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.

Steven Lubet, There Are No Scriveners Here, 84 Iowa L. Rev. 341, 350 (1999).

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.freivogelonconflicts.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 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”)

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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. FREIVOGL 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)


William E. Wright, Jr., *Ethical Considerations in Representing Multiple Parties in Litigation*, 79 *Tul. L. Rev.* 1523 (2005)

**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, 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.
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**

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.

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**

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**

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 co-plaintiffs 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.
JOINT REPRESENTATION HYPOTHETICALS

The Perils of Joint Representation in Civil Litigation

1. As regular outside counsel to Dinachips, Inc., you have been asked to defend (a) the company, (b) David Perkins, its VP of Sales, Automotive Division, and (c) Charles Clark, its Asst.V.P., Human Relations, in a suit alleging sexual harassment (hostile work environment) and retaliation. The suit was brought by Polly Jones, a former sales manager in the Automotive Division. Dinachips’ General Counsel, Clark (who investigated the complaint) and Perkins all agree that the allegations are “totally baseless.” What do you do?

2. You take on the joint representation of Dinachips, Perkins and Clark, sending each an engagement letter a week later. When Clark questions the need, you explain that you have been doing work for the company for years, but haven’t found any letters that provided that you had represented Clark in his personal capacity. “We’re just dotting i’s and crossing t’s,” you explain.

3. Six months later, while you are preparing Perkins for his deposition, he explains that his memory has been jogged a bit and he now remembers that he “may have done some things that other people could misinterpret.” What do you do now?

4. Jones had made her internal complaint on harassment in June. Clark had argued that her transfer to another division in July could not have been retaliation for her report because the transfer was first proposed in his file memo written in March. Six weeks after Perkins’ epiphany, you discover that Clark’s March memo to the file presaging Jones’ transfer actually was written in August. You explain to the GC that Dinachips is basically on the hook for all compensatory damages in the case, but that Dinachips should “really distance itself” from the individual defendants to avoid punitive damages. Any problems?

5. Perkins and Clark have retained new lawyers. Each lawyer files a motion to disqualify you. How do you respond?

The Perils of Joint Representation in Transactional Matters

A. Papering the Deal/Lawyer as Scrivener

Peter and Sandy come to your office and inform you that they have agreed on all the essential terms for a simple purchase and sale of an office building. They would like to hire you to paper the deal. Sandy is an existing client on other matters. Any issues?
B. Entity Formation

One of your longtime clients asks you to represent three partners who seek to form a new business: (1) your longtime client, who is the money guy; (2) the new venture’s CEO, who will pay with his sweat equity; and (3) the woman who owns the patent that is the key to the business plan. Any issues?

C. Complex Real Estate/Multiple Entity Transaction

In 2008, Earl Thomas and Richard Sherman hired your firm to handle their acquisition of a commercial shopping mall under construction. Thomas’s and Sherman’s company, Seabird Investments, Inc., contracted to buy the mall. To help finance the acquisition, Seabird planned to sell ownership interests in the property to investors seeking tax advantages; these investors would be tenants in common (TIC) of the shopping center.

Needing a partner, a third party referred Seabird to Bennett Brothers LLC (BB), which is owned by two brothers, Michael and Barry Bennett. BB and Seabird formed a 50/50 joint venture, BS Enterprises, to close the deal for the shopping mall and complete its construction. The price of the property was $50 million, and to help pay it, the BS joint venture obtained a $20 million mortgage loan from a bank, again hiring your firm to provide the legal services needed for the project.

You also drafted the agreement establishing the BS joint venture, which appointed three persons to manage it: Thomas, Sherman, and one of the Bennetts (Michael). The agreement also made BB responsible both for obtaining the money needed to close the deal and for selling ownership interests to TIC investors. All loans needed to complete the project were individually guaranteed by each of the Bennetts and were nonrecourse against Seabird.

At one point, a dispute arose between Seabird and BB over legal fees owed your firm. Seabird wanted to use proceeds from a sale of TIC interests to pay down those fees. Bennett Brothers disagreed. Thomas and Sherman exercised their right in the joint venture agreement to authorize expenditures by the BS joint venture of less than $50,000 over the opposition of the third manager, Michael Bennett, voting to pay you $49,999 of the TIC proceeds. This payment infuriated the principal lender, who, according to Michael, threatened to declare the BS joint venture in default for failing to remit all of the TIC proceeds to it.

The Bennetts were alarmed because they needed the money from the TIC sales to close the deal to buy the shopping mall. Purporting to have lost confidence in you and your firm, they retained new lawyers to solve a mechanics lien problem—known to your firm but not initially disclosed to the Bennetts—that had spooked some of the TIC investors, and to try to salvage the deal.

Shortly afterward the lender declared a default, requiring the Bennetts to repay the loan. The deal fell apart, and the acquisition and development of the shopping mall did not occur.
No writings exist about any of the above-referenced events. What are the legal and professional responsibility issues raised in this scenario?

[Adapted from Nelson Bros. Prof. Real Estate, LLC v. Freeborn & Peters, LLP, 773 F.3d 853 (7th Cir. 2014)]

D. Zero-Sum Game

Two lawyers in the same law firm have been retained by A and B, each a competitor for a single broadcast license, to assist each of them in obtaining the license from Agency. This work will likely require advocacy by the lawyer for an applicant before Agency.

[Adapted from RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, §121, cmt. c(i), Illus. 1 (ALI 2000)]

Joint Representation Client Consent Language

A. Consent to “Potential Conflicts”

A law firm’s standard form engagement letter instructs firm lawyers to use the following language for joint representation conflicts of interest:

Although the interests of these other individuals are generally consistent with your interests and Attorneys are aware of no adverse interests at this time, it is recognized and understood that there is a potential that differences may exist or become evident during the course of this representation. You acknowledge that you have been informed of, and waive, any potential conflicts of interest which may exist or arise between or among you and any other individuals Attorneys may represent in this matter.

Any issues with using this standard language?

B. A treatise on consumer class actions includes the following provision in its sample retainer agreement:

Client understands the effect of joint representation on Attorney-Client confidentiality. Attorney-Client communications are privileged and protected against disclosure to a third party. Under this agreement, Client may be one among multiple Plaintiffs being jointly represented by Attorneys. By entering into this agreement, Client waives any right Client may have to require that Attorneys disclose to Client any confidences Attorneys have obtained from any other Plaintiff in connection with the subject matter of this agreement.

POLLOCK, J.

This appeal presents the issue whether a law firm may disclose confidential information of one co-client to another co-client. Specifically, in this paternity action, the mother's former law firm, which contemporaneously represented the father and his wife in planning their estates, seeks to disclose to the wife the existence of the father's illegitimate child.

A law firm, Hill Wallack (described variously as "the law firm" or "the firm"), jointly represented the husband and wife in drafting wills in which they devised their respective estates to each other. The devises created the possibility that the other spouse's issue, whether legitimate or illegitimate, ultimately would acquire the decedent's property.

Unbeknown to Hill Wallack and the wife, the husband recently had fathered an illegitimate child. Before the execution of the wills, the child's mother retained Hill Wallack to institute this paternity action against the husband. Because of a clerical error, the firm's computer check did not reveal the conflict of interest inherent in its representation of the mother against the husband. On learning of the conflict, the firm withdrew from representation of the mother in the paternity action. Now, the firm wishes to disclose to the wife the fact that the husband has an illegitimate child. To prevent Hill Wallack from making that disclosure, the husband joined the firm as a third-party defendant in the paternity action.

In the Family Part, the husband, represented by new counsel, Fox, Rothschild, O'Brien & Frankel ("Fox Rothschild"), requested restraints against Hill Wallack to prevent the firm from disclosing to his wife the existence of the child. The Family Part denied the requested restraints. The Appellate Division reversed and remanded "for the entry of an order imposing preliminary restraints and for further consideration."

Hill Wallack then filed motions in this Court seeking leave to appeal, to present oral argument, and to accelerate the appeal. Pursuant to Rule 2:8-3(a), we grant the motion for leave to appeal, accelerate the appeal, reverse the judgment of the Appellate Division and remand the matter to the Family Part. Hill Wallack's motion for oral argument is denied.

I.

Although the record is both informal and attenuated, the parties agree substantially on the relevant facts. Because the Family Part has sealed the record, we refer to the parties without identifying them by their proper names. So viewed, the record supports the following factual statement.

In October 1997, the husband and wife retained Hill Wallack, a firm of approximately sixty lawyers, to assist them with planning their estates. On the commencement of the joint representation, the husband and wife each signed a letter captioned "Waiver of Conflict of Interest." In explaining the possible conflicts of interest, the letter recited that the effect of a testamentary transfer by one spouse to the other would permit the transferee to dispose of the property as he or she desired. The firm's letter also explained that information provided by one spouse could become available to the other. Although the letter did not contain an express waiver of the confidentiality of any such information, each spouse consented to and waived any conflicts arising from the firm's joint representation.

Unfortunately, the clerk who opened the firm's estate planning file misspelled the clients' surname. The misspelled name was entered in the computer program that the firm uses to discover possible conflicts of interest. The firm then prepared reciprocal wills and related documents with the names of the husband and wife correctly spelled.

In January 1998, before the husband and wife executed the estate planning documents, the mother coincidentally retained Hill Wallack to pursue a paternity claim against the husband. This time, when making its computer search for conflicts of interest, Hill Wallack spelled the husband's name correctly. Accordingly, the computer search did not reveal the existence of the firm's joint representation of the husband and wife. As a result, the estate planning department did not know that the family law department had instituted a paternity action for the mother. Similarly, the family law department did not know that the estate planning department was preparing estate plans for the husband and wife.

A lawyer from the firm's family law department wrote to the husband about the mother's paternity claim. The husband neither objected to the firm's representation of the mother nor alerted the firm to the conflict of interest. Instead, he retained Fox Rothschild to represent him in the paternity action. After initially denying paternity, he agreed to voluntary DNA testing, which revealed that he is the father. Negotiations over child support failed, and the mother instituted the present action.
After the mother filed the paternity action, the husband and wife executed their wills at the Hill Wallack office. The parties agree that in their wills, the husband and wife leave their respective residuary estates to each other. If the other spouse does not survive, the contingent beneficiaries are the testator's issue. The wife's will leaves her residuary estate to her husband, creating the possibility that her property ultimately may pass to his issue. Under N.J.S.A. 3B:1-2; :3-48, the term "issue" includes both legitimate and illegitimate children. When the wife executed her will, therefore, she did not know that the husband's illegitimate child ultimately may inherit her property.

The conflict of interest surfaced when Fox Rothschild, in response to Hill Wallack's request for disclosure of the husband's assets, informed the firm that it already possessed the requested information. Hill Wallack promptly informed the mother that it unknowingly was representing both the husband and the wife in an unrelated matter.

Hill Wallack immediately withdrew from representing the mother in the paternity action. It also instructed the estate planning department not to disclose any information about the husband's assets to the member of the firm who had been representing the mother. The firm then wrote to the husband stating that it believed it had an ethical obligation to disclose to the wife the existence, but not the identity, of his illegitimate child. Additionally, the firm stated that it was obligated to inform the wife "that her current estate plan may devise a portion of her assets through her spouse to that child." The firm suggested that the husband so inform his wife and stated that if he did not do so, it would. Because of the restraints imposed by the Appellate Division, however, the firm has not disclosed the information to the wife.

II.

This appeal concerns the conflict between two fundamental obligations of lawyers: the duty of confidentiality, Rules of Professional Conduct (RPC) 1.6(a), and the duty to inform clients of material facts, RPC 1.4(b). The conflict arises from a law firm's joint representation of two clients whose interests initially were, but no longer are, compatible.

Crucial to the attorney-client relationship is the attorney's obligation not to reveal confidential information learned in the course of representation. Thus, RPC 1.6(a) states that "[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 in order to carry out the representation." Generally, "the principle of attorney-client confidentiality imposes a sacred trust on the attorney not to disclose the client's confidential communication." State v. Land, 73 N.J. 24, 30, 372 A.2d 297 (1977).

A lawyer's obligation to communicate to one client all information needed to make an informed decision qualifies the firm's duty to maintain the confidentiality of a co-client's information. RPC 1.4(b), which reflects a lawyer's duty to keep clients informed, requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." See also Gautam v. De Luca, 215 N.J. Super. 388, 397, 521 A.2d 1343 (App.Div.1987) (stating that attorney has continuing duty "to inform his client promptly of any information important to him"); Passanante v. Yormark, 138 N.J. Super. 233, 238, 350 A.2d 497 (App.Div.1975) ([An attorney's] duty includes the obligation of informing his client promptly of any known information important to him."). In limited situations, moreover, an attorney is permitted or required to disclose confidential information. Hill Wallack argues that RPC 1.6 mandates, or at least permits, the firm to disclose to the wife the existence of the husband's illegitimate child. RPC 1.6(b) requires that a lawyer disclose "information relating to representation of a client" to the proper authorities if the lawyer "reasonably believes" that such disclosure is necessary to prevent the client "from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another." RPC 1.6(b)(1). Despite Hill Wallack's claim that RPC 1.6(b) applies, the facts do not justify mandatory disclosure. The possible inheritance of the wife's estate by the husband's illegitimate child is too remote to constitute "substantial injury to the financial interest or property of another" within the meaning of RPC 1.6(b).

By comparison, in limited circumstances RPC 1.6(c) permits a lawyer to disclose a confidential communication. RPC 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." RPC 1.6(c)(1). Although RPC 1.6(c) does not define a "fraudulent act," the term takes on meaning from our construction of the word "fraud," found in the analogous "crime or fraud" exception to the attorney-client privilege. See N.J.R.E. 504(2)(a) (excepting from attorney-client privilege "a communication in the course of legal service sought or obtained in the aid of the commission of a crime or fraud"); Kevin H. Michels, New Jersey Attorney Ethics § 15:3-3 at 280 (1998) ("While the RPCs no longer incorporate the attorney-client privilege into the definition of confidential information, prior constructions of the fraud exception may be relevant in interpreting the exceptions to confidentiality contained in RPC 1.6(b) and (c). . . .") (internal citation omitted). When construing the "crime or fraud"

We likewise construe broadly the term "fraudulent act" within the meaning of RPC 1.6(c). So construed, the husband's deliberate omission of the existence of his illegitimate child constitutes a fraud on his wife. When discussing their respective estates with the firm, the husband and wife reasonably could expect that each would disclose information material to the distribution of their estates, including the existence of children who are contingent residuary beneficiaries. The husband breached that duty. Under the reciprocal wills, the existence of the husband's illegitimate child could affect the distribution of the wife's estate, if she predeceased him. Additionally, the husband's child support payments and other financial responsibilities owed to the illegitimate child could deplete that part of his estate that otherwise would pass to his wife.

From another perspective, it would be "fundamentally unfair" for the husband to reap the "joint planning advantages of access to information and certainty of outcome," while denying those same advantages to his wife. Teresa S. Collett, Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence, 28 Real Prop. Prob. Tr. J. 683, 743 (1994). In effect, the husband has used the law firm's services to defraud his wife in the preparation of her estate.

The New Jersey RPCs are based substantially on the American Bar Association Model Rules of Professional Conduct ("the Model Rules"). RPC 1.6, however, exceeds the Model Rules in authorizing the disclosure of confidential information. A brief review of the history of the Model Rules and of RPC 1.6 confirms New Jersey's more expansive commitment to the disclosure of confidential client information.

In 1977, the American Bar Association appointed a Commission on Evaluation of Professional Standards, chaired by the late Robert J. Kutak. The Commission, generally known as the "Kutak Commission," originally proposed a rule that permitted a lawyer to disclose confidential information in circumstances comparable to those permitted by RPC 1.6. The House of Delegates of the American Bar Association, however, rejected the Kutak Commission's recommendation. As adopted by the American Bar Association, Model Rule 1.6(b) permits a lawyer to reveal confidential information only "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." Unlike RPC 1.6, Model Rule 1.6 does not except information relating to the commission of a fraudulent act or that relating to a client's act that is likely to result in substantial financial injury. In no situation, moreover, does Model Rule 1.6 require disclosure. Thus, the Model Rules provide for narrower disclosure than that authorized by RPC 1.6.

In 1982, this Court appointed a committee to consider the Model Rules. The committee, chaired by the Honorable Dickinson R. Debevoise, became known as the "Debevoise Committee." It determined that the original provisions proposed by the Kutak Commission more closely reflected the existing ethics rules in New Jersey. Thus, the Committee concluded that Model Rule 1.6 would "narrow radically the circumstances in which New Jersey attorneys either may or must disclose the information of their clients' criminal or fraudulent behavior." Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct (1983), reprinted in Michels, supra, Appendix D at 1043. When adopting the RPCs, this Court substantially followed the recommendation of the Debevoise Committee. Described as an "openly-radical experiment," Geoffrey C. Hazard, Jr. & W. William Hodes, 2 The Law of Lawyering § AP4:104 (1998), RPC 1.6 "contained the most far-reaching disclosure requirements of any attorney code of conduct in the country," Leslie C. Levin, Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others, 47 Rutgers L. Rev. 81, 92 (1994).

Under RPC 1.6, the facts support disclosure to the wife. The law firm did not learn of the husband's illegitimate child in a confidential communication from him. Indeed, he concealed that information from both his wife and the firm. The law firm learned about the husband's child through its representation of the mother in her paternity action against the husband. Accordingly, the husband's expectation of nondisclosure of the information may be less than if he had communicated the information to the firm in confidence.

In addition, the husband and wife signed letters captioned "Waiver of Conflict of Interest." These letters acknowledge that information provided by one client could become available to the other. The letters, however, stop short of explicitly authorizing the firm to disclose one spouse's confidential information to the other. Even in the absence of any such explicit authorization, the spirit of the letters supports the firm's decision to disclose to the wife the existence of the husband's illegitimate child.
Neither our research nor that of counsel has revealed a dispositive judicial decision from this or any other jurisdiction on the issue of disclosure of confidential information about one client to a co-client. Persuasive secondary authority, however, supports the conclusion that the firm may disclose to the wife the existence of the husband's child.

The forthcoming Restatement (Third) of The Law Governing Lawyers § 112 comment l (Proposed Final Draft No. 1, 1996) ("the Restatement") suggests, for example, that if the attorney and the co-clients have reached a prior, explicit agreement concerning the sharing of confidential information, that agreement controls whether the attorney should disclose the confidential information of one co-client to another. Ibid. ("Co-clients . . . may explicitly agree to share information" and "can also explicitly agree that the lawyer is not to share certain information . . . with one or more other co-clients. A lawyer must honor such agreements."); see also Report of the ABA Special Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife, 28 Real Prop. Prob. Tr. J. 765, 787 (1994) ("Although legally and ethically there is no need for a prior discussion and agreement with the couple about the mode of representation, discussion and agreement are the better practice. The agreement may cover . . . the duty to keep or disclose confidences."); American College of Trust and Estate Counsel, ACTEC Commentaries on the Model Rules of Professional Conduct 65-66 (2d ed. 1995) ("When the lawyer is first consulted by the multiple potential clients the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them.").

As the preceding authorities suggest, an attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a "disclosure agreement," the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation.

In the absence of an agreement to share confidential information with co-clients, the Restatement reposes the resolution of the lawyer's competing duties within the lawyer's discretion:

[T]he lawyer, after consideration of all relevant circumstances, has the . . . discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy.

[Restatement (Third) of The Law Governing Lawyers, supra, § 112 comment l.]

Additionally, the Restatement advises that the lawyer, when withdrawing from representation of the co-clients, may inform the affected co-client that the attorney has learned of information adversely affecting that client's interests that the communicating co-client refuses to permit the lawyer to disclose. Ibid.

In the context of estate planning, the Restatement also suggests that a lawyer's disclosure of confidential information communicated by one spouse is appropriate only if the other spouse's failure to learn of the information would be materially detrimental to that other spouse or frustrate the spouse's intended testamentary arrangement. Id. § 112 comment l, illustrations 2, 3. The Restatement provides two analogous illustrations in which a lawyer has been jointly retained by a husband and wife to prepare reciprocal wills. The first illustration states:

Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other. Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about whom Husband had not previously informed Lawyer. Husband states that Wife would be distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of the information could destroy their marriage. Husband directs Lawyer not to inform Wife. The inter vivos trust that Husband proposes to create would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will, because Husband proposes to use property designated in Husband's will for a personally favored charity. In view of the lack of material effect on Wife, Lawyer may assist Husband to establish and fund the inter vivos trust and refrain from disclosing Husband's information to Wife. [Id. § 112 comment l, illustration 2.]

In authorizing non-disclosure, the Restatement explains that an attorney should refrain from disclosing the existence of the illegitimate child to the wife because the trust "would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will." Ibid.

The other illustration states:
The New York opinion addressed the following situation:

The Professional Ethics Committees of New York and Florida, however, have concluded that disclosure to a co-client is available ruling authority is "scant and offers little analytical guidance." Professional Ethics, Op. 95-4 (1997).

Prohibited. New York State Bar Ass'n Comm. on Professional Ethics, Op. 555 (1984); Florida State Bar Ass'n Comm. on confidence to the other spouse." General, "the available ruling authority points toward the conclusion that a lawyer is not required to disclose an adverse result if the confidence is, or is not, disclosed. Id. at 784. In Id. The Section of Real Property, Probate and Trust Law of the American Bar Association, in a report prepared by its Special Study Committee on Professional Responsibility, reached a similar conclusion:

Faced with any adverse confidence, the lawyer must act as a fiduciary toward joint clients. The lawyer must balance the potential for material harm to the confiding spouse caused by disclosure against the potential for material harm to the other spouse caused by a failure to disclose.


The report stresses that the resolution of the balancing test should center on the expectations of the clients. Id. at 784. In general, "the available ruling authority points toward the conclusion that a lawyer is not required to disclose an adverse confidence to the other spouse." Id. at 788. At the same time, the report acknowledges, as did the Restatement, that the available ruling authority is "scant and offers little analytical guidance." Id. at 788 n. 27.


The New York opinion addressed the following situation:

A and B formed a partnership and employed Lawyer L to represent them in connection with the partnership affairs. Subsequently, B, in a conversation with Lawyer L, advised Lawyer L that he was actively breaching the partnership agreement. B preceded this statement to Lawyer L with the statement that he proposed to tell Lawyer L something "in confidence." Lawyer L did not respond to that statement and did not understand that B intended to make a statement that would be of importance to A but that was to be kept confidential from A. Lawyer L had not, prior thereto, advised A or B that he could not receive from one communications regarding the subject of the joint
representation that would be confidential from the other. B has subsequently declined to tell A what he has told Lawyer L.

[New York State Bar Ass'n Comm. on Professional Ethics, Op. 555, supra.]

In that situation, the New York Ethics Committee concluded that the lawyer may not disclose to the co-client the communicating client's statement. The Committee based its conclusion on the absence of prior consent by the clients to the sharing of all confidential communications and the fact that the client "specifically in advance designated his communication as confidential, and the lawyer did not demur." Ibid.

The Florida Ethics Committee addressed a similar situation:

Lawyer has represented Husband and Wife for many years in a range of personal matters, including estate planning. Husband and Wife have substantial individual assets, and they also own substantial jointly-held property. Recently, Lawyer prepared new updated wills that Husband and Wife signed. Like their previous wills, their new wills primarily benefit the survivor of them for his or her life, with beneficial disposition at the death of the survivor being made equally to their children.***

Several months after the execution of the new wills, Husband confers separately with Lawyer. Husband reveals to Lawyer that he has just executed a codicil (prepared by another law firm) that makes substantial beneficial disposition to a woman with whom Husband has been having an extra-marital relationship.

[Florida State Bar Ass'n Comm. on Professional Ethics, Op. 95-4, supra.]

Reasoning that the lawyer's duty of confidentiality takes precedence over the duty to communicate all relevant information to a client, the Florida Ethics Committee concluded that the lawyer did not have discretion to reveal the information. In support of that conclusion, the Florida committee reasoned that joint clients do not necessarily expect that everything relating to the joint representation communicated by one co-client will be shared with the other co-client.

In several material respects, however, the present appeal differs from the hypothetical cases considered by the New York and Florida committees. Most significantly, the New York and Florida disciplinary rules, unlike RPC 1.6, do not except disclosure needed "to rectify the consequences of a client's . . . fraudulent act in the furtherance of which the lawyer's services had been used." RPC 1.6(c). But see New York Code of Professional Responsibility DR 4-101; Florida Rules of Professional Conduct 4-1.6. Second, Hill Wallack learned of the husband's paternity from a third party, not from the husband himself. Thus, the husband did not communicate anything to the law firm with the expectation that the communication would be kept confidential. Finally, the husband and wife, unlike the co-clients considered by the New York and Florida Committees, signed an agreement suggesting their intent to share all information with each other.

Because Hill Wallack wishes to make the disclosure, we need not reach the issue whether the lawyer's obligation to disclose is discretionary or mandatory. In conclusion, Hill Wallack may inform the wife of the existence of the husband's illegitimate child.

Finally, authorizing the disclosure of the existence, but not the identity, of the child will not contravene N.J.S.A. 9:17-42, which provides:

All papers and records and any information pertaining to an action or proceeding held under [the New Jersey Parentage Act] which may reveal the identity of any party in an action, other than the final judgment or the birth certificate, whether part of the permanent record of the court or of a file with the State registrar of vital statistics or elsewhere, are confidential and are subject to inspection only upon consent of the court and all parties to the action who are still living, or in exceptional cases only upon an order of the court for compelling reason clearly and convincingly shown.

The law firm learned of the husband's paternity of the child through the mother's disclosure before the institution of the paternity suit. It does not seek to disclose the identity of the mother or the child. Given the wife's need for the information and the law firm's right to disclose it, the disclosure of the child's existence to the wife constitutes an exceptional case with "compelling reason clearly and convincingly shown."

The judgment of the Appellate Division is reversed and the matter is remanded to the Family Part.

CHIEF JUSTICE PORITZ and JUSTICES HANDLER, GARIBALDI, STEIN, and COLEMAN join in JUSTICE POLLOCK's opinion. JUSTICE O'HERN did not participate.
MEMORANDUM OPINION AND ORDER

HART, J.

Before this court are four related cases that have been assigned to the same judge for purposes of coordinated discovery and pretrial proceedings and, if appropriate, a single trial. The cases, however, have not been consolidated; they remain separately pending cases. Each case is brought by a different plaintiff: Patrick Murray (06 C 1372), Michael Garofalo (06 C 3674), David Nelson (06 C 3675), and Mark Peers (06 C 3735). Each plaintiff was formerly employed as a sergeant in the Police Department of defendant Village of Hazel Crest. Also named as defendants are Robert Donaldson, mayor/village president of Hazel Crest; Gary Jones, police chief of Hazel Crest since April 22, 2005; and Robert Palmer, village manager of Hazel Crest. Each plaintiff applied for the position of deputy chief of police and alleges that he suffered discrimination because of race when an allegedly less-qualified African-American patrol officer was promoted to that position effective July 12, 2005. There is only one deputy chief position at the police department. Each plaintiff also alleges that he was constructively discharged as a result of his treatment, Murray and Nelson on December 1, 2005, Garofalo in June 2006, and Peers in March 2006. Each plaintiff alleges in his complaint that his damages include the loss of income that he would have earned had he been promoted to Deputy Chief and each seeks injunctive relief in the form of a promotion. Each plaintiff also alleges lost wages from being forced to resign and damages for emotional injury. Each plaintiff also seeks reinstatement.

Each plaintiff is represented by attorneys Patricia Rummer and Richard Lowell. Defendant Village of Hazel Crest has moved to disqualify counsel from representing any of the plaintiffs on the ground that conflicts of interest exist among the plaintiffs because each plaintiff contends that he should have been the one promoted to deputy chief of police. Counsel contend this is not a conflict and that each client desires to be represented by them.

Local Rule 83.51.7 provides:
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after disclosure.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after disclosure.

(c) When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

Local Rule 83.51.9 provides in part:
(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 the person’s interests are materially adverse to the interests of the former client unless the former client consents after disclosure.

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

1 Prior to the other cases being reassigned to the same judge, Murray reached an agreement with defendants to dismiss all counts except the Count I Title VII claim against the Village itself. That agreement, which was reduced to a written order entered by the court (see Order dated July 19, 2006, Docket Entry [25] in 06 C 1372), permits continued discovery related to the individual defendants and permits reinstatement of claims and defendants at the close of discovery if Murray believes evidence would support additional claims. The other plaintiffs may have reached similar agreements with defendants, but, if so, appropriate orders have not been entered. Also, none of the defendants have answered the complaints in the other cases. The Village has answered Count I of Murray’s complaint.
is less capable has a positive impact on the other plaintiffs. 22 of other applicants must decrease. Thus, even under the lost-chance theory, the plaintiffs in the present cases would be in direct competition with each other regarding lost wages. Assuming liability can be proven, any successful showing of greater capability by one plaintiff (which is absolutely necessary in order to pursue that plaintiff’s interests) is in direct conflict with the interests of the other three plaintiffs who each want to show he is the most qualified or otherwise most likely to have been promoted.

Plaintiffs contend none of them need show that he would have actually been promoted because each can proceed on a “lost-chance theory.” See Bishop, 272 F.3d at 1016-17. Under that theory, damages are calculated based on the probability that the applicant would have been promoted. See id. If there are multiple applicants for the position, a successful plaintiff’s back pay and front pay is calculated based on the probability that he or she would have been promoted absent discrimination. Where there was more than one plaintiff seeking the same position, each could recover lost pay based on each plaintiff’s probability of obtaining the promotion absent discrimination. For example, if there were five applicants for a position, four plaintiffs and a third person who was selected because of his or her race, and each one (including the one actually selected) was equally qualified to perform the work and equal as to other selection criteria as well, then each plaintiff had a 20% chance of being selected and would be entitled to 20% of the additional income he or she would have received if selected. Under the lost-chance theory, and assuming no option of nonselection for the position, the probabilities that each applicant would have been selected must total 100%. Awarding damages based on probabilities that total in excess of 100% would improperly result in an award of duplicative damages. See Bishop, 272 F.3d at 1016. Since the individual probabilities for all applicants must total 100%, any successful proof that a particular applicant had a greater probability of being selected means that the probable hiring of other applicants must decrease. Thus, even under the lost-chance theory, the plaintiffs in the present cases would be in direct competition with each other regarding lost wages. Assuming liability can be proven, any successful showing of greater capability by one plaintiff has a direct negative impact on the other plaintiffs. The corollary is that showing one of the plaintiffs is less capable has a positive impact on the other plaintiffs. Even though plaintiffs also claim some damages that are not based directly on lost wages from not being promoted, they are still in direct and irreconcilable conflict regarding back pay and front pay whether proceeding on a lost-chance theory or simply seeking to prove that each was the only one that would have been promoted.

In their surreply, counsel contends for the first time that each plaintiff seeks only his 25% share and not to prove he was more likely to have been promoted than the others. The facts alleged, however, do not support that it would be impossible to differentiate among the plaintiffs so that a 25% apportionment after proof of discriminatory intent is the only likely result. Counsel imply that plaintiffs are willing to forego the possibility of greater damages in the interest of the cost-saving of sharing counsel. There is, however, no indication that plaintiffs have been fully advised of the possibilities and consented after full disclosure. There is also no indication each plaintiff has been advised of the strengths or weaknesses of his individual claim. Given 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. Additionally, counsel’s speculative result of requiring defendants to take away the promotion and hold a new competition for the position is unlikely.

Finding the existence of a direct conflict of interest does not end the matter since it is possible that the conflict is waivable.

2 It is also possible that one of the four plaintiffs would stand out as the most qualified. In that circumstance, that plaintiff should have a lawyer independent of the other plaintiffs to advise him whether he should proceed on a lost-chance theory or instead go for it all by taking a traditional approach and eschewing the lost-chance theory.
Plaintiffs’ attorneys point to the affidavits they have provided and contend they have satisfied the requirements of Local Rule 83.51.7. Even ignoring the conclusory nature of the affidavits, they do not show that Rule 83.51.7 is satisfied. The affidavit from each of plaintiffs’ attorneys contains the following identical paragraphs:

5. I have carefully examined the applicable law and the facts to determine whether any conflict exists with respect to representing all four of the plaintiffs. I have determined as a result that there is no conflict with respect to my representation of the four individuals with respect to their claims in these cases.

6. Each of the four plaintiffs has expressly stated that he desires to be represented by the same counsel.

Despite the assertions by counsel that they have examined the law and facts and have determined that no conflict exists, the above discussion of the law shows that plaintiffs necessarily are in conflict regarding their pursuit of lost income, a form of relief that all have requested. The fact that all of them have stated that they desire to be represented by the same counsel does not satisfy the requirement of waiver because such consent must occur “after disclosure.” N.D. Ill. Loc. R. 83.51.7(b)(2). See also id. 83.51.7(c). The affidavits are silent as to any disclosures that were made. However, before requiring that counsel make full disclosures to their clients and determine if they are willing to continue to consent to representation, it should first be determined whether such a waiver is possible. As stated in the “Disclosure and Consent” section of the Committee Comment to Local Rule 83.51.7, “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.”

Here, the four plaintiffs have a common interest in showing that defendants selected the winning candidate because of his race and in showing the lack of qualifications of the candidate that was selected. There are also likely to be some economies in being represented by the same attorneys. However, plaintiffs are in direct conflict with each other regarding showing who is the most likely to have been selected for the promotion. Each plaintiff has an interest in showing that he is highly qualified and as an interest in showing that other plaintiffs lacked qualifications. The issues in conflict will have a substantial impact on any damages that are recovered. This is a situation where a disinterested attorney would determine that each plaintiff should have his own attorney. Plaintiffs’ attorneys would not be able to vigorously pursue damages on behalf of one plaintiff without coming into direct conflict with the interests of the other plaintiffs. Counsel will be disqualified from representing multiple plaintiffs in this case.

Defendants contend that present counsel should not have the option of remaining in the case by representing only one plaintiff, that they should be disqualified from representing any plaintiff in this case. Local Rule 83.51.9 applies to that issue. See N.D. Ill. Loc. R. 83.51.7, Committee Comment, “Loyalty to a Client.” If consent is obtained from the other three plaintiffs, it is possible that the attorneys could continue to represent one of the clients, or that each of the current attorneys (who apparently are independent practitioners) could each represent one plaintiff. See N.D. Ill. Loc. R. 83.51.9(a). Whether such representation would be appropriate may depend on whether plaintiffs have already revealed confidential information to the attorneys that would give unfair advantage to one of the other plaintiffs. If counsel desires to continue to represent one of the plaintiffs, counsel must carefully consider whether such representation would be appropriate and must obtain the consent of the other plaintiffs, including after each of the other plaintiffs has retained his new counsel.

Discovery in this case will be stayed until January 24, 2007. The new discovery closing date will be May 15, 2007. Plaintiffs shall retain new counsel by no later than January 5, 2007. New counsel shall promptly move for leave to substitute their appearances for former counsel. If, on the advice of new counsel, any plaintiff desires to amend his existing complaint, that plaintiff must file an amended complaint by no later than January 8, 2007. If current counsel remains in any case, counsel shall file a pleading in that case so stating. In the three cases other than Murray, defendants’ counsel shall promptly meet with new counsel to discuss whether any agreement can be reached similar to the July 19, 2006 order entered in the Murray case. Defendants shall answer or otherwise plead in those cases by no later than January 22, 2007. The next status hearing for these cases will be held on January 10, 2007 at 11:00 a.m.

IT IS THEREFORE ORDERED that defendants’ motion to disqualify counsel [31] (filed in 06 C 1372) is granted in part and denied in part. The present attorneys for plaintiffs are disqualified from representing more than one plaintiff in these four cases and may only represent one of the plaintiffs by obtaining the counseled consent of the three other plaintiffs. Discovery in the four cases is stayed until January 24, 2007 and all discovery is to be completed by no later than May 15, 2007. Defendants in 06 C 3674, 06 C 3675, and 06 C 3735 shall answer or otherwise plead by no later than January 22, 2007. A status hearing for all four cases will be held on January 10, 2007 at 11:00 a.m.

3 Since defendants have not answered, leave is not required to amend the complaints. See Fed.R.Civ.P. 15(a). The only plaintiff who would need to file a motion for leave to amend would be Murray, since the Village answered his complaint.
In the
United States Court of Appeals
For the Seventh Circuit

No. 14-2046
NELSON BROTHERS PROFESSIONAL REAL ESTATE, LLC, et al.,

Plaintiffs-Appellees,

v.

FREEBORN & PETERS, LLP,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 11 C 1277 — Harry D. Leinenweber, Judge.

ARGUED SEPTEMBER 23, 2014 — DECIDED DECEMBER 5, 2014

Before POSNER, ROVNER, and WILLIAMS, Circuit Judges.

POSNER, Circuit Judge. The plaintiffs in this diversity suit for legal malpractice are a limited liability company that we’ll call for the sake of brevity Nelson Brothers and the two brothers (Brian and Patrick Nelson) who are the sole members (owners) of the company; we’ll call them the Nelsons. The defendant, Freeborn & Peters, is a well-known Chicago law firm which the suit accuses of malpractice consisting of
eight breaches of the duty of loyalty that they owed the plaintiffs, their clients. More than $1.3 million in damages was sought. The case was tried to a jury, which returned a verdict that after being modified by the district judge awarded $786,880.85 to Nelson Brothers and $249,957.33 jointly to the two Nelsons—a total of slightly more than $1 million. The jury had calculated the total losses of Nelson Brothers and the Nelsons personally at $1,731,311.00, but had reduced the amount to $1,508,231.58 on the ground that the plaintiffs had been negligent and their negligence had contributed to their losses. The judge thus reduced the amount of damages further.

The malpractice claim arises from a transaction that the law firm handled for the plaintiffs involving real estate in Algonquin, Illinois, a suburb of Chicago. In 2008 Ben Reinberg and Burt Follman had hired Freeborn & Peters to handle their acquisition of a shopping center under construction in Algonquin, to be called the Algonquin Galleria. Edward J. Hannon was the Freeborn & Peters partner whom they dealt with. Reinberg’s and Follman’s company, Alliance Equities, contracted to buy the shopping center, but the deal had not yet closed. To help finance the acquisition Alliance Equities planned to sell ownership interests in the property to investors seeking tax advantages. These investors would be tenants in common of the shopping center. The parties call them the “TIC” investors.

Needing a partner, Alliance Equities was referred to Nelson Brothers and the two firms formed a joint venture, Alliance NW, half owned by each firm, to close the deal for the shopping center and complete its construction. The price was $22.5 million, and to help pay it Alliance NW obtained a
$16 million mortgage loan from a bank, and hired Freeborn & Peters, in the person of Hannon, to provide the legal services needed for the project. Representing as he did a joint venture of Alliance Equities and Nelson Brothers, Hannon was obligated to be loyal to both. The plaintiffs argue that he breached his duty to them in a variety of respects, for example by favoring Alliance Equities, his original client, over Nelson Brothers.

The agreement establishing the joint venture appointed three persons to manage the venture: Reinberg, Follman, and one of the Nelsons (Patrick), rather than all four of the principals (Reinberg, Follman, and both Nelsons). Expenditures of up to $50,000 could be authorized by a majority of the managers, thus giving Alliance Equities control of such expenditures. Larger expenditures required the agreement of the joint venture’s members, Alliance Equities and Nelson Brothers. Patrick Nelson testified that Hannon did not inform him that the Nelsons could be outvoted with regard to expenditure decisions by the managers within the $50,000 limit.

The agreement made Nelson Brothers responsible both for obtaining the money needed to close the deal to buy the shopping center and for selling ownership interests to TIC investors. The amount of money needed for the closing was the difference between the $22.5 million purchase price and the sum of the $16 million mortgage loan and money received from the sale of ownership interests. Nelson Brothers agreed that it would obtain a loan in the amount required to close the gap and that the loan would be without recourse to Alliance Equities, meaning that Alliance Equities would not
be liable should the joint venture fail to repay the loan—only Nelson Brothers would be.

Nelson Brothers obtained a gap loan (a “mezzanine” loan, as it is called in the trade) of $5.175 million, but this was short by more than a million dollars of closing the gap between the mortgage loan and the purchase price. So Nelson Brothers obtained a second gap loan, again without recourse to Alliance Equities—so again only Nelson Brothers would be liable to the lender should there be a default.

There were mechanics’ liens on the shopping center as a result of costs incurred during its construction. At least some of those liens, however, were insured against by title insurance policies. The bank that had made the $16 million mortgage loan was comfortable with the mechanics’ liens; although they were prior debts, the bank considered its loan protected by its title insurance; should enforcement of the mechanics’ liens result in losses of property that was collateral for the loan, the title insurer would cover the loss. See Noel C. Paul & Andrea Yassemedis, “Title Insurance Coverage for Mechanics Liens: A Lender’s Guide,” Oct. 31, 2012, http://apps.americanbar.org/litigation/committees/insurance/articles/septoct2012-mechanics-liens.html (visited Dec. 2, 2014). The gap lender was similarly protected. But some of the potential TIC investors became spooked when they learned there were mechanics’ liens on the property, fearing that as part owners they might have to repay part of the liens or lose their ownership interests to foreclosure. As a result there was a delay in closing some $3 to $4 million in TIC sales, and some of the sales were cancelled altogether.

The Nelsons were alarmed. They needed the money from those sales to close the deal to buy the shopping center. They
decided to retain new lawyers rather than rely on Freeborn & Peters, which they were beginning to distrust, to help them solve the problem. The fees they paid their new lawyers are part of the damages they seek to recover in this lawsuit. The Nelsons contend that Hannon had failed to advise them that there were mechanics’ liens on the property, or to create an escrow fund to enable the liens to be removed so that they wouldn’t prevent sales to the TIC investors from closing.

Freeborn & Peters ripostes that the sale of the shopping center to the joint venture closed only two weeks before the financial collapse of September 2008, which drove down real estate values, and that as a result it became difficult to attract TIC investors. But apportioning the losses to the plaintiffs between inadequate representation by Freeborn & Peters and a sudden scarcity of potential TIC investors attributable to the financial collapse was a task for the jury. The law firm also argues that the plaintiffs’ claim of damages caused by Hannon’s failure to advise them of the mechanics’ liens is barred by the statute of limitations, but they waived this argument in the district court by not making it until after the jury’s verdict, which was too late. See Fed. R. Civ. P. 50, Committee Notes on Rules—2006 Amendment; United States EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1286–87 (7th Cir. 1995); United States for Use of Wallace v. Flintco Inc., 143 F.3d 955, 960–61 (5th Cir. 1998).

The plaintiffs’ loss was the difference between their expenditures in trying to obtain a substantial interest in the shopping center and what they obtained for those expenditures—namely, that interest. If that interest were worth anything, awarding the plaintiffs as damages all their expendi-
tures would overcompensate them. But their contention, which the jury appears to have accepted, is that the interest they acquired was worthless because without the money of the potential TIC investors who were scared off by the mechanics’ liens Nelson Brothers could not repay the loans that had been used to buy the property, which it alone was obligated to repay. An alternative possibility is that the project failed simply because of the financial crisis, which as we said hit real estate hard. But the jury didn’t buy that theory.

A dispute arose between Alliance Equities and Nelson Brothers over fees owed Freeborn & Peters. (No surprise there.) Alliance Equities wanted to use proceeds from a sale of TIC interests to pay down those fees. Nelson Brothers disagreed. But exercising their right to authorize expenditures by the joint venture of less than $50,000, Reinberg and Follman, over the opposition of the third manager, Patrick Nelson, voted to pay $49,999 of the TIC proceeds to Freeborn & Peters. This transaction infuriated the gap lender, who, according to Patrick, threatened to declare Alliance NW in default for failing to remit the TIC proceeds to it. This contretemps occurred on the eve of the expiration of the six-month term of the gap loan. The joint venture wanted an extension; the lender granted a three-month extension but at a price twice as high as contemplated in the loan agreement. The plaintiffs blame Hannon for failing to prevent the $49,999 expenditure that by violating the terms of the gap loan agreement precipitated the imposition of stiff terms for the extension.

Still another concern of the Nelsons about the gap loan was that the loan agreement imposed what are called “bad boy” guarantees on them. As a result, not only was the loan
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nonrecourse against Alliance Equities but the Nelsons individually were guarantors. They contend that they had to hire another law firm to advise them of the breadth of the guarantees, which they say Hannon hadn’t explained to them.

Freeborn & Peters denied in the district court that they had been retained to represent either Nelson Brothers or the Nelsons with regard to the terms of the gap loan. But on appeal they have switched grounds and contend that because the Nelsons were never required to make good on the guarantees, they incurred no loss that can be attributed to the law firm. The contention overlooks the fact that the fees the Nelsons paid their new lawyers were a reasonable measure to head off the harm that could have resulted from Freeborn & Peters’s failure to advise the plaintiffs of the risks associated with the guarantees. The fees mitigated the consequences of that failure—a failure the plaintiffs deem negligent.

Eventually, with the gap loan partially repaid yet more than $4.3 million of principal still owing on it, the joint venture sought and was refused a further extension of the loan. Shortly afterward the lender declared a default, requiring Nelson Brothers to repay the loan.

Hannon admits that he never discussed with the Nelsons the potential conflicts of interest between them and Alliance Equities or the possibility that the Nelsons should retain separate counsel to advise them.

Of the $1,731,311 in damages sought by the plaintiffs, $259,069 were for the lawyers’ fees they incurred (other than to Freeborn & Peters) to resolve the mechanics’ liens problem and to assess the risks associated with the Nelsons’ per-
sonal guarantees of the extended gap loan. The balance of the damages sought consisted of money that the Nelsons had to repay to another gap lender and to relatives from whom they had borrowed and of earnest money to secure membership in the joint venture. They claim that they would not have borrowed any of this money or entered into the joint venture in the first place had Hannon advised them of the risks they were taking—the risks created for example by the bad-boy guarantees, Alliance Equities’ control of expenditures under $50,000 (which led to the expenditure that caused such trouble with the original gap lender), and the absence of an escrow fund to pay off mechanics’ liens. Implicit in treating the repayments of loans as losses is that the money borrowed produced no profits for Nelson Brothers or net income for the Nelsons personally. For the acquisition of the shopping center turned out to be a flop, causing substantial losses to both the Nelsons and their company as a result of their having to repay substantial loans from which they derived no benefit.

Freeborn & Peters argued at trial that it didn’t represent the plaintiffs at all, but that is wrong. It represented both parties to the joint venture, Alliance Equities and Nelson Brothers, and Nelson Brothers and the Nelsons are interchangeable. A reasonable jury could find that the law firm violated its ethical obligations to the plaintiffs by not warning them of the firm’s conflicts of interest, by drafting agreements that reflected favoritism toward Alliance Equities and concealing the favoritism from the plaintiffs (as by not revealing that Alliance Equities would be controlling the below-$50,000 expenditures—which later resulted in the decision to pay the law firm $49,999 owed to the gap lender), and by failing to advise the plaintiffs of the risks to them
created by the bad-boy guarantees and the mechanics’ liens on the shopping center, and finally by closing the deal for the shopping center without providing for an escrow to cover the liens.

Freeborn & Peters argues that it isn’t liable for any problems with the mechanics’ liens because it was unforeseeable that the mortgage lender would be worried by them. The argument ignores the fact that the TIC investors may have been scared off investing by fear that they might have to pay off the liens as part owners of the shopping center. An expert witness for the plaintiffs testified that title insurance would not have assuaged the investors’ fears as well as an escrow fund would have done because the title insurer might find reasons not to indemnify the insureds.

The law firm argues that at least it has no liability to the Nelsons as distinct from their company because they were not a client but merely the client’s owners. Corporate shareholders (or their equivalent, members of an LLC) can’t seek personal damages for an injury to their corporation, since if the corporation obtains damages the shareholders will be compensated indirectly—their shares will be worth more. But the law firm created individual liabilities for the Nelsons—their personal guarantees of the gap loan and their obligations to repay the relatives from whom they borrowed money to enable repayment of that loan.
The jury’s determination of liability is thus unassailable. But its damages award, even as corrected by the district judge, was irregular and presents the most difficult issue in this appeal.

The plaintiffs made the following expenditures that they claim they would not have made had it not been for Freeborn & Peters’ malpractice: Expenditures by Nelson Brothers: $1,283,373.11 as an equity contribution to Alliance NW; $141,000 in earnest money to secure membership in Alliance NW; $120,000 paid in attorneys’ fees for legal defense costs necessitated by the default on one of the gap loans; $55,714.82 in attorneys’ fees for advice on clarifying the scope of the guarantees; $83,354 in attorneys’ fees for clarifying potential obligations stemming from the mechanics’ liens. Expenditures by the brothers rather than by their company: $47,869 repaid by the Nelsons to relatives from whom they’d borrowed $161,000.

The plaintiffs’ total losses were thus $1,283,373.11 + $141,000 + $120,000 + $55,714.82 + $83,354 + $47,869 = $1,731,310.93. The jury assessed Nelson Brothers’ damages at $865,655.50 and the brothers’ damages at $865,655.50. (The sum of the two amounts is 7 cents more than the above total, a difference that can be disregarded.) But the jury also found contributory negligence by Nelson Brothers and the two brothers and reduced the award to Nelson Brothers to $865,655.50 x (1 – 9.1%) = $786,880.85 and the award to the two brothers to $865,655.50 x (1 – 16.67%) = $721,350.73.

The district judge further reduced the brothers’ award—to $249,957.33. He got there by finding, first, that the Nelsons, not their company, had paid the $55,714.82 in attorneys’ fees incurred to clarify the guarantees and the $83,354
in fees to try to resolve the effect of the mechanics’ liens. To these amounts he added $161,000—the principal of the loan the Nelsons had obtained from their relatives, rather than $47,869, the amount they had repaid. These additions brought the total up to $300,068.82, which the judge then reduced by the percentage the jury had attributed to the brothers’ contributory negligence. The result, after the judge rounded the jury’s 16.67% calculation to 16.7% and applied the deduction to his gross estimate of $300,068.62, was $249,957.33, and the Nelsons accepted that amount.

Both jury and judge made mistakes. The jury split the damages 50-50 between Nelson Brothers the company and the brothers themselves, even though the Nelsons’ only loss to date is the $47,869 they repaid for the loan they received from their relatives. The losses could be greater should the Nelson brothers ever have to pay back the balance of the $161,000 loan from their relatives, but the parties have not addressed that question.

The judge incorrectly found that the Nelsons had paid the $55,714.82 in attorneys’ fees incurred to clarify the guarantees and the $83,354 in attorneys’ fees incurred to clarify the mechanics’ liens. In fact, Patrick Nelson testified that Nelson Brothers LLC had paid both of those sums, and Freeborn & Peters doesn’t contest that. And remember that the judge deemed $161,000 (the principal of the loan from the relatives), rather than $47,869 (what the brothers repaid) as the brothers’ loss from having to obtain the loan—without determining whether they would ever be asked to repay it.

Nelson Brothers was entitled by way of damages to all of its expenditures, after the discount for its contributory negligence: $1,530,248.71 [(($1,283,373.11 + $141,000 + $120,000 +
$55,714.82 + $83,354) x (1 – .091)]. The Nelsons were entitled to their expenditures (net of their contributory-negligence offset), but their only expenditure was the partial repayment of the loan to them by their relatives, $47,869, which after the jury’s adjustment for their contributory negligence adjustment was only $39,889.24. Yet the judge decided that Nelson Brothers should be awarded $786,880.85 and the brothers $249,957.33. This overcompensates the brothers—awarded $249,957.33 though entitled to only $39,889.24—and undercompensates Nelson Brothers, awarded only $786,880.85 but entitled to $1,530,248.71. Nevertheless, because the plaintiffs as a whole were awarded only $1,036,838.18, which is much less than the $1,530,248.71 to which they’re entitled, yet they aren’t asking for more, and because, the brothers and their company appear to be interchangeable, the errors made by jury and judge seem harmless. Cf. Fisher v. Agios Nicolaos V, 628 F.2d 308, 318–21 (5th Cir. 1980); International Paper Co. v. Busby, 182 F.2d 790, 792–93 (5th Cir. 1950). In any case, the errors don’t harm the defendant, which can’t (so far as we know) care whether it writes a check to the Nelsons or to their LLC. Nor is there any evidence that any creditors of Nelson Brothers will be harmed by this division of damages between the company and its owners. Nor are the plaintiffs complaining about the damages they’ve been awarded.

AFFIRMED.
MEMORANDUM OPINION

Robert E. Payne, Senior District Judge.

This matter is before the Court on PLAINTIFFS' MOTION TO DISQUALIFY DEFENSE COUNSEL ON THE BASIS OF A CONFLICT OF INTEREST (Docket No. 209). For the reasons and to the extent set forth below, the motion is granted.

BACKGROUND

This action arises out of the death of John Charles Sanford on December 24, 2006. At the time of his death, Sanford was a patient in the Medical College of Virginia Main Hospital (the "Hospital") who was recovering from surgery, which had been performed on December 20, 2006, in which his kidney was removed. The Plaintiffs, the administrator of Sanford's estate and several of his relatives, filed this action against a number of medical personnel employed by the Hospital, a security guard at the Hospital and a number of police officers who are members of the Virginia Commonwealth University Police Department ("VCUPD"). The Hospital is run by the Virginia Commonwealth University Health System ("VCUHS"). The VCUPD officer defendants are employed by the Virginia Commonwealth University ("VCU") and, respectively, are the former Chief and several officers employed by the VCUPD. The VCUHS and VCU are agencies of the Commonwealth of Virginia. At all times pertinent to this action, all of the defendants were acting within the scope of their employment by their respective agencies and under color of state law.

A. The Nature Of The Claims

The Plaintiffs' claims are now in the third iteration, the Court recently having permitted the filing of the Second Amended Complaint. The claims against the VCUPD defendants (Mark B. Bailey, Ellsworth C. Pryor, Loran B. Carter, Craig L. Branch, Aaron K. LaVigne, and Willie B. Fuller by his guardian) arise out of the conduct of those defendants in restraining John Sanford two days after the removal of his kidney when the VCUPD officer defendants were summoned to Sanford's room by MCV medical personnel. The claim against Sammy Lancaster, a security guard employed by the Hospital, arise out of his conduct in the effectuation of the restraints imposed on Sanford. There are medical malpractice claims against Dr. Baruch M. Grob, Dr. Harry Kou, Dr. Ahmed S. A. Meguid, Dr. Patrick G. Maiberger, and the MCV Associated Physicians, the practice group to which those doctors belong. Also, there are claims against three nurses, Jowanna D. Brown, Patricia M. Ferguson, and Ma. Honey Faye Magdaug, and their supervisor, Chief Nursing Officer ("CNO"), Carol M. Crosby.

The claims against Colonel Fuller and CNO Crosby are grounded in their alleged failures to train properly the VCUPD officer defendants and the nurses respectively.

B. Sanford's Hospitalization And The Events Before December 24, 2006

The circumstances leading up to the death of John Sanford require brief explication because those facts are pertinent to the disqualification issues. Sanford was admitted to MCV to have surgery for the removal of a kidney on December 20, 2006. At the time, Sanford was 40 years of age, five feet five inches tall, weighed 150 pounds, and was mentally and physically disabled.

He was declared mentally and physically disabled by the Social Security Administration on July 30, 1993. In April 1994, a physician at MCV determined that Sanford was suffering from Biemond's Syndrome, a neurological condition which included cerebellar damage and ataxia (a severe loss of muscular coordination). Sanford's head and body shook almost continuously and, at times, rather violently. He was able to walk only with the assistance of a "walker," and he wore leg braces which extended from knee to foot.

It is alleged that, on December 22, 2006, two days after his surgery, Sanford was found by his brother in the hall outside his room at which time he was naked, delirious, hallucinating, and clinging to a hand rail for support, trying to hold himself upright without the assistance of the walker. It is alleged that Sanford's delirium and hallucinations were the consequence of toxic levels of certain medications prescribed and administered by the MCV medical defendants. The MCV medical staff was aware of Sanford's condition and had summoned the VCUPD to help in restraining him. However, before the VCUPD officers arrived, Sanford's brother, the lead plaintiff in this case, was successful in
penetrating the delirium in returning Sanford to his room and getting him into his bed. It is alleged that, on December 23, 2006, other family members found Sanford delirious and hallucinating and concluded that he was not being attended by any physician or nurse because he was on the floor in his hospital room partially disrobed and cleaning up imaginary blood.

As a consequence of the events of December 22 and 23, the lead plaintiff requested a psychiatric consult and liaison service, asserting that the justification therefore was that Sanford was not acting as he usually acted and that he was not being cared for in the manner consistent with his disability and his post-operative condition.

C. December 24, 2006: Sanford's Death And The Plaintiffs' Claims

On December 24, 2006, it is alleged that Sanford became delirious as a consequence of the medications he had been prescribed and administered by the MCV medical defendants. The nursing defendants (except CNO Crosby) summoned the VCUPD officers (except for Colonel Fuller), and the security guard, Lancaster, to the scene. Lancaster and Officer Bailey of the VCUPD responded and allegedly physically seized Sanford, wrestled him to the ground, put his hands behind his back, handcuffed him with metal handcuffs and held him prone. He was kept in that position by Bailey, aided by Lancaster and the other VCUPD officer defendants, for approximately thirty minutes. During that time, one or more of the nursing defendants injected him with Haldol, a sedative. After he had been laying handcuffed and prone for approximately thirty minutes, the VCUPD officers and the nursing staff turned Sanford over and discovered that he was dead. Officer Bailey and Lancaster are alleged to have used excessive force to effectuate an unreasonable seizure in violation of the Fourth Amendment (Count One). All of the VCUPD defendants (except for Colonel Fuller) and security guard Lancaster are alleged to have violated Sanford's due process rights under the Fourteenth Amendment in the means of restraining him. Three of the nurses, Nurse Ferguson, Nurse Magdaug, and Nurse Brown, are also alleged to have violated the same rights by virtue of their participation in the restraint process and in failing to monitor the defendant while in restraints (Count Two). In like fashion, all of the VCUPD defendants (except for Colonel Fuller) and the same nurses are charged with the same type of violations, i.e. due process violations of the Fourteenth Amendment rights of Sanford, by creating a danger to Sanford and not dealing with it properly (Count Three). The same defendants are charged with deprivation of life in violation of Sanford's due process rights under the Fourteenth Amendment, by virtue of the same conduct (Count Four). Colonel Fuller is charged with violating the Fourteenth Amendment rights of Sanford by failing to discharge his supervisory duty to train the VCUPD officer defendants in how to effectuate the restraint of a mentally disabled hospital patient, alleging that the CNO Crosby is likewise charged with violating Sanford's due process rights under the Fourteenth Amendment by failing to train her employees in the proper manner to restrain Sanford (Count Six).

All of the VCUPD officer defendants (other than Colonel Fuller) and security guard Lancaster are charged with a civil conspiracy to violate the previously alleged Fourteenth Amendment due process rights (Count Seven).

The VCUPD officer defendants (other than Colonel Fuller), security guard Lancaster, and nurses Ferguson and Magdaug are charged with gross negligence in the application of excessively forceful restraints and failure to monitor Sanford appropriately while he was thus restrained (Count Eight). Officer Bailey, Corporal Branch, security guard Lancaster, and Nurse Brown are charged with willful and wanton negligence in the administration of restraints and in Nurse Brown's administration of medicine while Sanford was in restraints (Count Nine). Officer Pryor, Officer Carter, Officer Branch and security guard Lancaster and Nurses Ferguson and Brown are charged with battery, apparently through the restraint conduct and the administration of a high dose of inappropriate medication (Count Ten).

All of the VCUPD officer defendants (except for Colonel Fuller), security guard Lancaster, and Nurses Ferguson and Magdaug are charged with false imprisonment by virtue of the restraint process (Count Eleven). Officer Bailey, Officer Pryor, Officer Carter, Officer Branch, security guard Lancaster, and Nurses Ferguson and Brown are charged with the intentional and/or reckless infliction of mental distress, again by virtue of the application of the restraints (Count Twelve). The VCUPD defendants (other than Colonel Fuller) and security guard Lancaster are charged with a common law civil conspiracy to unlawfully restrain Sanford (Count Thirteen).

The physician defendants, Drs. Grob, Kou, Meguid, and Maiberger, are charged with medical malpractice in several ways (Count Fourteen). Drs. Grob and Kou are charged with breaching the standard of care by improperly prescribing certain medications, by failing to recognize Sanford's delirium, by failing to make an appropriate medical assessment and intervention respecting the delirium, by failing to communicate with other attending physicians and with
consultant physicians, and by failing to proactively be involved in the patient's care in failing to supervise those who treated Sanford.

Dr. Meguid is charged with medical malpractice by failing to monitor and follow-up Sanford's compromised condition, by failing to consider the consequences of recommending administration of medications, by failing to communicate with Drs. Grob and Kou and the residents who provided Sanford's post-operative care, by failing to conduct a proper consult assessment, by failing to properly diagnose delirium, and by failing to recommend medical assessment.

Drs. Grob, Kou, and Dr. Meguid are charged also with medical malpractice by failing to know and consider Sanford's baseline physical and medical disabilities in giving orders for his care, by failing to recognize the toxicity of medication and prescribing concurrent medications which were inappropriate, by failing to monitor and adjust his medications, by failing to diagnose the cause of delirium, and by failing to respond to the symptoms of medical toxicity. Dr. Maiberger is charged with medical malpractice by failing to review and know Sanford's medical records, by failing to be aware of other physicians' orders, by not knowing Sanford's baseline condition and pre-existing medical conditions as well as his current medical conditions, by failing to return calls for assistance for a period of two hours and forty-eight minutes while Sanford's condition rapidly deteriorated, by failing to examine Sanford immediately upon learning of his deteriorated condition and perhaps ordering medication without examining his patient, by ordering an improperly high dose of medication without appropriate monitoring, and by failing to give notice to the other defendants of Sanford's already compromised condition.

The same lawyer represents all of the VCUPD officer defendants and Colonel Fuller (the "VCUPD defendants"). Another lawyer represents security guard Lancaster and all of the other MCV employees who are either doctors or nurses (the "MCV defendants"). Thus, each lawyer representing each set of defendants has multiple clients.

DISCUSSION

The motion to disqualify defense counsel is based upon Virginia State Bar Rule of Professional Conduct 1.7, entitled "Conflict of Interest." Rule 1.7 provides that:

(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: * * *

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyers' responsibilities to another client, a former client or a third person or by personal interest of the lawyer.

The rule is explicated by explanatory notes.

Note [8] provides that:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not preclude the representation. The critical questions are the likelihood that a conflict will eventuate, and if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or courses of action that reasonably should be pursued on behalf of the client.

Note [9] to Rule 1.7 cautions that the assertion of a conflict of interest by an opposing party must be "viewed with caution . . . for it can be misused as a technique of harassment." Note [9] observes that, while the "resolution of questions respecting conflict of interest is primarily the responsibility of the lawyer who is undertaking the representation," the Court may raise the question "when there is reason to infer that the lawyer has neglected the responsibility."

In this case, the possibility of the conflict was identified at two pretrial conferences: the Initial Pretrial Conference on March 25, 2009, 2 and the status conference on September 25, 2009. Counsel for both sets of defendants represent that thereafter, each of the lawyers met with their respective clients and, pursuant to Rule 1.7(b), secured the consent of each client to the joint representation. Each lawyer has expressed the view that he will "be able to provide competent and diligent representation to each affected client." Under Rule 1.7, joint representation can be permitted.

The Plaintiffs contend that Note [19] operates to negate the consent. The rule provides:
However, 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.

Note [23] provides that:

"[a]n impermissible 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.

According to counsel for the Plaintiffs, the current conflicts exist by reason of substantial discrepancy in the parties' testimony and the incompatibility in positions in relation to opposing parties. Further, it appears that there are substantially different possibilities of settlement of the claims or liabilities in question as to different defendants and that too is a topic that must be examined.

The Court has required the Plaintiffs to specify the conflicts thought to be at issue so that the necessary assessments can be made. The identified conflicts are summarized in the following paragraphs.

In support of the disqualification motion, the Plaintiffs have identified three types of conflict that must be examined respecting disqualification of counsel for the VCUPD defendants. The Plaintiffs have identified five kinds of conflicts which need to be examined to determine whether disqualification is necessary for the MCV defendants. Each will be considered in turn.

A. VCUPD Officer Defendants

First, there is, according to the Plaintiffs, the conflict between Colonel Fuller and all of the subordinate VCU police officers respecting the adequacy of training for dealing with hospital patients. Colonel Fuller has admitted that VCUPD officers receive no special training about how to deal with restraining hospital patients. In sum, it is the position of Colonel Fuller that his officers are adequately trained to deal with hospital patients because their general training about how to deal with handcuffed persons includes instruction to check for signs of physical distress and for difficulty in breathing.

The testimony of Officer LaVigne is that subordinate officers received no training for handling patients in a health care setting and Officer Carter testifies that she is not trained to look for signs of distress or difficulty in breathing. Officer Carter's testimony clearly conflicted with Colonel Fuller's testimony on that point. Officer LaVigne's does not. However, LaVigne's testimony would permit an argument that he engaged in no misconduct, and that the lack of training respecting how to deal with hospital patients, not his conduct, was the cause of Sanford's death. Officer Pryor testified that he did not monitor Sanford during the period when he was handcuffed and that places his testimony also at odds with the position of Colonel Fuller respecting the adequacy of training.

Thus, on this topic, the adequacy of training, there appears to be a substantial discrepancy in the testimony of the VCUPD officer defendants and an incompatibility in positions that the VCUPD officer defendants occupy vis-a-vis Colonel Fuller. The possibilities for settlement also appear to be substantially different on the claims and liabilities in question as to Colonel Fuller, on one hand, and the VCUPD officer defendants, on the other.

It is also asserted by the Plaintiffs that there is conflict between the VCUPD officer defendants who initially responded to the summons to Sanford's room and effectuated the seizure by handcuffing Sanford and keeping him facedown on the floor, and those officers who arrived on the scene later. This conflict arises out of the undisputed evidence that the accepted protocol for the VCUPD in situations such as the one here at issue is that the first responding officer provides the lead and that subsequently responding officers follow the instructions of the lead officer. Officer Bailey was the lead responder and the other defendants, Officers Pryor, LaVigne, and Carter, followed his lead, as specified by the departmental protocol. Further, it appears also that Officers Pryor and Carter followed explicit directions given by Officer Bailey after they arrived at the scene. Thus, the objective evidence is that Officer Bailey took the action which resulted in handcuffing Sanford and in maintaining him in a prone position and that Officers Pryor and Carter acted pursuant to his explicit direction in doing what they did and that Officer LaVigne followed Officer Bailey's lead in accord with the departmental protocol.

These largely undisputed facts present a somewhat clearer incompatibility in the positions occupied by Officer Bailey, on the one hand, and Officers Pryor, Carter and LaVigne, on the other. The latter would be able to assert that their conduct was governed by protocol, which had been set in place when they arrived upon the scene and by the instructions of
Officer Bailey. Thus, they could argue that the reasonableness of their conduct, which lies at the heart of their ability to
defend a number of the claims against them, must be assessed differently than the conduct of Officer Bailey who was the
one who first laid hands on Sanford and who also dictated that Sanford be kept in handcuffs and be kept facedown in the
prone position. The positional incompatibility in presenting a defense is obvious. In addition to the incompatibility of
positions in relation to Sanford, the same facts give rise to a considerably different possibility for settlement with respect
to Officers LaVigne, Pryor, and Carter on the one hand and Officer Bailey on the other.

Lastly, the Plaintiffs point to a conflict created by an order that was issued by Corporal Branch, the superior of all of the
other VCU police officers (excepting Colonel Fuller). Corporal Branch arrived after the other officers had arrived and
acted. It was undisputed that Sanford was calm by the time that Corporal Branch arrived upon the scene. It was further
undisputed that Corporal Branch gave an order to Officer Bailey and the other officers to keep Sanford in the restraints
until stronger restraints arrived from the psychiatric ward (such restraints having been sent for by the nursing staff at the
direction of the VCU police officer defendants). Corporal Branch has said that he intended his order to mean that Officer
Bailey and the others should keep Sanford handcuffed and prone until the stronger restraints arrived. After issuing that
order, Corporal Branch left the scene. It also appears that Sanford died during this phase of the restraint.

The testimony of Corporal Branch in this regard gives rise to a potential positional conflict between Officer Bailey and
Branch, and also between Colonel Fuller and Corporal Branch. Because of the sequence in which depositions were taken,
it is not clear that there is a positional conflict between Branch and Officer Carter.

A lawyer representing the officers other than Corporal Branch might reasonably be expected to argue to the jury that the
conduct of those officers was quite reasonable in view of Corporal Branch's instruction. Of course, the mere fact that they
were following Corporal Branch's instructions would not present a legal defense, but it would present a significant basis
for differentiating the reasonableness of the conduct of Corporal Branch on the one hand and the other officers on the
other. Further, the evidence respecting Corporal Branch's instruction gives rise to significantly different possibilities of
settlement of the claims and liabilities in question.

Moreover, the situation confronting Officers LaVigne, Pryor, and Carter must be measured in perspective of Officer
Bailey's conduct (handcuffing Sanford and keeping him prone) and Corporal Branch's order (to keep him that way).
Thus, it is rather clear that to defend the reasonableness of their conduct, as well as the rightness of their conduct, Officers
LaVigne, Carter, and Prior would want to point to the conduct of Officer Bailey and Corporal Branch as the cause of
Sanford's death, rather than the action they took in doing what they were told to do by the departmental protocol, by
Officer Bailey and Corporal Branch.

B. VCU Medical Defendants

The motion asserts several conflicts among the VCU medical defendants. First, Dr. Meguid diagnosed Sanford's
condition as opium withdrawal rather than delirium, a condition which Dr. Meguid stated might be present in Sanford
only in its waning stages. Several defense experts (a pharmacist, a toxicologist, and a psychiatrist) have expressed the
opinion that Sanford's symptoms were consistent with delirium, not with opium withdrawal. The Plaintiffs intend to offer
evidence that Dr. Meguid's diagnosis was erroneous and that, as a consequence of the misdiagnosis, certain of Sanford's
medications were resumed without the necessary, precedent tests. As a consequence, it will be said by other expert
witnesses that certain drug levels reached toxic levels and created episodes of delirium which led to the decision to
restrain Sanford and hence to his death.

In other words, the expert opinions of the defense experts will support the conclusion that Dr. Meguid misdiagnosed
Sanford. There is a medical malpractice claim against Dr. Meguid and an attorney representing Dr. Meguid would
certainly want to present expert testimony that Dr. Meguid's diagnosis was correct. However, there appears to be no such
evidence offered on his behalf and, indeed, the defense experts render opinions which make it quite difficult for Dr.
Meguid to assert that his diagnosis was a correct one. On this record, there is a significant incompatibility in position
between Dr. Meguid and the other medical professionals on this issue. In addition, the existence of the testimony of these
other medical experts on behalf of the medical defendants other than Dr. Meguid presents a substantially different
possibility for settlement of the claims and liabilities in question.

Second, it is undisputed that Dr. Meguid made a medical note that Haldol should be avoided for Sanford, if possible.
Further, Dr. Meguid recognized that Haldol might not be appropriate for a patient with Biemond's Syndrome and that the
drug could have adverse cardiac side effects. Dr. Maiberger, however, prescribed Haldol and Nurse Brown or Nurse
Ferguson administered Haldol. Neither of the three were aware of Dr. Meguid's cautions respecting the use of Haldol for
Sanford. At oral argument on the disqualification motion, counsel for the medical defendants asserted that it was the
position of Dr. Maiberger and Nurse Brown that they had no reason to be aware of Dr. Meguid's caution because Dr. Meguid had not entered his note in the computerized system which, in turn, would have alerted the nurses to Dr. Meguid's cautionary advice. That failure is a further indictment of Dr. Meguid.

Quite clearly there are conflicting positions presented by the testimony. Dr. Meguid certainly is entitled to present, as part of his defense, that he cautioned against the use of Haldol. At the same time, Dr. Maiberger and the nurses intend to say that they had no reason to know of this caution because Dr. Meguid did not act in accord with established procedure at the Hospital to take the necessary actions to alert them to his caution. Counsel for Dr. Maiberger and the nurses, therefore, would certainly want to point the finger of fault toward Dr. Meguid as part of the means of defending Dr. Maiberger and the nurses.

Neither Dr. Maiberger nor the nurses have asserted the position (Dr. Meguid's failure to enter the note in the computer) that quite logically might assist in exonerating them from liability, if supported by the evidence and if accepted by the jury. Also, there is a positional incompatibility between Dr. Maiberger and Nurse Brown, on the one hand, and Dr. Meguid, on the other as respects the propriety of using Haldol to sedate Sanford. Additionally, the factual differences presented by the potential different defenses present substantially different possibilities of settlement of the claims and liabilities in question.

Third, it is alleged that there exists a conflict between CNO Crosby and Nurse Brown on the issue of training. CNO Crosby asserts that Nurse Brown was properly trained in every respect and, in particular, in the restraint policy that CNO Crosby says that she established. It is beyond dispute that Nurse Brown violated the restraint policy as it is understood by CNO Crosby. Thus, as the Plaintiffs contend, if CNO Crosby properly trained Nurse Brown to follow the policy, then Nurse Brown ignored that training and that fact would certainly be pertinent in making out a defense for Chief Nurse Crosby. On the other hand, if Nurse Brown complied with her training, then a reasonable juror could conclude, and counsel representing Nurse Brown would want to argue, that she was not properly trained and that her actions were reasonable ones. Here too, there is a positional conflict between these two defendants.

Fourth, it is alleged that there is a likely conflict between Dr. Grob, the urologist who performed the surgery and under whose care Sanford was at the time of the incident, and Dr. Koo, an attending physician. Dr. Grob was on vacation at the time of Sanford's death, and had delegated the task of post-operatively caring for Sanford to Dr. Koo. Dr. Koo is a newly added defendant, and he has not been deposed so it is uncertain what his position will be. The claims against Dr. Grob include failing to recognize signs of Sanford's delirium, failing to supervise residents, failing properly to communicate with consultant physicians and failing properly to communicate with the attending physician who was covering for Dr. Grob. That physician is Dr. Koo.

Dr. Grob has fastened his defense on the fact that he was on a holiday vacation, and that he had turned all of the responsibility for Sanford's care to Dr. Koo as a covering attendant physician. Thus, it appears rather likely that there is a conflict between Dr. Grob and Dr. Koo. The conflict is positional in nature and has a significant impact on the settlement possibilities, particularly as to Dr. Grob.

Finally, it is alleged that Dr. Maiberger was not properly advised of the facts by Nurse Brown at the time that he had prescribed the administration of Haldol for Sanford. Dr. Maiberger prescribed the use of Haldol without seeing Sanford and did so on the basis of a description given by Nurse Brown over the telephone to the effect that Sanford's conduct was such that it took six officers to hold Sanford down. The record simply does not support the version of facts communicated by Nurse Brown to Dr. Maiberger. Indeed, there is evidence that only two people were involved in handcuffing Sanford; that the task was accomplished relatively quickly; and that Sanford was in fact calm well before Haldol was administered. It seems rather clear that the defense of Dr. Maiberger requires a showing that his conduct was reasonable in perspective of the information that he was given by Nurse Brown. And, of course, if that information was wrong, then Dr. Maiberger would have a defense, the existence of which would require the lawyer defending Dr. Maiberger to point at Nurse Brown's inadequate information as a means of exonerating Dr. Maiberger. That evidence would point necessarily, in an inculpatory fashion, to Nurse Brown. That conflict is positional and is pertinent to settlement issues.

C. The Legal Principles

Pursuant to Local Civil Rule 83.1(I) of this Court, the standard relating to the practice of law in civil cases in this Court is the Virginia Rules of Professional Conduct as published effective January 1, 2000. Rule 1.7 of the Virginia Rules of Professional Conduct governs conflicts of interest. As noted above, Rule 1.7 prohibits a lawyer from representing a client
if the representation involves a concurrent conflict of interest, which exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." The notes to Rule 1.7 make clear that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." Rule 1.7, Note [1]. This assessment ought to be undertaken at the beginning of the representation of multiple clients in the same action, but the rules make clear that if the conflict arises after the representation has been undertaken, it is the obligation of the lawyer to withdraw from the representation. Rule 1.7, Note [4].

"Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that otherwise would be available to the client." Rule 1.7, Note [8]. It is also important to note that "[s]imultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2)" of Rule 1.7. Rule 1.7, Note [23]. "An impermissible 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." Id.

The United States Court of Appeals for the Fourth Circuit has made clear that:

In determining whether to disqualify counsel for conflict of interest, the trial court is not to weigh the circumstances 'with hair-splitting nicety' but, in the proper exercise of its supervising power over the members of the bar and with the view of preventing 'the appearance of impropriety,' it is to resolve all doubts in favor of disqualification. United States v. Clarkson, 567 F.2d 270, 273 n. 3 (4th Cir. 1977) (citations omitted). In other words, the assessment must be made in perspective of the realities of the case.

It is, of course, important in our system of justice that parties be free to retain counsel of their choice. "However, this Court has held that the right of one to retain counsel of his choosing is 'secondary in importance to the Court's duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar.'" Tessier v. Plastic Surgeries Specialists, Inc., 731 F. Supp. 724, 729 (E.D. Va. 1990) (citations omitted). Accordingly, "[t]here must be a balance between the client's free choice of counsel and the maintenance of the highest and ethical and professional standards in the legal community." Id. Moreover, the party seeking disqualification has a high standard of proof to show that disqualification is warranted. Id. These principles are well settled.

The rules of professional responsibility make clear that the resolution of conflict of interest questions is principally the responsibility of the lawyer undertaking the litigation. However, those rules also make equally clear that, during litigation, it is appropriate for a court to raise the question in certain circumstances, or the conflict can be raised properly by opposing counsel. Rule 1.7, Note [9]. "Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment." Id. In this case, the Court pointed out the potential for conflict of interest at the Initial Pretrial Conference and at a subsequent scheduling conference and urged counsel carefully to assess the conflict situation mindful of the admonition in Clarkson that principles of the appearance of impropriety had to be considered in making an assessment.

While, as the Fourth Circuit explained in Clarkson, the assessment to be made in a disqualification motion cannot be made with "hair-splitting nicety," it is nonetheless true that the asserted conflict must be a real one and not a hypothetical one or a fanciful one. Aetna Casualty & Surety Company v. United States, 570 F.2d 1197, 1200-01 (4th Cir. 1978); Richmond Hilton Associates v. The City of Richmond, 690 F.2d 1086, 1089-90 (4th Cir. 1982) (explaining the necessity for a real and concurrently existing conflict of interest rather than a hypothetical one). Put another way, disqualification simply cannot be based on mere speculation that "a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur." Shaffer v. Farm Fresh, Inc., 966 F.2d 142, 145 (4th Cir. 1992).

The applicable rule requires disqualification when the independent professional judgment of the lawyer is likely to be affected. Accordingly, some stronger indicator than judicial intuition or surmise on the part of opposing counsel is necessary to warrant the "drastic step of disqualification of counsel." Id. at 145-46.

As explained above, the conflicts that are presented here are real conflicts. They exist now and they have existed throughout the course of the case. They have significant impact on the conduct of the trial respecting how best to serve the interests of the individual defendants who are affected by the extant conflicts.

Furthermore, the conflicts here raise the serious prospect that the trial could fall into disarray. This prospect has actually manifested itself in the motions for summary judgment presented by the defendants and in the presentation of expert
testimony, including several contentions of law and opinion favoring the interest of one defendant while presenting the
prospect of real harm to others.

It is obvious from reviewing the motions for summary judgment and the expert opinions that counsel, both for the
VCUPD officers and the VCU medical defendants, have staked out defensive positions that they think are the best
positions for the defense side of the case considered as a whole. It does not appear, however, that counsel have
considered, or that they appreciate, how the assertion of those positions could affect the ability of each individual
defendant to defend herself or himself by presenting arguments that other defendants are really responsible for Sanford's
tragic death even though another defendant may have had some involvement in the circumstances leading up to that
death. Nor do the summary judgment papers indicate that these potential individual defenses have been developed or
pursued.

Having conferred with counsel on the issues in this case on a number of occasions in connection with motions to dismiss
and discovery issues and having studied the briefs in support of motions for summary judgment made by all of the
defendants, as well as a motion for summary judgment made by the plaintiffs, and having examined the expert opinions
in the case filed by both sides, the Court must conclude that the conflicts alleged here are real ones that are currently in
existence. The conflicts also present very real risks of serious, adverse consequences for the rights of the litigants, mostly
the defendants, but also those of the plaintiffs.

Moreover, the nature of the conflicts is such that disqualification is necessary to ensure and preserve trust in the integrity
of the bar. The present record contains testimony that tends to inculpate the VCUPD officers in different degrees. That
same testimony would permit some VCUPD officer defendants to urge their exoneration by arguing that other VCUPD
officer defendants are the cause of Sanford's death. The same is true respecting the VCU medical defendants.

Each defendant is entitled to use the record to exonerate himself or herself even if to do so inculpates another defendant
in the same category of defendants (i.e., the same group of clients).

The pleadings, motions and briefs filed thus far afford no indication that such a course in being pursued on behalf of any
defendant who, from the record evidence, could take it. Of course, that course need not necessarily be pressed in
summary judgment motions. But, the record shows that the option to pursue that course clearly will be available at trial.
The option can be exercised by the asking of questions, or by refraining from asking questions and by asking for
instructions. And, most importantly, it can be pursued in closing argument. Of course, a lawyer who represents all
defendants is not free to pursue such a course on behalf of any defendant because to do so would be to act adversely to
one or more of his other clients. On the other hand, the failure to pursue such a course compromises the interest of any
defendant on whose behalf that approach could be taken at trial.

The failure to take such a course in a case, when the opportunity exists to do so, creates an appearance of impropriety in a
multiple representation even if the motivation for doing so is the notion that somehow to eschew the best defense for
each individual defendant presents the best defense for the group of clients considered as a whole. No matter how well
motivated the latter course may be, it cannot be realistically pursued unless each defendant is separately and
meaningfully advised about the risks inherent in taking that course of action. That advice must be given by a lawyer
whose only loyalty is to that defendant who is giving advice as to that defendant's best interest. There is no showing that
this had occurred.

Counsel for each group of defendants asserts that disqualification is not required because all of the defendants have
consented to multiple representations. It is true that Rule 1.7(b) provides that the written consent of the client may allow
counsel to represent clients who otherwise would not be representable under Rule 1.7(a)(2). However, there are four
conditions to a representation under the consent process: (1) the lawyer must reasonably believe that he will be able to
provide competent representation to each affected client; (2) the representation must not be prohibited by law; (3) the
representation does not involve the assertion of a claim by one client against another; and (4) the waiver of conflict must
be in writing. Rule 1.7(b). The second and third conditions above do not present any problems for the counsel in this
case. As will be explained below, the fourth condition, for purposes of the Plaintiff's motion, is not dispositive, and the
Court will assume compliance therewith. However, the Court cannot conclude that any lawyer reasonably could believe,
as the first condition requires, that he would be able to provide competent and diligent representation to each of the
affected clients identified in the foregoing discussion of conflicts.

At the Initial Pretrial Conference and at a status conference, counsel were asked to explain in some
detail the nature of the case beyond that which was set forth in the rather lengthy complaint. After those explanations were given by the Plaintiffs' counsel and by counsel for both sets of defendants, the Court expressed concern that, inherent in the positions being related by counsel for the defendants and the evidence related by both sides, there was a real risk of conflicts of interest among each set of defendants. It appears that, as discovery took place, the positional conflicts mentioned to counsel in those conferences actually became manifest in each camp. The conflicts appear to have become exacerbated after the compelled production of certain withheld documents. However, these conflicts, while rather obvious, do not appear to be recognized by the lawyers in either camp.

For consent to be effective under Rule 1.7(b), it must be meaningful and that, in turn, necessitates that the clients be advised clearly about the conflicts that might very well arise.

The record shows that each of the VCUPD defendants, including the legal guardian for the now incompetent Colonel Fuller, signed documents stating the following:

I, [Defendant's name], hereby declare that, notwithstanding the existence of any possible conflicts of interest, I knowingly and voluntarily consent to the continued representation by [counsel for the VCUPD Defendants] in this matter. This informed consent is made after consultation with my attorney.

Although counsel for these defendants asserts that the consent was provided knowingly and voluntarily, there is no basis in the record to conclude that the affected defendants had the very real conflicts described to them thoroughly and accurately. And, such a showing is essential especially where, as here, the conflicts are so patent and so numerous and have such potentially adverse consequences for many of the defendant clients. The absence of that showing alone renders the record on consent here insufficient to animate the exception permitted by Rule 1.7(b).

Counsel for the VCUPD defendants obtained signed, written consent from each officer. Counsel for the MCV defendants has filed no such consent with the court. They have orally averred that they have obtained such consent, from each defendant on November 2, 3, or 4, in compliance with Rule 1.7(b) (4). For purposes of this motion, and because the existence of a signed consent waiver would not change the outcome, the Court will take counsel's averment at face value.

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.

CONCLUSION

For the foregoing reasons, the PLAINTIFFS' MOTION TO DISQUALIFY DEFENSE COUNSEL ON THE BASIS OF A CONFLICT OF INTEREST (Docket No. 209) is granted. The question arises whether the grant of this motion to disqualify permits existing counsel to remain in the case for any of the defendants. The approach taken in the Virginia Rules of Professional Responsibility is that "ordinarily, the lawyer would be forced to withdraw from representing all of the clients if the common representation fails." Rule 1.7, Note [29]. See also id. Note [4] ("Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9."). 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.

It is so ORDERED.

Robert E. Payne
Senior United States District Judge
Richmond, Virginia
December 2, 2009