JOINT REPRESENTATION
IN CIVIL LITIGATION
AND NONLITIGATED MATTERS

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I. JOINT REPRESENTATION V. CONCURRENT REPRESENTATION

A. JOINT REPRESENTATION

A sues B and C. Larry Lawyer enters his appearance for both B and C. Larry Lawyer has a joint representation of B and C.

Larry Lawyer undertakes to represent both of two individuals seeking to form a limited liability company. Larry Lawyer has a joint representation of the two individuals.

B. CONCURRENT REPRESENTATION

A sues B. Larry Lawyer enters his appearance for B. Larry Lawyer represents A on unrelated matters. Larry Lawyer has a concurrent representation of A and B.

Larry Lawyer represents A in forming a partnership with B. Larry Lawyer represents B in unrelated matters. Larry Lawyer has a concurrent representation of A and B.

II. MOTIVATIONS UNDERLYING JOINT REPRESENTATION

A. IN LITIGATION

Most Efficient Access to Relevant Information — Although similarly aligned parties will normally pool and exchange information relative to a case without the need for formal discovery, joint representation assures the most efficient access of counsel to all information under the control of such parties

Economy — It is generally assumed that the all-in cost of representation of multiple (presumably aligned) clients will be less when they are represented by a single lawyer

United Front — When a single lawyer represents multiple parties, it signals an intention to pursue or defend against claims collectively and consistently

Control — One party, and its counsel, ordinarily hold the view that they can better control the pursuit or defense of a claim if that counsel jointly represents similarly-aligned parties

Potentially Greater Ability to Coordinate a Settlement — When a single lawyer represents multiple defendants, it may be easier to coordinate a settlement of the matter

Potentially Greater Leverage in Settlement — When a single lawyer represents multiple plaintiffs (individually or as a class), that lawyer may have greater leverage than when the plaintiffs are separately represented
**Elimination of Potential Adversity** — Clients may believe that representation by a single counsel will help in eliminating any potential adversity between/among them in the prosecution/defense, and possible settlement, of the matter

**B. IN TRANSACTIONAL MATTERS**

**Economy** — It is generally assumed that the all-in cost of representation of multiple (presumably aligned) clients will be less when they are represented by a single lawyer

**Speed** — The parties believe that the transaction will move faster if fewer lawyers are involved

**Perceived Unity of Interest** — The parties intend to pursue a common enterprise and believe that their interests are generally aligned

**Control** — One party, usually the principal financing source, believes that the final terms will be more consistent with his/her/its interest if fewer lawyers are involved

**Request by Joint Clients for Limited-Scope “Scrivener” Services** — Adverse parties to a transaction agree in advance to the transaction’s material terms, and seek a limited-scope joint representation to “paper the deal”

**Elimination of Potential Adversity** — Clients may believe that representation by a single counsel will help in eliminating any potential adversity between/among them in the negotiation and documentation of the transaction

**Potentially Greater Ability to Negotiate With Opposing Participant(s)** — When a single lawyer represents multiple aligned parties on one side of a transaction, that lawyer may have greater leverage in negotiations with participant(s) on the other side of the transaction

**III. THE ATTORNEY-CLIENT PRIVILEGE**

The [attorney-client] privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

IV. OF THE DUTY OF CONFIDENTIALITY AND THE ATTORNEY-CLIENT PRIVILEGE IN JOINT REPRESENTATIONS

A. ABSENT CONSENT, THE DUTY OF CONFIDENTIALITY RUNS INDEPENDENTLY TO EACH JOINTLY REPRESENTED CLIENT

Model Rule 1.6(a) provides that “(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” There is nothing in Rule 1.6(b) or in the comments to Rule 1.6, that suggests that the mere fact that clients have agreed to a joint representation relieves the lawyer of his/her independent obligation of confidentiality to each of them. Indeed, in Formal Opinion 08-450, Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters (April 9, 2008) (“ABA Formal Op. 08-450”), the ABA Standing Committee on Ethics and Professional Responsibility stated

Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client’s representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise.

and

Absent an express agreement among the lawyer and the clients that satisfies the "informed consent" standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6.

B. NO ATTORNEY-CLIENT PRIVILEGE BETWEEN/AMONG JOINTLY REPRESENTED CLIENTS

Unlike the continuing vitality of the duty of confidentiality as between/among jointly represented clients, unless consent is given—as it is in almost every case—to override it in a joint representation, the attorney-client privilege simply does not operate between/among jointly represented clients. Section 75 of the Restatement of The Law (Third), Law Governing Lawyers (2000) (the “Restatement”) provides:

The Privilege of Co-Clients

(1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.
(2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

Decisional law confirms the rule stated above.

_Croce v. Superior Court_, 21 Cal.App.2d 18, 20 (1937) ("[T]he communications made by parties united in a common interest to their joint or common counsel, while privileged against strangers, are not privileged as between such parties nor as between their counsel and any of them, when later they assume adverse positions.")

_Rockwell Int’l. Corp. v. Superior Court_, 26 Cal. App. 4th 1255, 1267 (1994) (“In California, the ‘joint client’ or ‘common interest’ exception applies only where ‘two or more clients have retained or consulted a lawyer upon a matter of common interest,’ in which event neither may claim the privilege in an action by one against the other. (Evid. Code, § 962, 953, subd. (a), 954, subd. (a)).")

_Hecht v. Superior Court_, 192 Cal. App. 3d 560, 567 (1987) (“Based on the record presented here, Hecht has made a showing sufficient to bring herself within the ‘joint client’ exception to the attorney-client privilege. She is thus entitled to compel the testimony of Attorney Zukor (to the extent that he can recall) as to attorney-client conversations with David Ferguson up to and including the point at which the ASNA corporate documents (including share certificates) were revised to delete Hecht's name.”)

_Rudow v. Cohen_, No. 85 Civ. 9323 (LBS), 1988 WL 13746, at *3 (S.D.N.Y. Feb. 18, 1988) (finding that attorney-client privilege is no bar to discovery of documents prepared during joint representation when subsequent proceeding is between the same two parties)

_In re Teleglobe Comms. Corp._, 493 F.3d 345, 366 (3rd Cir. 2007) (“The great caveat of the joint-client privilege is that it only protects communications from compelled disclosure to parties outside the joint representation. When former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable. Del. R. Evid. § 502(D)(6); Restatement (Third) Of The Law Governing Lawyers § 75(2).”)

V. OF AND CONCERNING CONSENTS

A. GENERAL CONSIDERATIONS IN APPROACHING CONSENTS TO JOINT REPRESENTATION

1. **Determine whether there is a conflict:** Is there “a significant risk the representation of [any of the joint 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”? Model Rule 1.7(a)(2).
2. Determine whether the conflict is consentable

a. Would a reasonable, objective lawyer believe that “the lawyer will be able to provide competent and diligent representation to each affected client”? Model Rule 1.7(b)(1) and Comment [15] (“Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).”)

b. Do the joint clients “have such different interests that representation of one will have a material and adverse effect on the lawyer’s representation of the other”? Restatement § 128, cmt. d.

c. Certain categories of “joint” representations have been held in many instances to be non-consentable. For example, representing both buyer and seller in a real estate transaction has been generally condemned. N.J. Advisory Comm. on Prof. Ethics Op. 243, 95 N.J.L.J. 1145 (1972) (“the representation of a buyer and a seller in connection with the preparation and execution of a contract of sale of real property is so fraught with obvious situations where a conflict may arise that one attorney shall not undertake to represent both parties in such a situation”); Baldasarre v. Butler, 625 A.2d 467 (N.J. 1993) (“complex” transaction). Representing a driver of a vehicle and one or more passengers is highly problematic, particularly if there is any evidence of the driver’s fault. See, e.g., Fla. Op. 02-3 (2002) (example 4). Representing both a husband and a wife in an ostensibly “amicable” separation is close to the line or, in many cases, over it. See, e.g., Legal Ethics Comm. of the Oregon State Bar, Op. 1991-86 (1991) (specifying nine conditions, in addition to informed consent, that must be met to permit such representation). In all of these situations, direct adversity under Rule 1.7(a)(1) is clear or quite likely. And Rule 1.7(b) (3) (direct adversity in litigation) is within view in at least two of them.

d. Much ink has been spilled on the joint representation of clients with varying interests in non-litigated matters. These matters frequently involve the formation of a business or similar transactions. Old Model Rule 2.2 permitted lawyers to act as an “intermediary,” subject to certain carefully circumscribed conditions, including (a) the informed consent of each client, (b) the lawyer’s reasonable belief that the matter can be resolved on terms compatible with the clients’ best interest, (c) the lawyer’s reasonable belief that the matter can be undertaken impartially and without improper effect on the lawyer’s responsibilities to any client, and (d) an understanding that the lawyer would withdraw as intermediary on the request of any client. Rule 2.2 was repealed because it was believed to be, in some cases, a trap for the unwary, and, in other cases, subject to abuse. Parts of the substance of old Model Rule 2.2 are now incorporated into the comments to Model Rule 1.7. See Part D to the Appendix. Comment [28] to Model Rule 1.7 provides, in part:

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

One commentator concluded a brief survey of this area as follows:

It is sometimes a good idea for multiple clients to proceed with the same lawyer or law firm when negotiating a business transaction -- they can save money, speed the process, and establish a relationship all at the same time. Other times, however, it is a disastrous idea. One of the clients may end up being under-represented, exposed to risk, and perhaps exploited or worse. Rational clients will make different judgments as to their need for independent counsel -- point being that it is the client's decision to make.


It is surely true that joint representation in business formation and similar transactions is fraught with danger for both the clients and the lawyer. Before reaching the “client’s decision to make, the lawyer must first scale the Model Rule 1.7(b)(1) bar (would a reasonable, disinterested lawyer conclude that “the lawyer will be able to provide competent and diligent representation to each affected client”). If one gets over that hurdle, the lawyer must then conclude that it is possible, as a practical matter, and after consideration of the sophistication of the putative clients, to effectively convey all of the material risks inherent in common representation in a manner that each client can fully comprehend. Without such comprehension, informed consent will be elusive.

3. Provide adequate disclosures to obtain informed consents

a. Model Rule 1.0 defines “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

b. Disclose advantages and risks, preferably in writing:

   (i) Model Rule 1.0, cmt. [6]: “The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or
other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.”

(ii) Model Rule 1.7, cmt. [18]: “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.”

(iii) Model Rule 1.7, cmt. [19]: “In some cases, the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client’s interests.”

(iv) But see Murray v. Village of Hazel Crest, 2006 WL 3589969, *3 (N.D. Ill. Dec. 7, 2006) (granting municipal defendant’s motion to disqualify where a single firm represented multiple plaintiffs in separate lawsuits alleging municipality’s discriminatory failure to hire each of them for the same position of deputy chief of police; because Title VII would require each plaintiff to prove that he was the most qualified for the position, their interests were inherently conflicted; observing that there was no evidence that the firm advised the multiple clients on the conflict or on the strengths or weaknesses of his individual claim, the court stated that, “[g]iven their representation of all four plaintiffs, as well as their own self-interest in continuing to represent all four, counsel have an actual conflict simply trying to give such advice”) (emphasis added).

c. For advance consents, strive for both specificity and breadth. Model Rule 1.7, cmt. [22]: “If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.”

d. “In a multiple-client situation, the information normally should address the interests of the lawyer and other client giving rise to the conflict; contingent, optional, and tactical considerations and alternative course of action that would be foreclosed or made less readily available by the conflict; the effect of the representation or the process of obtaining other clients’ informed consent upon confidential information of the client; any material reservations that a disinterested lawyer might reasonably harbor about the arrangement if such a lawyer were representing only the client being advised; and the consequences and effect of a future withdrawal of consent by any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients[.]” Restatement § 122, cmt. c(i).

e. Recommend advice by independent counsel? Model Rule 1.0, cmt. [6]: “In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel.”
4. Document the consents

a. Consent to most current client conflicts and all former client conflicts must be confirmed in writing. Model Rules 1.7(b)(4), 1.9(a).

b. Although Model Rule 1.6 does not require consent to disclosure of protected information to be confirmed in writing, the best practice is to obtain written confirmation.

5. As engagement proceeds, continue to scrutinize for conflicts and, if one arises

a. Reevaluate the propriety of joint representation.

b. Consider the need for renewed, contemporaneous disclosures and consents—or risk disqualification. E.g., Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 821 (N.D. Calif. 2004) (granting disqualification motion: “Under the law of this jurisdiction, even if a prospective waiver of conflict has been obtained, the attorney must request a second, more specific waiver, ‘if the [prospective] waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between the parties.’” (citation omitted); Blecher v. Collins, P.C. v. Northwest Airline, Inc., 858 F. Supp. 1442 (C.D. Cal. 1994) (under superseded California ethics rules, joint airline clients’ agreement that common counsel would advance only the airlines’ common purpose and that individual carriers would have to pursue any individual claims on their own, was not a sufficient advance consent to the actual conflict that materialized when clients took counsel’s advice to abandon a damages theory that could not be developed for all clients; lawyer should have obtained contemporaneous consent to conflict that actually developed).

c. “A material change in the factual basis on which the client originally gave informed consent can justify a client in withdrawing consent. For example, in the absence of an agreement to the contrary, the consent of a client to be represented concurrently with another normally presupposes that the co-clients will not develop seriously antagonistic positions. If such antagonism develops, it might warrant revoking consent. If the conflict is subject to informed consent, the lawyer must thereupon obtain renewed informed consent of the clients, now adequately informed of the change of circumstances. If the conflict is not consentable, or the lawyer cannot obtain informed consent from the other client or decides not to proceed with the representation, the lawyer must withdraw from representing all affected clients adverse to any former client in the matter.” Restatement § 122, cmt. f (internal cross-references omitted).
B. CONSENT TO WHAT?

1. Joint representation despite the possibility that a conflict will require the lawyer to withdraw from representing one or more of the joint clients.

2. Actual conflicts that exist at the outset of the engagement.

3. Disclosure of information relating to the representation to all of the joint clients.

4. Payment of fees by a third party (one of the joint clients).

C. THE POTENTIAL FOR FUTURE WITHDRAWAL

1. Implosion

Always the risk of a disqualifying conflict—with attendant costs and delay—if the clients’ interests diverge and some or all need to retain separate counsel later.

“In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.”

Model Rule 1.7, cmt. [29] (emphasis added.)

2. Preserving a going forward construct

Some courts have held that, with adequate disclosure and consent, the lawyer may be able to continue to represent some of the multiple clients even after a conflict develops. See Part V.G.3.

3. Sample language

a. “At this time, neither you nor we perceive any conflicting or differing interests [between][among] you. Accordingly, it appears to be entirely proper for our firm to represent each of you in this case [matter], and you have retained us to do so. If during the course of this representation, we perceive any conflicting or differing interests between you, we will advise you of that fact at once. Similarly, you will advise us at once if you come across differing or conflicting interests of which we are not aware, now or later during the course of the representation. In that event, we may not participate in the resolution of any such conflict [between][among] you; rather you will attempt to resolve your differences between yourselves in such manner as you determine to be proper. In the event you are unable to resolve such differences, it may be necessary for our firm to withdraw from the representation of [either] [each] of you, depending on the circumstances.”
b. “At present, there does not appear to be any difference of opinion among the Joint Clients with respect to the basic terms of the [new entity project]. However, on further consultation with you, it may turn out that the Joint Clients have differing opinions regarding the terms of the [new entity project], or regarding the means by which the representation will be carried out. If we or you determine that there are material differences on one or more issues that cannot be resolved amicably or on terms compatible with the mutual best interests of the Joint Clients, you and we agree to discuss whether the conflict can be resolved through contemporaneous consents by one or more of the Joint Clients, or whether we must withdraw from representing some or all of the Joint Clients.”

D. ACTUAL CONFLICTS THAT EXIST AT THE OUTSET OF THE MULTIPLE REPRESENTATION

1. Assuming they are consentable—many will not be.

2. Examples of existing and known conflicts from the start, to which joint clients may consent—at least in the view of some courts and other authorities:


   b. Co-plaintiffs or co-defendants who have agreed not to pursue particular claims or defenses in order to enable the joint representation. See NYCBA Op. 2004-2 (requiring “‘disclosure of any and all defenses and arguments that a client will forgo because of the joint representation, together with the lawyer’s fair and reasoned evaluation of such defenses and arguments, and the possible consequences to the client of failing to raise them’”) (quoting New York Cnty. Lawyers Ass’n Ethics Op. 707 (1995)); but see Sanford v. Comm. of Va., 687 F. Supp. 2d 591, 604 (E.D. Va. 2009) (where the joint representation of multiple defendants in a complex tort action arising out of a hospital patient’s death led counsel to “eschew the best defense for each individual defendant” and instead to “present[ ] the best defense for the group of clients considered as a whole,” “the Court cannot reasonably conclude that any lawyer reasonably could believe, as the first condition [for obtaining a joint representation conflict consent] requires, that he would be able to provide competent and diligent representation to each of the affected clients”).

   c. Risk that governmental investigation in which lawyer represents both corporation and its employee will develop into litigation in which the corporation’s and employee’s interests will be adverse, and attorney will continue to represent the corporate client. See, e.g., NYCBA Op. 2004-2 (“[I]f there is any realistic likelihood that the governmental investigation might lead to litigation, consideration should be given to obtaining a waiver of the employee client’s right to object to being cross-examined by his former attorney. Such a waiver
will satisfy the specificity requirement for advance waivers because the constituent will understand the nature of the future representation in which the lawyer would cease to represent the individual and continue to represent the entity.”).

d. Representation of co-plaintiffs or co-defendants with potential claims against each other. See Restatement § 128, cmt. d(i); e.g., Messing v. FDI, Inc., 439 F. Supp. 776, 784 (D.N.J. 1977) (inside and outside directors named as defendants in shareholder derivative action could consent to joint representation despite risk that the outside directors might claim that the inside directors deceived them regarding the alleged fraud).

e. Representation of plaintiff and non-party with common interest. King v. Martin, 2012 U.S. Dist. LEXIS 148995 (W.D. La. Oct. 16, 2012) (in suit to set aside first sale of real property to plaintiff Buyer A, court denied motion to disqualify firm that jointly represented the defendant seller and third-party Buyer B—to whom seller entered into second agreement to sell same real property; they shared an interest in defeating the initial sale and gave informed consent to the conflicts between them).

f. Potential insufficiency of defendants’ assets to satisfy all co-plaintiffs’ claims. See Restatement § 128, cmt. d(i) & illus. 1.

3. Sample language

a. Consent to preexisting and continuing relationship with “primary” client:

   (i) “We must disclose to you and discuss with you the fact that we have represented in the past and wish to continue in the future to represent [present client] in [present client’s] other business activities. The purpose of this paragraph is to explain to you certain consequences of our representing [new client] and in particular the consequences of our continuing to represent [new client] and [present client], and to seek your consent to that continued representation of both of you. If during the course of this representation, we perceive any conflicting or differing interests between you and [present client], and we determine that we cannot continue representing both you and [present client], we will withdraw from representing you and will endeavor to continue representing [present client] if permissible under the controlling ethics rules. We ask [new client], after obtaining advice from your independent counsel, to waive to the maximum extent permitted by applicable law and by applicable ethical principles, any right you may have to disqualify us or object to our continued representation of [present client] either in this matter or in [present client’s] other business activities. As a condition to our commencing representation of [new client] we ask that you indicate your agreement to such a waiver by signing the enclosed copy of this letter and returning it to the undersigned.”

   (ii) “As you know, our Firm has in the past represented and currently represents [present entrepreneur client], in connection with matters unrelated to our representation of you and [present entrepreneur client] in your joint venture to set up [new venture]. Pursuant to my discussions with you, you have consented to the Firm’s joint representation of you and [present entrepreneur client] even though we
have represented [present entrepreneur client] in the past and may continue to represent him in the future. You acknowledge and agree that [among other consents provided], we will continue to represent [present entrepreneur client] in connection with matters unrelated to the formation of [new venture], and in the event of a conflict that may arise in our representation of you and [present entrepreneur client], we may continue as counsel to [present entrepreneur client] in connection with [new venture], if we deem such continued representation permissible under the controlling ethics rules.”

b. Consent to joint representation of co-venturers:

“As you know, we have jointly represented you as co-venturers in the formation of [new entity client]. You have asked us to continue to represent you as shareholders of [new entity client] and also to represent [new entity client]. We begin our work for [new entity client] in addition to each of you as shareholders of [new entity client] relying on the following: (a) Neither you nor we currently know of any conflicting or differing interests between you as shareholders of [new entity client] or between [new entity client] and you as shareholders of [new entity client]; (b) neither you nor we know of any likely future conflicting or differing interests; and (c) you and we agree to disclose and discuss with each other any conflicting or differing interests that may develop in the future. It is important that each of you have independent counsel who is fully informed as to your respective objectives and requirements with respect to your investment in [new entity client], reviews any and all documents relating to [new entity client] and advises you as to what is in your best interest as shareholders, officers or directors of [new entity client]. We encourage you to engage independent counsel now. In any such conflicting or differing interest situations we will represent and advise [new entity client].”

c. Consent to conflicts that inhere in joint representation in litigation, excerpted from William Freivogel, Freivogel on Conflicts, available at http://www.freivogelconflicts.com/waiverconsentforms.html: “Conflicts under these circumstances sometimes arise. One example would be where we discover evidence that one of you may have behaved as alleged by the plaintiff. Others could be where you disagree on trial strategy or the appropriateness of a settlement.”

E. DISCLOSURE OF INFORMATION RELATING TO THE REPRESENTATION TO ALL OF THE MULTIPLE CLIENTS

1. Model Rule 1.6: Absent client consent (and assuming that no Rule 1.6(b) exception applies), lawyer may not reveal to other client(s) information provided in confidence by another client.

2. Model Rule 1.7, cmt. [31]: “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.”
3. Sample language:

a. “In providing you with legal services, we shall represent both [all] of you and therefore cannot treat any information relating to the matter that one of you provides to us as confidential from the other[s]. To agree otherwise would destroy the effectiveness of our representation of the client from whom that information was being withheld. Accordingly, we shall treat all communications from either [any] of you relating to the matter as being communicated by both [all] of you, and such communications and all of our advice will be freely available to each of you during the course of our representation and in any dispute that may arise between [among] you after our representation has concluded. However, your communications with us for the purpose of obtaining our legal advice, and our legal advice to you, will generally be protected as to third parties by the attorney-client privilege, unless the confidentiality of those communications is not maintained. Therefore, it is important that each of you maintains the confidentiality of all privileged communications.”

b. “The Firm cannot effectively represent each of you in the Matter if we must preserve in confidence without disclosure to each of the Joint Clients material information disclosed to us by any Joint Client relating to the Matter. Therefore, our agreement to represent you jointly is subject to the express condition and understanding that any material information related to the Matter that any of the Joint Clients discloses to the Firm, may be disclosed to the other Joint Clients if the Firm determines, in the exercise of its independent professional judgment, that knowledge of such information would be necessary for the other Joint Clients to make informed decisions regarding the Matter.”

c. “You both acknowledge and agree that any confidential information that either of you provides to the Firm in connection with this representation will be shared with the other client and may not be protected by the attorney-client privilege, as against the other, and that disclosure of such information may be compelled in any future litigation between you.”

d. In estate planning context: “In providing you with [tax and estate planning] services, we shall represent both of you [as a couple] and therefore cannot treat any information that one of you provides to us as confidential from the other. To agree otherwise would destroy the effectiveness of our representation of the client from whom that information was being withheld. Accordingly, we shall treat all communications from either of you related to the matter as being communicated by both of you, and such communications and all of our advice will be freely available to each of you during the course of our representation.”

F. PAYMENT OF FEES BY ONE OF THE MULTIPLE CLIENTS

1. Typical scenario: Joint representation of corporate client and constituent (e.g., officer or employee), with corporation paying all fees.

2. Model 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.”
3. Model Rule 1.8(f), cmt. [11]: “Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.”

4. Model Rule 1.8(f), cmt. [12]: “Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.”

5. 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 services.”

6. No Partiality: Lawyer may not be partial toward client paying fees, to disadvantage of other clients.

7. Sample language: “As we have discussed, all attorneys fees [and costs] associated with representing you in this matter will be paid by [payor/co-client]. [Payor/Co-client] also will continue to be a client of the firm, and will be a co-client for this matter. Should [payor/co-client] fail to pay fees [and costs] associated with your representation, you agree to be responsible for amounts owed, and agree to pay such amounts under the terms of this letter.”

G. A USEFUL—BUT NOT FOOLPROOF—PROTOTYPE: THE ZADOR CONSENT

1. Zador: Zador Corp. v. Kwan, 31 Cal. App. 4th 1285, 37 Cal. Rptr. 2d 754 (Cal. App. 1995) (firm represented several related corporate entities, a shareholder of such entities, and an individual; firm dropped individual client because of perceived conflicts with corporate clients; dropped client moved to disqualify firm from continuing to represent corporate clients; the trial court granted the motion; the appellate court reversed, largely on the grounds that, at the outset of the representation, the dropped client consented in writing to exactly what subsequently occurred and agreed that, in those circumstances, he would not “assert any such conflict of interest or to seek to disqualify us from representing the Companies, notwithstanding any adversity that may develop.” The former client who subsequently moved to disqualify the firm from representing its remaining client reaffirmed its consent after the adversity had been
identified (but before moving to disqualify). The Zador court noted that fact several times but appeared to put relatively little weight on it, relying instead principally on the first advance waiver. Subsequent decisions relying on Zador have not involved any reaffirmation and those courts appear to rely entirely on whether the first and only advance waiver met the specificity of the advance waiver in Zador.

2. The Zador consent

Based on the information that has been provided to us, we do not believe that our representation currently involves any actual conflict of interest. You should be aware, however, that our representation may in the future involve actual conflicts of interests if the interests of the Co-defendants become inconsistent with your interests. Should that occur, we will endeavor to apprise you promptly of any such conflict so that you can decide whether you wish to obtain independent counsel.

Multiple representation may result in economic or tactical advantages. You should be aware, however, that multiple representation also involves significant risks. First, multiple representation may result in divided or at least shared attorney-client loyalties. Although we are not currently aware of any actual or reasonably foreseeable adverse effects of such divided or shared loyalty, it is possible that issues may arise as to which our representation of you may be materially limited by our representation of the Co-defendants.

Furthermore, because we will be jointly retained by both you and the Co-defendants in this matter, in the event of a dispute between you and the Co-defendants, the attorney-client privilege generally will not protect communications that have taken place among all of you and attorneys in our firm. Moreover, pursuant to this 'Joint Client' arrangement, anything you disclose to us may be disclosed to any of the other jointly represented clients.

In the event of a dispute or conflict between you and the Co-defendants, there is a risk that we may be disqualified from representing all of you absent written consent from all of you at that time. We anticipate that if such a conflict or dispute were to arise, we would continue to represent the subsidiary companies of Miramar Hotel & Investment Co., Ltd. (the 'Companies'), whose legal interests in this matter are aligned, notwithstanding any adversity between you and the Companies' interests. Among the Companies are Zador (California) Corporation, Zador Corporation N.V. and YCS Investments. Accordingly, we are now asking that you consent to our continued and future representation of the Companies and agree not to assert any such conflict of interest or to seek to disqualify us from representing the Companies, notwithstanding any adversity that may develop. By signing and returning to us the agreement and consent set forth at the end of this letter, you will consent to such arrangement and waive any conflicts regarding that arrangement. Notwithstanding such waiver and consent, depending on the circumstances, there remains some degree of risk that we would be disqualified from representing any of you in the event of a dispute.

Notwithstanding these risks, you have advised us that in this matter at the present time you do not desire to seek other counsel but instead you desire that we represent
multiple interests of yourself and the Co-defendants. Because the interests of the Co-defendants may become inconsistent with your interests, under the ethical standards discussed below we are required to bring this matter to your attention and to obtain your consent, as well as the consent of the Co-defendants, before representing you in the matter described above. . . .

Accordingly, we request that you signify your informed written consent by signing and returning this letter to us. We encourage you to seek independent counsel regarding the import of this consent, if you so desire, and we emphasize that you remain completely free to seek independent counsel at any time even if you decide to sign the consent set forth below. . . .

31 Cal. App. 4th at 1290-91, 37 Cal. Rptr. 2d at 756-57

3. Decisions relying on Zador-Type consents

Courts have relied on Zador-type consents in denying disqualification motions when conflicts arise in joint representations, and the firm continues to represent one or more of the jointly represented clients. E.g., SEC v. Tang, 831 F. Supp. 2d 1130, 1134, 1144-47 (N.D. Cal. 2011) (“If the joint defense is no longer tenable, it is the Firm’s intent that it will continue to represent you and not Mr. Siu, even if that means that the representation of you would be adverse to Mr. Siu or any other joint party.”); In re Rite Aid Corp. Secs. Litig. v. Grass, 139 F. Supp. 2d 649, 652-53, 660 (E.D. Pa. 2001) (“At the present time, we do not see any conflict that would prevent the firm from representing both the Corporation and Mr. Grass. It is possible, however, that such a conflict may arise or become apparent in the future, in which case it is understood that Mr. Grass would retain separate counsel and that the firm would continue to represent the Corporation.”); GEM Holdco, LLC v. Changing World Techs., LP, 46 Misc. 3d 1207(A), 2015 WL 120843 (N.Y. Sup. Ct. Jan. 9, 2015) (unpublished) (“We anticipate that if a conflict or dispute were to arise or if for any other reason joint representation does not continue, we would continue to represent [the primary clients]. Accordingly, we are now asking you . . . to consent to our continued and future representation of [the primary clients], and to agree not to assert any such conflict of interest or seek to disqualify us from representing [the primary clients] in this or any other matter, notwithstanding any adversity or litigation that may exist or develop.”).

4. Decisions Refusing to Rely on Zador-Type Consents

Numerous authorities suggest that advance consents in the joint representation context will not be enforced against unsophisticated persons, or if there has not been full disclosure of all potential adverse consequences and a knowing, intelligent, and fully informed waiver. See, e.g., Los Angeles Cty. Bar Formal Ethics Op. 471 (1992); D.C. Bar Ethics Op. 309 (2001); Texas Bar Ethics Op. 487 (1992); N.Y. County Lawyers’ Ass’n Ethics Op. 724 (1998); see also Restatement §121, cmt. e(i). It is, therefore, difficult to predict whether a court or disciplinary authority will honor a Zador-type consent in a particular case, especially in circumstances where confidential information material to the matter has been disclosed by the now former client to the lawyer who proposes to represent one or more of the “remaining” clients. ABA Formal Opinion 08-450 (See Part VI) questions the enforceability of advance consents to the use of client confidential information.
In *Sanford v. Virginia*, 687 F. Supp. 2d 591 (E.D. Va. 2009), the court briefly examined the consents, which may or may not have met a Zador standard, but ultimately dismissed that analysis and relied, instead, on non-consentability

Setting aside the importance of obtaining properly executed written consent, *to focus on the particularities of the conflict waivers is to miss the key point.* As provided in Note [19] to Rule 1.7, 'when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.' In this case, neither of these counsel were in position to request a waiver because, for the reasons set forth fully above, neither reasonably could have believed that, under the circumstances of this case, they could represent all of the defendants whom they undertook to represent.

*Id.* at 605 (emphasis supplied)

**VI. SOME RELEVANT ABA OPINIONS**

A. Formal Opinion 08-450 ("Absent an express agreement among the lawyer and the clients that satisfies the "informed consent" standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6. Whether any agreement made before the lawyer understands the facts giving rise to the conflict may satisfy "informed consent" (which presumes appreciation of "adequate information" about those facts) is highly doubtful. In the event the lawyer is prohibited from revealing the information, and withholding the information from the other client would cause the lawyer to violate Rule 1.4(b), the lawyer must withdraw from representing the other client under Rule 1.16(a)(1).”)

B. Formal Opinion 05-436, *Informed Consent to Future Conflicts of Interest* (May 11, 2005) ("The Model Rules contemplate that a lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest. General and open-ended consent is more likely to be effective when given by a client that is an experienced user of legal services, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. Rule 1.7, as amended in February 2002, permits a lawyer to obtain effective informed consent to a wider range of future conflicts than would have been possible under the Model Rules prior to their amendment.”)
VII. SOME RELEVANT STATE AND LOCAL OPINIONS

Ariz. Op. 07-04: Joint Representation; Conflicts; Communication; Informed Consent (Nov. 2007) (“The representation of multiple clients in a single litigation matter is generally permissible so long as the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each client, the representation does not involve the assertion of a claim by one client against another client, and each client gives informed consent, confirmed in writing. Ethical Rule (ER) 1.7(b). The requirement of informed consent arises only if, as an initial matter, the lawyer determines that the lawyer can, in fact, competently and diligently represent each client in the particular matter. Once that determination is made, the lawyer bears the burden of showing that there was adequate disclosure to each client and that each client gave an informed consent.”)

Fla. Op. 02-3 (June 21, 2002) (issues relating to the representation of multiple parties in automobile accident litigation)

Ga Formal Advisory Op. No. 03-2 (2003) (making clear that “[u]nlike the attorney-client privilege, jointly represented clients do not lose the protection of confidentiality described in Rule 1.6, Confidentiality of Information, as to each other by entering into the joint representation. See, e.g., D.C. Bar Legal Ethics Committee, Opinion No. 296 (2000) and Committee on Professional Ethics, New York State Bar Association, Opinion No. 555 (1984). Nor do jointly represented clients impliedly consent to a sharing of confidences with each other…”)

Los Angeles Cty. Bar Ass’n Op. 471 (Dec.21, 1992) (“When a law firm proposes to jointly represent two distinct clients who are co-defendants in a lawsuit with potentially conflicting interests, it is not improper for the law firm to seek advance consent to its later representing one client against the other client in litigation arising out of the same transaction, provided (1) the lawyer can jointly represent both clients competently, and (2) both clients give their informed written consent.”)

NYCBA Op. 2004-2 (“Multiple representations of a corporation and one or more of its constituents are ethically complex, and are particularly so in the context of governmental investigations. If the interests of the corporation and its constituent actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such a multiple representation, provided the representation satisfies the requirements of DR 5-105(C) of the New York Code of Professional Responsibility: (i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent; and (ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise. In determining whether these requirements are satisfied, counsel for the corporation must ensure that he or she has sufficient information to apply DR 5-105(C)’s disinterested lawyer test in light of the particular facts and circumstances at hand, and that in obtaining the information necessary to do so, he or she does not prejudice the interests of the current client, the corporation.”)

N.Y. State Bar Ass’n Ethics Op 778 (Aug. 30, 2004) (“Lawyer engaged by insurance company may not represent two defendants, one of whom has a potential indemnification claim against the other, unless a disinterested lawyer would believe the lawyer can competently represent the
interests of each, the one defendant waives the right to assert indemnification as cross-claim, and both defendants otherwise consent after full disclosure.”)

N.Y. State Bar Ass’n Ethics Op. No. 903 (Jan. 30, 2012) (“When a lawyer jointly represents two co-defendants pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the clients, and one of the clients later revokes consent, whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent.”)

Tex. Ethics Op. 487 (Dec. 1992) (“If the law firm fully advised the employer and employee of the implications, any potential disadvantage or adverse consequences to the dual representation, and the consequences of the disclosure of confidential information before the agreement was executed, then: [1] No disciplinary rule was violated by the law firm in allowing the employer and employee to execute the agreement. [2] It is not improper for the law firm to reveal to the employer confidential information about the employee obtained during the law firm's interview of the employee. [3] It is not improper for the law firm to withdraw from representing the employee and continue representing the employer in the present litigation.”)

VIII. SELECTED DECISIONS

Messing v. FDI, Inc., 439 F. Supp. 776 (D.N.J. 1977) (firm represented corporation, inside directors, and outside directors in derivative litigation: “More recent decisions appear to have adopted the position that directors accused of fraud may not share counsel with the corporation in a derivative shareholder's action. … The nature of the allegations against the directors is but one factor that has been considered in determining the propriety of the joint representation of the corporation and the directors in a derivative action. The Association of the Bar of New York Committee on Ethics, while recognizing that a conflict of interests is always inherent in such arrangements, has indicated that the corporation should obtain independent counsel whenever the corporation elects to take an active role in the litigation. … By contrast, commentators appear to have taken the broader view that the corporation should always be separately represented in a derivative action. … This Court perceives no basis for relying upon the nature of the charges against the directors for purposes of determining whether they may share counsel with the corporation. Irrespective of the nature of the charges against the directors—whether it be fraud or negligence—the interests of the two groups will almost always be diverse. Nor can we readily perceive the need for independent counsel turning upon the question whether the corporation has already elected to pursue an active or passive stance in the litigation, for that very election may have already been tainted by conflict. Moreover, just as it should be recognized that the corporate entity has a legitimate interest in recovering the fruits of past mismanagement or fraud on the part of its own directors, so too, it has a legitimate interest, and perhaps a role to play, in the defense of actions which have been frivolously or even wrongfully brought against its directors. The initial decision then as to what role if any the corporation should take must in the first instance be made completely free from any actual or apparent conflict. However, because in the instant case the directors have been accused of fraud and the corporation has elected to take an active stance in the litigation, it is enough for now to decide that, under these combined circumstances, the corporation must retain independent counsel. … PBT points out a second
potential conflict inherent in the representation afforded by the Weston-Sills firms. The outsiders may have an interest in proving that they were deceived by the insiders, an interest disserved by joint representation. This Court agrees that the joint representation of these two groups presents a real potential for conflict. However, in contrast to the question of the joint representation of the directors and the corporation, here there are individuals who are capable of informed consent and who can act independently of each other. …"

_Aetna Cas. & Sur. Co. v. U.S._, 570 F.2d 1197 (4th Cir. 1978) (firm represented United States and air traffic controllers in litigation arising from air crash; “It is our opinion that in disqualifying the Department of Justice in this case the district court erred in two respects. First of all, we find nothing in the record to support the conclusion of the court that ‘an actual conflict exists.’ We agree with counsel for the Government that in reaching this conclusion the court appears to have taken the position that the mere existence of multiple defendants in a case such as this inevitably creates a conflict of interest on the part of the lawyer undertaking to represent them. At the hearings and in its order the district court pointed out possible contentions which might be made by each of the four controllers which would exculpate him from liability, but cast the blame upon one or more of his codefendants, including the Government. These hypotheses, however, were based solely upon conjecture and ignored the representation of Government counsel, which was accepted by the court, that in the conference between the representatives of the Department of Justice and the controllers, there was no dispute among them either with respect to their duties and responsibilities or the details of the plane crash. … Bearing further on the question is the fact that there is little or no possibility that the four controllers will incur any personal liability as a result of this litigation. As heretofore noted, the plaintiffs allege, and the Government admits, that the controllers were acting within the course and scope of their employment at the time of the crash, and under such circumstances any finding of negligence against them would be imputed to the Government and place liability upon it under the Tort Claims Act. Additionally, we note that if the Government and the controllers should be held to be jointly liable, the individual defendants would not be required to pay the damages, since a judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against them. 28 U.S.C. § 2676; … These, we think, are practical considerations which appropriately should have entered into the disposition of the motion.”)

_Kempner v. Oppenheimer & Co._, 662 F. Supp. 1271 (S.D.N.Y. 1987) (firm representing a brokerage house and two of its employees in a complaint alleging various acts of fraudulent trading dropped the employees as clients; the employees moved to disqualify the firm from continuing to represent the brokerage house; the employees had initially denied any wrongdoing, but one later alleged that the other had forged the client’s signature on a margin account agreement; the court thought it telling that “it is the client, and not the attorney, who has changed position”; the court cited a long line of Second Circuit decisions and district court opinions to the effect that the “substantial relationship” test is not a fruitful method of analysis in the joint representation/dropped client cases since a “substantial relationship is always present in those circumstances and … the dropped client moving to disqualify former counsel from continuing to represent others in the matter should not be heard to complain of the disclosure of confidential information to other clients since such disclosures are inherent in joint representation cases.”)

_Zador Corp. v. Kwan_, 31 Cal. App. 4th 1285, 37 Cal. Rptr. 2d 754 (Cal. App. 1995) (firm represented several related corporate entities, a shareholder of such entities, and an individual;
firm dropped individual client because of perceived conflicts with corporate clients; dropped client moved to disqualify firm from continuing to represent corporate clients; the trial court granted the motion; the appellate court reversed, largely on the grounds that, at the outset of the representation, the dropped client consented in writing to exactly what had subsequently occurred and agreed that, in those circumstances, he would not “assert any such conflict of interest or to seek to disqualify us from representing the Companies, notwithstanding any adversity that may develop.” The full consent in Zador, as quoted by the court, appears in Part V.G.2 of this Outline and is referred to herein as a “Zador consent.” The former client who subsequently moved to disqualify the firm from representing its remaining client reaffirmed its consent after the adversity had been identified (but before moving to disqualify). The Zador court noted that fact several times but appeared to put relatively little weight on it, relying instead principally on the first advance waiver. Subsequent decisions relying on Zador have not involved any reaffirmation and those courts appear to rely entirely on whether the first and only advance waiver met the specificity of the advance waiver in Zador.

Colyer v. Smith, 50 F. Supp. 2d 966 (C.D. Cal. 1999) (plaintiff moved to disqualify firm representing several codefendants on the grounds that such representation was a conflict with at least one of the firm’s current and former clients; defendants resisted motion, in part, on the basis that the plaintiff lacked standing; the Colyer court engaged in a broad survey decisions on the issue in various federal and state courts, concluding that a third party may have standing to raise an adverse counsel’s alleged conflict only when “the ethical breach so infects the litigation in which disqualification is sought that it impacts the moving party's interest in a just and lawful determination of [such party’s] claims,” noting that noting that “[i]n such a case . . . the prudential barrier to litigating the rights and claims of third parties . . . would be overcome by the court's inherent obligation to manage the conduct of attorneys who appear before it and to ensure the fair administration of justice.”; the Colyer court held that the plaintiff/movant failed to meet the test which it had established)

A. v. B., 726 A.2d 924 (N.J. 1999) (firm jointly represented husband and wife in estate planning; their wills “created the possibility that the other spouse's issue, whether legitimate or illegitimate, ultimately would acquire the decedent's property”; before the wills were executed, a third party retained the firm to bring a paternity action against the husband; a clerical error made by the firm masked its conflict in taking on a matter adverse to the husband client; after the wills were executed, the firm discovered the conflict, withdrew from representing the plaintiff in the paternity action and advised the husband that it “believed it had an ethical obligation to disclose to the wife the existence, but not the identity, of his illegitimate child”; the husband, represented by another firm in the paternity action, refused to consent to the disclosure and joined the firm as a third party defendant in the paternity action; an intermediate appellate court in the paternity action issued an order barring the firm from disclosing the husband’s illegitimate child to the wife; the Supreme Court reversed, holding that (1) “the husband's deliberate omission of the existence of his illegitimate child constitutes a fraud on his wife,” (2) New Jersey version of Model Rule 1.6 (c) “permits, but does not require, a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary ‘to rectify the consequences of a client's criminal, illegal or fraudulent act in furtherance of which the lawyer's services had been used,” (3) it necessarily followed that the firm could “ inform the wife of the existence of the husband's illegitimate child”
In re Rite Aid Corp. Sec. Litig. v. Grass, 139 F. Supp. 2d 649 (E.D. Pa. 2001) (firm dropped jointly-represented client (CEO of corporate client) because of perceived conflict with corporate client; dropped client moved to disqualify firm from continuing to represent corporate client; court denied motion, in part, on the basis of a Zador consent; seemingly endorses the concept of “accommodation client,” relying on comment i to Section 132 of the Restatement (See Part X of this Outline))

Murray v. Village of Hazel Crest, 2006 WL 3589969 (N.D. Ill. Dec. 7, 2006) (lawyer disqualified from representing four ostensibly similarly situated clients who claimed discrimination in seeking promotion to the same single position; court concluded that each would likely be required to demonstrate that their qualifications were superior to the other three; lawyer offered consents and the court held that they could not have been informed; court did not preclude original counsel from continuing to represent one of original plaintiffs, but only after new consents obtained from the other three after they had retained new, separate counsel; subsequent history of the case indicates such new consents were apparently obtained)

Reitzel v. Hale, 820 N.Y.S.2d 845 (N.Y. Misc. 2006) (firm representing all five defendants in a medical malpractice action was “disqualified from representing the Defendants or any of them”; the court stated that “The gravamen of the Plaintiff's application is that the Defendants herein have differing and conflicting interests sufficient to warrant disqualification. A fair reading of the Affirmation in Opposition by defense counsel leads the Court to conclude that it actually supports the Plaintiff's position. Indeed, paragraph 4 of the Affirmation describes the differing roles (and hence, the different exposure faced by each) of each of the Defendants, which clearly amplifies the perceived conflict of interest.”)

Sanford v. Virginia, 687 F. Supp. 2d 591 (E.D. Va. 2009) (two groups of defendant each had a single attorney; the court analyzed the manner in which the positions, defenses and settlement prospects of each defendant within each group differed from those of the other defendants within each group; The court ultimately disqualified each lawyer representing each group, leaving a crack in the door for each firm to continue to represent one of its clients: “This commentary leaves open the possibility that a lawyer might remain as counsel to one or more defendants even if he is disqualified from representing all defendants. Considering the complex issues presented in this record and the rather significant nature of the conflict, it appears that this case ought to be one in which counsel, having been disqualified, should not further remain in the case. However, it is appropriate to leave that prospect open and to allow for discussion and further assessment of that issue after each defendant is separately advised by counsel not laboring under conflicts.”)

SEC v. Tang, 831 F. Supp. 2d 1130 (N.D. Ca, 2011) (firm represented several defendants, on the basis of Zador consents, in multi-defendant SEC insider trading case; one of the jointly-represented defendants, by then represented by independent counsel, pled guilty in a parallel criminal case and, in doing so, implicated the firm’s remaining clients; the SEC filed a motion to disqualify the firm from representing its remaining clients on the grounds that the firm “faces an actual conflict because ‘it owes a duty to [its remaining clients] to use its best efforts to undermine [the former jointly-represented client’s] credibility, but [it] cannot attempt to do so without violating continuing duties owed to its former client, . . . which [that former client] never waived.’”; the court denied the motion on three independent grounds; (a) the SEC lacked standing to assert any conflict that might exist; (b) the SEC’s delay in bringing the motion was fatal to its position; and (c) the Zador consent was effective).

In re Ellis, 2015 Ore. LEXIS 130 (Ore. Mar. 4, 2015) (a granular analysis of issues affecting a joint representation in an SEC enforcement proceeding)

IX. SELECTED SECONDARY AUTHORITY


Debra Lyn Bassett, Three’s a Crowd: A Proposal to Abolish Joint Representation, 32 RUTGERS L. J. 387 (2001)

Teresa Stanton Collett, The Promise of Multiple Representation, 16 REV. LITIG. 567 (1997)


David P. Dunning & Michael V. Bourland, Ethical Issues in Representing Owners of Family Businesses and Their Families, CU005 ALI-CLE 921 (July 2012)


Freivogel On Conflicts – Joint/Multiple Representation
http://www.freivogelonconflicts.com/jointmultiplerepresentation.html

NOTE: Many of the citations in Parts VII-VIII of this outline are drawn from this source with the permission of the author. FREIVOGEL ON CONFLICTS is, of course, one mandatory starting point for any inquiry relating to lawyer conflicts of interest


Steven Lubet, There Are No Scriveners Here, 84 IOWA L. REV. 341 (1999)
X. THE EPHEMERAL “ACCOMMODATION CLIENT”

Restatement §132, is, in substance, a reformulation of Model Rule 1.9(a). Comment i to Section 132 provides as follows:

i. Withdrawal from representing an "accommodation" client. With the informed consent of each client as provided in § 122, a lawyer might undertake representation of another client as an accommodation to the lawyer's regular client, typically for a limited purpose in order to avoid duplication of services and consequent higher fees. If adverse interests later develop between the clients, even if the adversity relates to the matter involved in the common representation, circumstances might warrant the inference that the "accommodation" client understood and impliedly consented to the lawyer's continuing to represent the regular client in the matter. Circumstances most likely to evidence such an understanding are that the lawyer has represented the regular client for a long period of time before undertaking representation of the other client, that the representation was to be of limited scope and duration, and that the lawyer was not expected to keep confidential from the regular client any information provided to the lawyer by the other client. On obtaining express consent in advance to later representation of the regular client in such circumstances, see § 122, Comment d. The lawyer bears the burden of showing that circumstances exist to warrant an inference of understanding and implied consent. On other situations of withdrawal, see § 121, Comment e.

In Richmond, Accommodation Clients (see Part IX) the author has this to say on the concept:

A lawyer may take on the representation of a second client in a matter at the request of a regular client. That means only that the lawyer represents co-clients. There is not a category of inferior clients known as accommodation clients to whom lawyers owe diminished professional duties. The Restatement's apparent creation of such a breed of
client is at best an ill-considered description of some attorney-client relationships that are characterized by unusual facts or defined by well-crafted engagement letters.

There is no need for the potential confusion the accommodation client moniker creates. A lawyer who wishes to avoid a disqualifying conflict in the representation of multiple clients often can avoid trouble by obtaining the clients' consent, 127 and by detailing the scope and nature of his representation of each client in a clear and thorough engagement letter. If a lawyer does these things and is thus able to continue to represent a favored client after withdrawing from the representation of a second client, that does not retroactively transform the second client into an "accommodation client." The second client is nothing more than a former client who has waived the lawyer's conflict of interest. The second client has, for whatever reason, decided that any advantage to be gained by insisting on his lawyer's loyalty is outweighed by other considerations.

If accommodation client status is thought to be characterized by the accommodation client's assumed or implied expectation or understanding that his confidences may pass to the primary client through their common lawyer, courts should ask why that is significant, or how it is important. Model Rule 1.6(a) provides in pertinent part:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation, ... .

A lawyer may be impliedly authorized to share a client's information with a co-client in any case in which the clients are mounting a joint defense. If that happens in a case in which one of the clients is the defense lawyer's regular client and the other client is not, that does not mean that the lawyer owes the second client any less loyalty. Moreover, in order for the second (accommodation) client to have impliedly authorized the lawyer's disclosure of his confidences, he must have understood that the possibility of disclosure existed. To presume that the so-called accommodation client could have no reasonable expectation of confidentiality vis-a-vis the would-be primary client is to ignore the lawyer's duty under Model Rule 1.4(b) to explain confidentiality principles and the concept of impliedly authorized disclosures to both clients. ....

[T]he recognition of accommodation client status runs contrary to long-standing principles of client loyalty in concurrent representations. Absent prior consent, a lawyer cannot accept a new representation adverse to an existing client. A lawyer cannot simply discontinue an existing representation in order to represent a more favored client. As the court in Picker International, Inc. v. Varian Associates, Inc., observed: "A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client." Yet that is exactly what proponents of accommodation client status would permit lawyers to do.

35 Akron L. Rev. at 77-79 (footnotes omitted).
XI. SOME TOUCHSTONES IN THE REPRESENTATION OF JOINT CLIENTS BEFORE VARIOUS FEDERAL AGENCIES

A. BEFORE THE SECURITIES AND EXCHANGE COMMISSION


Multiple Representations

So what do we see in the Enforcement Division that concerns us?

Multiple representations remain fairly common, both involving the company and individual employees, as well as among groups of individuals.

In many cases, there is no problem presented by multiple representations — such as when one lawyer or one firm represents employees who are purely witnesses with no conflicting interests or material risk of legal exposure.

But we have seen cases where the same counsel represented both the company and over 30 employees, in another the company and over 20 individuals, all where there was a real potential that some of those persons faced material legal exposure.

There also are numerous examples of defense counsel representing multiple individuals with seemingly divergent interests.

We have seen counsel represent both the supervisor and the person he supervised in a “failure to supervise” case.

In another case, a lawyer represented himself, the alleged wrongdoer and the principal investor, who testified that he was not concerned that he had invested almost his whole net worth with an individual who had multiple felony convictions.

It is worth noting that the SEC’s new Cooperation Program raises the stakes in multiple representation situations. The Program, announced by the Commission in January 2010, provides for reduced sanctions, or even no sanctions, in exchange for truthful and substantial assistance in an SEC investigation.

This increases the likelihood that one counsel cannot serve the interests of multiple clients, given the real benefits that could result from cooperation, such as one client testifying against another client represented by the same counsel.

In light of the potential for cooperation, we are taking a closer look at such multiple, seemingly adverse, representations. You will likely see an increase in concerns expressed by SEC staff in those situations.
B. BEFORE THE INTERNAL REVENUE SERVICE

31 CFR § 10.29:

Conflicting interests.

(a) Except as provided by paragraph (b) of this section, a practitioner shall not represent a client before the Internal Revenue Service if the representation involves a conflict of interest. A 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 practitioner’s responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner.

(b) Notwithstanding the existence of a conflict of interest under paragraph (a) of this section, the practitioner may represent a client if —

(1) The practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law; and

(3) Each affected client waives the conflict of interest and gives informed consent, confirmed in writing by each affected client, at the time the existence of the conflict of interest is known by the practitioner. The confirmation may be made within a reasonable period of time after the informed consent, but in no event later than 30 days.

(c) Copies of the written consents must be retained by the practitioner for at least 36 months from the date of the conclusion of the representation of the affected clients, and the written consents must be provided to any officer or employee of the Internal Revenue Service on request.

(d) Effective/applicability date. This section is applicable on September 26, 2007.

(emphasis supplied)

C. BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

18 C.F.R. §1b.16(b):

(b) Any person compelled to appear, or who appears in person at a formal investigation by request or permission of the Investigating Officer may be accompanied, represented and advised by counsel, as provided by §385.2101 of this chapter and these rules, except that all witnesses shall be sequestered and, unless permitted in the discretion of the Investigating Officer, no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding. When counsel does represent more than one person in an investigation, for example, where the counsel is counsel to the witness and his employer, said counsel shall inform the Investigating Officer and each client of said counsel’s possible conflict of interest in representing that client and, if said counsel appears
with a witness giving testimony on the record in an investigation, counsel shall state on the record all persons said counsel represents in the investigation.

APPENDIX

A. MODEL RULE 1.0(e): DEFINITIONS (“INFORMED CONSENT”)

(e) “Informed consent” denotes 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.

From the Comments:

Informed Consent

[6] The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. . . . In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

B. MODEL RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

C. MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

From the Comments:

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.
D. MODEL RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(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.

From the Comments:

Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, 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.
[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

Informed Consent

[18] 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.

[19] In some cases, the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client’s interests.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such consents is generally determined by the extent to which the client reasonably understands the material risks that the consent entails. 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 the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict 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. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to
represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because 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. Other relevant factors are whether the lawyer subsequently will represent both
parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] 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. See Rule 1.4. 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. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's 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. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.
E. MODEL RULE 1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

   (1) whose interests are materially adverse to that person; and
   
   (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

   (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

   (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

From the Comments:

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

(emphasis supplied)
F. MODEL RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

…

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

G. RESTATEMENT OF THE LAW (THIRD), LAW GOVERNING LAWYERS (2000)

§ 128 Representing Clients with Conflicting Interests in Civil Litigation

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer in civil litigation may not:

(1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter; or

(2) represent one client to assert or defend a claim against or brought by another client currently represented by the lawyer, even if the matters are not related.

§ 130 Multiple Representation in a Nonlitigated Matter

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent two or more clients in a matter not involving litigation if there is a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to one or more of the other clients.