JOINT REPRESENTATIONS: A VERY BRIEF HISTORY

• Former MR 1.7(b) (“material limitation” conflict)
  – “When representation of multiple clients in a single matter is undertaken, the consultation [with the client regarding the ‘material limitation’ conflict] shall include explanation of the implications of the common representation and the advantages and risks involved.”

• Former MR 2.2: The “Intermediary” Rule
JOINT REPRESENTATIONS: CURRENT RULE/COMMENT

• MR 1.7(a)(2): “Material limitation” conflicts

• Commentary guidance in MR 1.7:
  – Transactions: Comments [8], [26] - [28]

• “Special Considerations in Common Representations”
  – Comments [29] – [33]
  – A “roadmap” for analyzing multiple representation situations & drafting “informed consent” language
JOINT REPRESENTATIONS: COMMENTARY “ROADMAP”

• If common representation fails, lawyer may have to withdraw from representing everyone
• Privilege issues (generally, no privilege between commonly represented parties)
• Confidentiality issues (usually, all information will be shared)
• Less lawyer “zeal”; greater client responsibility
• Other considerations & disclosures depending on factual context
HYPO #1: JOINT REPRESENTATION IN CIVIL LITIGATION

• 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 Assistant VP, 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?
HYPO #1: JOINT REPRESENTATION IN CIVIL LITIGATION

• 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.
**HYPO #1: JOINT REPRESENTATION IN CIVIL LITIGATION**

- 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?
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HYPO #1: JOINT REPRESENTATION IN CIVIL LITIGATION

• 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?
HYPO #1: JOINT REPRESENTATION IN CIVIL LITIGATION

• Perkins and Clark have retained new lawyers. Each lawyer files a motion to disqualify you.

• How do you respond?
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HYPO #2B: JOINT REPRESENTATION IN 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?
HYPO #2C: JOINT REPRESENTATION IN COMPLEX 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.
HYPO #2C: JOINT REPRESENTATION IN COMPLEX TRANSACTION

• 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.
HYPO #2C: JOINT REPRESENTATION IN COMPLEX TRANSACTION

• 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.
HYPO #2C: JOINT REPRESENTATION IN COMPLEX TRANSACTION

• 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.
HYPO #2C: JOINT REPRESENTATION IN COMPLEX TRANSACTION

• 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?
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HYPO #3A: JOINT REPRESENTATION, CONSENT TO “POTENTIAL CONFLICT”

• 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?
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HYPO #3B: JOINT REPRESENTATIONS, SHARING CONFIDENCES

• 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.

• Any issues with using this language?
HYPO #2A: JOINT REPRESENTATION IN “PAPERING THE DEAL”

• 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. Peter is the buyer and Sandy is the Seller of the property. They would like to hire you to paper the deal. Sandy is an existing client on other matters.

• Any issues?
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HYPO #2D: JOINT REPRESENTATION, 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.

• Any issues?
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