariz. ex rel. Ariz. Dept. of Revenue v. Yuen, 179 Cal. App. 4th 169, 181 (2009) (not sufficient, for full disclosure of conflict, to inform parties of fact of joint representation; lawyer must explain nature of conflict “in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interest of each of them” (quoting Sellers v. Ariz. Super. Ct., 742 P. 2d 292, 297 (Ariz. 1987))); Zador Corp. v. Kwan, 31 Cal. App. 4th 1285, 1301 (1995) (informed consent found where client for 20 minutes before signing it studied a consent form that included an explanation of risks of conflict); Conoco, Inc. v. Baskin, 803 S.W. 2d 416, 419 (Tex. Ct. App. 1991) (counsel must fully disclose existence, nature, implications, and possible adverse consequences of joint representation); Unified Sewerage Agency v. Jelco Inc., 646 F. 2d 1339, 1345-46 (9th Cir. 1981) (notice of joint representation insufficient; lawyer must explain nature of conflict in detail sufficient to enable client to understand reasons why it may be desirable to retain other separate counsel); Acheson v. White, 487 A. 2d 197, 199 n.5 (Conn. 1985) (same); Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc., 142 F. Supp. 2d 579, 583 (D. Del. 2001) (prospective waiver adequate where law firm identified existence of potential conflicts, client independently knew of the possibility of suit on the subject matter, and conflict was discussed between the two parties); Gen. Cigar Holdings v. Altadis, 144 F. Supp. 2d 1334 (S.D. Fla. 2001) (sufficient informed consent when knowledgeable and sophisticated corporation reviewed and had outside counsel review consent waiver provisions of an engagement letter, even though court recognized letter not entirely explicit in explaining every possible future consequence of representation); Anderson v. Nassau County Dep’t of Corr., 376 F. Supp. 2d 294 (D. N.Y. 2005) (informed consent must be obtained prior to the attorney’s undertaking representation, rather than in response to a motion to disqualify the attorney; waiver to prevent attorney from being relieved as counsel is not valid.); See also Restatement (Third) of The Law Governing Lawyers, § 122, Reporter’s Note (2000) (“The requirement of informed consent is rigorously enforced by the courts.”).

The ABA has recently endorsed, for the first time, the concept of general, open-ended advance conflict waivers. However, such waivers should be approached with extreme caution by practitioners who represent individuals. The ABA has noted that general waivers are more likely to be effective when given by clients who are sophisticated users of legal services; are independently represented by other counsel in giving consent; and give consent limited to future conflicts unrelated to the subject of the representation. These limits, as a practical matter, preclude general advance waivers for most, if not all, individual clients.

As noted above, Model Rule 1.8(g) now requires that the client’s informed consent be memorialized in a signed writing. This is good practice in any jurisdiction, and is commonly used by lawyers in all jurisdictions to insure that prospective clients are clear about the underlying risks as well as the benefits of joint representation. While the wording of Rule 1.8(g) is not free from ambiguity, the writing to be signed seemingly needs to include the data that makes the consent “informed.” A one-line letter “I hereby give informed consent to [Lawyer’s] representation of [Client #2]” is insufficient. Getting the client to sign off on a detailed disclosure letter would be good practice in any jurisdiction. Ordinarily, the informed-consent document is drafted by the lawyer to reflect the topics summarized in the preceding paragraph. A sample “informed-consent” letter is attached to this article as Attachment A.

Managing the relationships and personalities in multiple representation can become a job in itself. Therefore, at the outset, counsel also needs to set the ground rules for the representation, including instructions on how the parties and counsel will communicate and share information, and how fees and costs will be allocated. Probably most importantly, clients must be reminded that they cannot keep information secret from one another if that information is shared with the lawyer, and that the lawyer cannot be asked not to share information with the other client(s). Counsel must also inform the clients that her role “is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented.” These topics are also addressed in the attached sample letters.

As noted above, conflicts are especially likely to arise from divergent views about settlement. Accordingly, this should be a central topic of counsel’s informed-consent disclosures. A useful approach is for counsel to address such potential conflicts at the beginning of representation by having the co-plaintiffs agree to a method for deciding whether to settle, and how to allocate the settlement monies (see Attachment B for a sample agreement of this type). Counsel for the group should not propose such an allocation; doing so would violate counsel’s duty of loyalty to each member of the group. Each member of the group should be counseled, however, that s/he is free to obtain individual representation on that issue from another lawyer. If such an agreement cannot be reached, then counsel might need to reassess whether joint representation is ethically permissible. (See discussion above on the material limitation of counsel’s “ability to consider, recommend or carry out an appropriate course of action for the client,” and the discussion below on informed consent.)

Even if clients agree in advance about a settlement approach and a method of dividing up the settlement proceeds, such an agreement may well not bind them, and joint representation may be torpedoed by a non-consenting plaintiff at the settlement stage. Nevertheless, a frank advance discussion and a disclosure may help prevent the problem from arising.

SPECIAL ISSUES FOR UNION COUNSEL

The sometimes-conflicting obligations owed to the union and to the individual union member complicate the law and ethics of union representation. Under the applicable substantive law, unions owe their members a duty of fair representation. At the same time, most courts have found the union to be the lawyer’s client. In the context of a grievance proceeding,

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15 See, e.g., Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2009-06 (requirement that jointly represented clients give informed consent to aggregate settlement cannot be waived; clients cannot consent to aggregate settlement in advance because they cannot “intelligently evaluate” risks of consent at outset of representation, before they know materials facts and terms of settlement); Tax Authority, Inc. v. Jackson Hewitt, 898 A. 2d 512 (N.J. 2006) (impermissible to obtain advance consent from multiple clients to abide by majority decision on aggregate settlement; before any client may be bound by a settlement, must know and agree to its terms); In Re Hoffman, 883 So. 2d 425 (La. 2004) (one plaintiff cannot be designated by other plaintiffs to authorize settlement on their behalf); State Bar of Mich., Op. No. RI-134 (May 28, 1992) (the acceptance of a mediation award by two clients materially limits the lawyer’s responsibility to a third client who rejected the award, creating a conflict of interest); N.Y. State Bar Assoc. Comm. on Prof’l Ethics, Op. No. 639 (Dec. 7, 1992) (joint representation that appeared appropriate at the outset may nevertheless require the lawyer to withdraw from representing either client if an aggregate settlement proposal places the clients in an irreconcilable conflict); Hayes v. Eagle-Picher Indus. Inc., 513 F. 2d 892 (10th Cir. 1975) (an agreement entrusting a majority of co-plaintiffs with the decision whether to settle was not binding on non-consenting plaintiffs; the attorney violated the ethical rule requiring him to refrain from participating in settlement on behalf of two or more clients unless each of them consents to it; the settlement arrangement violated the “basic tenets of the attorney-client relationship in that it delegates to the attorney powers that allow him to act not only contrary to the wishes of his client, but to act in a manner disloyal to his client and to his client’s interests”). See generally Howard M. Erichson, A Typology of Aggregate Settlements, 80 Notre Dame L. Rev. 1769, 1809 (2005) (rule does not allow clients to agree in advance to be bound by majority rule on settlement offers). But see Allegretti-Freeman v. Baltig, 613 N.Y.S. 2d 449 (N.Y. App. Div. 1994) (finding no violation of public policy in an agreement drafted by counsel of multiple plaintiffs conditioning settlement or compromise of any individual case on the majority approval of the other plaintiffs; also finding no cause for disqualification for conflict of interest at that time because the interests of all plaintiffs were essentially the same and any potential risk of conflicting interests appeared minimal).

16 For a fuller discussion of such complexities, see Russell G. Pearce, The Union Lawyer’s Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law, 37 S. Tex. L. Rev. 1095, 1097 (1996). The focus herein will be on the issues concerning joint representation of unions and individual union members. The issues, to some extent, differ when union counsel provides representation to non-union bargaining unit members. For further treatment of those issues, see id. at 1111-12 and Catherine L. Fisk, Union Lawyers and Employment Law, 23 Berkeley J. Emp. & Lab. L. 57 (2002).

17 Pearce, at 1112 (but noting that some authorities argue for recognizing both the union and member as separate clients). See also Cynthia E. Nance, Why Labor and Employment Ethics?, 33 N. Ky. L. Rev. 201, 206-08 (2006) (acknowledging but criticizing minority view that member is also client as inappropriate in light of divergent interests, and acknowledging but criticizing as unworkable view that member is client as beneficiary of union’s fiduciary obligations to members).
it is generally recognized that the grievance belongs to the union, not its member.\footnote{D.C. Ethics Comm. Op. 314 (2002) (not distinguishing between a union member and a member of the bargaining unit who does not belong to the union) (citing Air Line Pilots Ass’n v. O’Neill, 499 U.S. 65, 76 (1991) (describing doctrine of fair representation) and Vaca v. Sipes, 386 U.S. 171, 177 (1967) (same)). Nevertheless, there is some authority that in some contexts, there may be an attorney-client relationship between the union counsel and the individual union member in a matter arising out of the collective bargaining agreement. \textit{See} Pearce, supra, at 1112-1114; N.Y. State Bar Ass’n Comm. on Prof’l Ethics Op. 743 (May 25, 2001) (“in some contexts, the employee and the employer are the parties to the proceeding,” giving an example of an arbitration concerning disciplinary charges against a public sector employee under the state’s civil service law). In such cases, the conflict of interest rules are implicated. \textit{See} D.C. Ethics Comm. Op. 314.} Therefore, the union lawyer’s duties of confidentiality and loyalty run to the union and not to the individual bargaining unit member. Union counsel must protect the union’s confidences, even from union members. The lawyer owes no independent duty of confidentiality to the bargaining unit member, and must reveal the member’s confidences, should union leadership reasonably seek them.\footnote{Pearce, at 1109.}

“[B]ecause grievances generally arise under collective bargaining agreements between union and employer which provide the union with control of grievances, the union (and not the individual) is generally the formal party initiating, pursuing, and resolving the grievance).”\footnote{Pearce, at 1100.} The ethical rules governing conflict of interest, therefore, are generally not implicated then when union counsel “represents” an individual union member in a grievance proceeding.\footnote{Pearce, at 1100, 1104.} However, it would be good practice for the union lawyer to make the fact of non-representation, and the lack of privilege attaching communications with the member, very clear to the grievant, preferably in writing.\footnote{Nance, at 208-09.}

But what if an individual union member wants to retain the same lawyer retained by the union in a matter that does not arise out of the collective bargaining agreement? This might occur when an individual union member (or group of members) wants to litigate claims brought, for example, under the discrimination statutes or the wage and hour laws.

There are advantages for plaintiffs who retain union counsel. Union counsel has experience negotiating with that employer. The union’s lawyers will also come into the litigation with a greater understanding of the operations of that particular workplace than a firm coming in from the outside will. Union counsel might also have records that the plaintiff would find helpful in the litigation. On the other hand, in those cases where the relationship between the employer and union counsel is particularly hostile, the individual plaintiff might be better off with another lawyer.
Model Rule 1.13 allows a lawyer representing an organization to represent any of its members, subject to the provisions of Rule 1.7. That principle applies when union counsel is contemplating joint representation of an individual union member in employment litigation while continuing to represent the union (which typically will not be a party to the litigation). The fact that an attorney had previously represented the union does not create an unlawful conflict. Thus, the ethical rules governing conflict of interest come into play, and counsel needs to take the steps (including careful preparation of an informed-consent letter) as noted in the previous section.

In assessing the risk that the individual’s plaintiff’s interests might be or become different from the interests of the union, counsel needs to look carefully, not only at the overall facts, but also at the facts unique to the union setting. For example, counsel needs to decide whether a conflict exists because the facts supporting the individual litigant’s case might also support a claim against the union, perhaps a parallel claim (e.g., discrimination) to that brought against the employer.

A conflict of interest might also arise if the member’s lawsuit will involve challenging a provision in the collective bargaining agreement, to which the union agreed. For example, a federal district court in Barton v. Albertson’s acknowledged that it was possible that the union’s conduct in negotiating the overtime provisions in the CBA might estop the plaintiffs from challenging the defendant’s policies of requiring off-the-clock overtime in an FLSA case. In that situation, the court said, the plaintiffs might have a claim against the union because it agreed to the CBA provisions. (The court, nevertheless, rejected the possibility as too speculative to warrant disqualification of plaintiffs’ counsel in that case.)

What if the individual member has a potential claim against the union arising out of the union’s internal handling of the member’s complaint? On this issue, Barton v. Albertson’s recognized the common scenario of union counsel doing pre-litigation investigation of potential claims on behalf of union members. In doing such work, “it is always possible that the union may have committed some misstep in the pre-litigation process that compromises some members’ claims. But such possibility is not enough to disqualify. If that is enough to create a conflict of interest, the union will be prohibited either from doing pre-litigation work on behalf of its members, or, if it has done pre-litigation work, from hiring a law firm to protect its members’ interests. To put the [union] to such a Hobson’s choice would constitute an unacceptable restriction on its ability to represent its members.”

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23 Nance at 208-10 (rejecting agreement that such joint representation is prohibited on conflict-of-interest grounds).

24 See Trull v. Davco Prods, LLC, 214 F.R.D. 394 (W.D.N.C. 2003) (although attorney had previously represented union and union was financing union member’s lawsuit, no conflict of interest where member plaintiff understood the situation, was not concerned about conflict of interest, and union was not actually controlling litigation).


26 No. 97-0159-S-BLW, 1997 U.S. Dist. LEXIS 22577, at *14-15 (D. Idaho Dec. 23, 1997) (denying defendant’s motion to disqualify union counsel from representing union members in FLSA collective action; rejecting defendant’s argument that there was a conflict of interest between because the plaintiffs might also have claims against the union because the union sat on the claims too long before filing suit, and that therefore, many union members whose claims were time-barred will have claims against the union for negligence or fraud).
Union counsel must gauge whether it is likely that the plaintiff will be naming another union member as an additional defendant, or calling a fellow member as an adverse witnesses. Because, as discussed above, union counsel does not “represent” the fellow union member, there is probably no direct conflict of interest in that situation. Nevertheless, the union counsel still needs to determine under the circumstances how joint representation of union and plaintiff might implicate the duty of fair representation of those members, thereby creating a risk that the lawyer’s responsibilities to a “third person” under Rule 1.7(a)(2) will materially limit the lawyer’s representation of the plaintiff.27,28

Counsel also needs to consider whether the individual employee is looking for a remedy that might adversely affect other union members, such as assignments, overtime, or seniority, particularly if those issues are or will be the subject of concurrent negotiation between the union and the employer.29

Before accepting the joint representation, counsel should also check the expectations of the union regarding control over the litigation. Representation that would be impaired by the influence of the union must be declined.30 And if the union will be funding the litigation,

27 See Comment [6] to Rule 1.7 (“directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit’’). This scenario raises interesting questions, beyond the scope of this article, concerning the duty of fair representation when, for example, there is a risk that union counsel will be representing Union Member A in a lawsuit against the employer and Union Member B, while union counsel is also “representing” Union Member B in an unrelated grievance. See DiBasi v. Charter County of Wayne, 284 F. Supp. 2d 760 (E.D. Mich. 2003) (general counsel for union of sheriff’s officers also represented white male sheriff’s lieutenant in reverse-discrimination suit against employer over selection of black female lieutenant for promotion; held, counsel had conflict where representation of union exposed attorney to privileged information concerning female lieutenant’s discipline history relevant to her qualifications for promotion). See also discussion above concerning the nature of the relationship between union counsel and union members, and sources cited therein.

28 See Sharp v. Next Entm’t, Inc., 163 Cal. App. 4th 410, 424-36 (2008) (counsel for writers’ union not disqualified from representing non-union writers as named plaintiffs in wage and hour class action, even though union was not a party, allegedly conceived of litigation as means to further campaign to organize writers, and financed litigation; held, union’s and named plaintiffs’ consent to representation sufficient to waive conflict, and obtaining unnamed class members’ consent not required because impractical).

29 The issue of concurrent negotiation was raised in an unsuccessful attempt by defendant to disqualify the plaintiffs’ counsel in Ganobsek v. Performing Arts Ctr. Auth., No. 99-6163-CIV-RYSKAMP/VITUNAC, 2000 U.S. Dist. LEXIS 6807, 163 LRRM 3018 (S.D. Fla. Mar. 24, 2000). The court denied defendants’ motion to disqualify union counsel from representing union members in FLSA action, rejecting defendants’ arguments that the union (not a party to the suit) was controlling the law firm representing plaintiffs, and that the firm was sacrificing the plaintiffs’ interests in order to utilize the lawsuit as a bargaining chip for the contract negotiations on behalf of the union. See also Shaffer v. Farm Fresh, Inc., 966 F. 2d 142, 146 (4th Cir. 1992), vacating order disqualifying union counsel from representing union members in class action case brought under FLSA. The court found too speculative the argument that union’s motives in wanting a settlement that was public and timed to assist its organizational drive, but it said that “the question of actual or more imminently threatened ethical misconduct resulting from multiple employment of course remains always subject to inquiry.”

30 See Model Rule 5.4(c) (“A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal
counsel must comply with the ethics provisions applying to third-person payments. In the Model Rules, this is covered in Rule 1.8(f):

A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6 [governing client confidentiality].

See also Coffin v. Bowater, 228 F.R.D. 397 (D. Me. 2005) (where union is financing litigation on behalf of a class, a speculative (that is, unproved) rivalry between two unions at the workplace is not a conflict of interest and will not prevent an attorney receiving such financing from representing any members of the class).
PERSONAL AND CONFIDENTIAL

[Client #1, or existing client]

Re: Waiver of Conflict of Interest

Dear [Client #1]:

This letter will explain the potential conflicts of interest that may arise out of this firm's representation of you and our simultaneous representation of [Client #2]. You and [Client #2] have each authorized us to represent the two of you jointly. In our opinion, no actual conflict exists at this time. This is because you and [Client #2] share common interests in representation by our law firm, namely, confirmation of continued employee status at [Employer]. Based on this information, no actual conflict of interest appears to be present.

In representing both you and [Client #2] on an ongoing basis, we cannot and will not advise either of you as to any matters upon which an actual conflict of interest may develop between you. In the event any conflict of interest arises between you as to your respective rights and defenses, we must disclose the existence of the conflict, obtain a waiver from both parties, or, if both waivers are not obtained, we must decline to represent both of you in any manner in connection with that dispute or disagreement.

There are various ways in which a future conflict of interest could arise. For example, you have agreed that any information that you provide us that is not personally identifying and that would be of benefit to [Client #2] may be disclosed to and/or used by that other faculty member. [Client #2] has likewise agreed to the same thing. It is in fact our
ethical duty to disclose such information, because it is our ethical duty to take whatever ethical steps are necessary to vindicate your legal rights. It may be, however, that certain information that you possess will, if used, benefit your interests while being harmful to [Client #2]. It may also be that certain information that you possess will, if used, harm your interests but benefit [Client #2’s] interests. In either case this situation, if unresolved, could create a conflict of interest, which would require us to withdraw from representation for both of you, and would require each of you to seek new counsel.

By signing this letter on the indicated line, you confirm that you have been fully informed of the nature of the potential conflicts which may arise (as best we know them at this time based on the information we have) as the result of our concurrent representation of you and [Client #2]; that you have been provided a reasonable opportunity to seek the advice of independent counsel of your choice regarding these potential conflicts and waiver thereof; and that you understand that a conflict may arise in the future that may require additional disclosure by us and waiver by you, or alternatively, withdrawal of our representation of you. In addition, you confirm that you will take the opportunity to retain independent counsel in the event you have any reservations regarding our potential concurrent representation of your interests, the issues arising from that representation, and/or the waiver of the potential conflict of interest.

Assuming the foregoing accurately reflects our agreements, please sign two copies of this letter on the following page, and we will return one copy to you. Of course, if you have any questions or comments, please feel free to give us a call. We look forward to working with you in connection with this case.

Sincerely,

____________________

WAIVER OF CONFLICT

I, [Client #1], of [Address], hereby acknowledge that I have carefully read the foregoing letter, informing me that my
interests may potentially be in conflict with those of [Client #2] in connection with [Firm’s] representation of my interests in connection with my employment issues related to [Employer]. I expressly acknowledge that [Firm’s] concurrent representation of my interests and those of [Client #2] constitutes the representation of potentially conflicting interests, to the extent that my interests and those of [Client #2] are potentially adverse. I nevertheless knowingly and voluntarily consent to such concurrent representation by [Firm].

I further consent to the use of confidential information provided to [Firm] by me, to be used by [Firm] in the representation of [Client #2], provided that such information is not personally identifying.

I further acknowledge that I have been advised that I have the right to seek independent legal counsel in connection with the advisability of waiving this conflict, and that I have had a reasonable opportunity to do so.

Date: _____________________  ____________________________  [Client #1]
JOINT REPRESENTATION IN EMPLOYMENT LITIGATION
FROM THE PLAINTIFF’S COUNSEL’S PERSPECTIVE

ATTACHMENT B

Sample Distribution of Settlement Forms
ATTACHMENT B-1

To: Dahlia Rudavsky  
From: [NAMES OF 8 CLIENTS]  
Subject: Revised Distribution of Settlement

The following represents the distribution plan as presented to each member of the group. If acceptable, each member will sign their copy of this letter and send it back to you.

A. Each individual is to receive a check for $________. This represents an even distribution of the 20%, taxable, portion of the settlement. (A total of $________.)

B. The group will be paying a fee of $________ to the law firm of Messing, Rudavsky & Weliky. This will be deducted from the $________ the law firm will receive from [defendants].

C. Each individual is to receive the following amounts as that portion of the 80% non-taxable part of the settlement. The remaining bill owed to the law firm is to be deducted from these checks evenly once the final amount owing has been calculated by your office. The money for [damages expert] is to be deducted from everyone except for the one to be paid to the Estate of [client number 8].

<table>
<thead>
<tr>
<th>NAME OF CLIENT</th>
<th>AMOUNT DISTRIBUTED TO EACH</th>
</tr>
</thead>
<tbody>
<tr>
<td>__________________</td>
<td>$_______</td>
</tr>
<tr>
<td>__________________</td>
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<td>$_______</td>
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<tr>
<td>__________________</td>
<td>$_______</td>
</tr>
</tbody>
</table>

Total $________

D. Each individual will be paying taxes on the 20% share they receive according to their own calculations for 1993 total tax liability they have.

The above Revised Distribution Plan is acceptable to me.

Signature of member: ____________________

Date: ____________________
ATTACHMENT B-2

ALTERNATIVE 1: $1.1M RECOVERY

<table>
<thead>
<tr>
<th>NAME</th>
<th>INDIVIDUAL %</th>
<th>$1,000,000.00</th>
<th>STRESS A</th>
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<td></td>
<td>.1076</td>
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<tr>
<td></td>
<td>--</td>
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</table>

TOTAL 1.0001 $1,000,100.00 $ 100,000.00

EMPLOYEE % CALCULATED ON YEARS OF SERVICE AT [DEFENDANT] PLUS [ONE DECEASED PLAINTIFF'S] “STRESS GUESS”

ALTERNATIVE 2: $1.65M RECOVERY

<table>
<thead>
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<th>NAME</th>
<th>INDIVIDUAL %</th>
<th>$1,500,000.00</th>
<th>STRESS A</th>
</tr>
</thead>
<tbody>
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TOTAL 1.0001 $1,500,150.00 $ 150,000.00

EMPLOYEE % CALCULATED ON YEARS OF SERVICE AT [DEFENDANT] PLUS [ONE DECEASED PLAINTIFF'S] “STRESS GUESS”