

REPRESENTATION OF MULTIPLE CLIENTS IN CIVIL LITIGATION

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How many times have you found yourself in the following situation?:

Your client has accepted a tender on behalf of several entities that it has a business relationship with in relation to a lawsuit that is currently pending against each entity. Your client is now asking you to represent all of the entities. They have assured you that they have no problem waiving the conflict of interest and are sure that the other entities will follow suit.

To the client, this course of action makes perfect sense. Why would they want to pay several lawyers when, instead, they can simply pay you to represent all the entities? However, attorneys must tread carefully. Despite your client's assurances that each entity will readily agree to waive all potential conflicts, such assurances are simply not good enough. Obtaining a knowing, informed waiver of this conflict of interest is critical as both a requirement of the ethical rules and as a risk management tool in your practice.

1. Model Rule 1.7

Model Rule 1.7 sets out the circumstances under which an attorney may undertake a joint representation notwithstanding a concurrent conflict of interest. Specifically, the conflict of interest can be waived if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide the 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.

Model Rules 1.7. For purposes of this article, it will be presumed that the second and third requirements are not at issue. Instead, we will address the first and fourth requirements, that: (1) the clients provide knowing, informed consent, in writing, to the joint representation, and (2) the attorney's representation of multiple clients will be competent and diligent.

2. Knowing and informed consent

What constitutes "informed consent" is the subject of much debate amongst legal scholars, ethics committees and courts. Comment 18 to Model Rule 1.7 states that:

[i]nformed consent requires that the affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.... The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.

Comment 18 to Model Rule 1.7.

With these issues in mind, the lawyer should discuss with each potential client the implications of the joint representation in order to obtain informed consent. This conversation is critical to obtain a “knowing and intelligent” waiver. This conversation should describe the material limitations on the services you can provide for each client resulting from your competing obligation to the other. The following are a few potential issues to discuss with your clients:

- The attorney will not be able to pursue certain claims for one client that could harm the other, such as filing a counter-claim against the other client;
- The attorney will owe a duty of loyalty and communication to each entity, thus the attorney would need to share all relevant information with each entity;
- No attorney-client privilege would apply as between the clients represented;
- The attorney would not be able to advise one client about matters that would disadvantage the other; and
- The attorney would not be able to negotiate on behalf of one client against the other.

The conversation should also inform the client that a client who has given consent to a conflict may revoke the consent at any time. Model Rule 1.7 Comment 21. Despite these material limitations on representation, the client may choose to consent to a waiver of the conflict of interest.

3. Competent and Diligent Representation

The attorney must then decide whether he or she is capable of competent and diligent representation to each entity. Put another way, the attorney must determine whether he/she can zealously advocate for each client. The lawyer must reasonably believe this dual representation will not impair the rights of each entity. Even if lawyers believe that they can competently and diligently represent each entity, the circumstances of representation should be continually reviewed throughout the representation to ensure that this position does not change.

4. Practical tips for obtaining a written waiver of conflict

If you have satisfied yourself that you have obtained a knowing and informed consent to the joint representation and that your representation of the multiple clients will be competent and diligent, Model Rules 1.7 now requires that the conflict waiver be reduced to writing. As such, the lawyer should prepare a letter that recites the material limitations of the joint representation as discussed with them previously.

Although it is not required by the Model Rules, it is also a good practice for this letter to include a waiver of conflict form that sets out the basic facts that the clients are willing to waive and calls for each of their signatures. This waiver of conflict form should recommend that all parties seek the advice of independent counsel before making the ultimate decision on joint representation. Although most clients will not seek independent counsel, this will provide another layer of protection to the lawyer.

It is clear that it is only through full and frank conversations with each entity that a conflict can be waived and attorneys can safely maintain their joint representations of all involved. Failure to properly comply with the model rules, as discussed above, can open an attorney up to a malpractice lawsuit. Although complying with the Model Rules and obtaining effective client waivers may prove difficult and time consuming, it is imperative that these steps are taken in order to avoid potential costly malpractice suits. Extra time and thought now could mean the difference between a successful joint representation now and costly litigation in the future.

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