

# 135

**ETHICAL CONSIDERATIONS IN THE  
JOINT REPRESENTATION OF CLIENTS IN  
THE SAME MATTER OR PROCEEDING**

Adopted February 20,2018

*I. Introduction and Scope*

This opinion discusses a lawyer’s responsibility, when requested to represent more than one client in the same matter, to identify and address conflicts of interest between the potential clients and to obtain informed client consent to the joint representation with respect to the identified conflicts. The lawyer also should consider how the lawyer will address the following: conflicts that may arise between the jointly represented clients during the representation; the sharing of confidential information; and revocation of consent to joint representation. This opinion builds on earlier opinions of the Colorado Bar Association Ethics Committee (Committee). Together with CBA Formal Opinion 68, “Conflicts of Interest: Propriety of Multiple Representation” (1985, rev. 2011), this opinion supersedes the portion of withdrawn CBA Formal Opinion 57, “Conflicts of Interest,” that addressed simultaneous representation of multiple clients under the former Colorado Code of Professional Responsibility. In addition to a general discussion of current conflicts, conflict waiver, and informed consent, Formal Opinion 68 provides specific illustrations of common conflicts in the context of family law and transactional law. This opinion’s guidance on joint representation generally applies within the context of litigation, including both civil and criminal representation.

## ***II. Syllabus***

When undertaking a new representation, a lawyer must first determine whether the engagement calls for the lawyer to represent more than one person or entity. If so, the lawyer then must consider whether there are conflicts of interest between those clients with respect to the representation and must decide whether a joint representation is permissible notwithstanding the conflicts. If the conflicts are consentable, the lawyer may undertake the joint representation only after obtaining the informed consent of each client and confirming each consent in writing. The lawyer's discussion with the clients should alert them to issues relating to confidentiality and the attorney client privilege. The lawyer should not only discuss these items with the clients at the time of retention, but also may wish to address each item, providing appropriate written advisement, in a waiver, retention agreement, or other appropriate collateral documentation (referred to in this opinion as a "retention agreement").

## ***III. Discussion and Analysis***

### ***A. Joint Representation***

Rule 1.7(a) of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) governs whether a lawyer may undertake the representation of multiple clients in the same matter. Under Rule 1.7(a), a lawyer may not represent a client if the representation involves a concurrent conflict of interest: *i.e.*, the representation will be *directly adverse* to another client or there is a significant risk that the representation will be *materially limited* by the lawyer's responsibilities to another client. The representation may be undertaken despite the existence of a concurrent conflict, however, 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 in the same litigation or proceeding; and (4) each affected client provides *informed consent*, confirmed in writing. Colo. RPC 1.7(b) (emphasis added).

*B. Informed Consent to the Conflict Identification Process*

Both at the outset of representation and during its pendency, the lawyer should evaluate whether the representation involves the representation of two or more clients. If so, the lawyer must analyze the conflict and consent issues involved in a joint representation.

When the lawyer has been asked to represent multiple clients in the same matter or proceeding, the lawyer should consider the impact of Rule 1.6 on the lawyer's ability to discuss and resolve potential conflicts between the potential joint clients. In the course of identifying any conflicts, the lawyer will gain information about either existing clients, which the lawyer may not disclose under Rule 1.6(a), or information about prospective clients, which may not be used or revealed pursuant to Rule 1.18(b). Under Rule 1.6(a), confidential information may be revealed if the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation.

If the communications inherent to the conflict identification process do not result in joint representation, then one or more of the clients will be a prospective client, defined under Rule 1.18 as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." Rule 1.18 prohibits representation of a client with interests materially adverse to those of a prospective client. Under Rule 1.18(c), if the lawyer received information from the prospective client that could significantly harm the prospective client, the lawyer may not represent a client whose interests are materially adverse in the same matter or a substantially related matter, subject to the enumerated exceptions, one of which is

obtaining informed consent, confirmed in writing, from both the affected client and the prospective client.

Comment [5] to Rule 1.18 provides guidance on disclosure of confidential information during the conflict identification process: “A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.” (Internal citation omitted.)

Therefore, the lawyer should consider the extent and nature of the written agreements or advisements that may be necessary to permit the lawyer to ethically collect information relating to the representation of a client or prospective client in order to identify conflicts, disclose that information to existing or prospective clients, and preserve the lawyer's ability to represent only one of these clients if the proposed joint representation is either prohibited or not undertaken for other reasons.

### *C. Identifying Actual and Potential Conflicts*

Before agreeing to any joint representation of two or more clients, the lawyer must determine whether conflicts of interest presently exist between the clients or are reasonably likely to arise in the future and, if so, whether the representation nevertheless may move forward.<sup>1</sup> The interests of any two persons or entities are seldom, if ever, perfectly aligned. A direct conflict exists if the multiple clients' interests are directly adverse. *See* Rule 1.7(a)(1).

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<sup>1</sup> Rule 6.5(a)(1) governs the obligation of lawyers acting under the auspices of a nonprofit or court-sponsored short-term limited legal services program, and provides in relevant part that the lawyer “is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest.”

The interests may be adverse even if the relationship is not hostile.<sup>2</sup> In the litigation context, adversity may exist regarding the facts of the case, as they are understood by each of the potential clients, or due to “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.” Colo. RPC 1.7, cmt. [23]. For example, co-defendants may be reasonably likely to be or become adverse with respect to at least some aspect of the defense or defense strategy, such as a desire to deflect blame to the other defendant if, together, they cannot wholly defeat the plaintiff’s claims. Even interests of spouses may diverge on some issues in matters on which they are jointly represented. A lawyer contemplating a joint representation should give careful thought not only to whether the clients’ interests are currently in conflict but also to how they might diverge as the representation goes forward, and the relative likelihood of such divergence. Conflicts arising only from conjecture related to potential future scenarios, however, are not concurrent conflicts under Rule 1.7 and are not a basis for disqualification from the joint representation. *See Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 855 F. Supp. 330, 336 (D. Colo. 1994).

Material limitation conflicts occur when there is a significant risk that the representation of a jointly represented client will be materially limited by the lawyer’s responsibility to another client or by the lawyer’s own interests. *See* Rule 1.7(a)(2). Generally, the lawyer must consider whether the ability to recommend or advocate all positions that each client reasonably might take will be limited because of the duty of loyalty owed to another jointly represented client. *See* Rule 1.7, cmt. [8]. This consideration is pertinent to the individual defense strategies that co-defendants may pursue. A lawyer’s long-standing relationship with only one of two jointly represented clients also may present a material limitation conflict.

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<sup>2</sup> *See, e.g.*, CBA Op. 68 (discussing the considerations involved in parties’ mutual transactional interests).

Material limitation conflicts also may occur, for example, when one of the clients is paying all or a disproportionate share of the fees and expenses. In that circumstance, the lawyer must consider whether his or her representation of the non-paying client will be limited by responsibilities to the paying client or the lawyer's personal interest in maintaining the relationship with the paying client. *See* Rule 1.7, cmt. [13]. This circumstance commonly occurs when a lawyer defends both a business and its employee in litigation.

The lawyer also should consider whether there is a *significant* risk of a material limitation conflict. California courts have noted that joint representation is not precluded in situations in which the potential conflict – although material if it were to eventuate – is merely theoretical and not realistic. *See Carroll v. Superior Court*, 101 Cal. App. 4th 1423, 1429, 124 Cal. Rptr. 2d 891, 896 (2002). As discussed at greater length below, the lawyer must discuss any actual or reasonably possible potential conflicts that the lawyer has identified with the prospective clients in order to obtain informed consent to the joint representation.

#### *D. Determining Whether Joint Representation Is Permitted Despite a Conflict*

Once the existence of a conflict is determined, the lawyer must evaluate whether the proposed joint representation is nevertheless permissible. Joint representation is prohibited, regardless of consent, when the representation is prohibited by law or when the representation involves the assertion of a claim by one client against the other client in the same litigation or proceeding. Colo. RPC 1.7(b). Joint representation likewise is prohibited, regardless of consent, if the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation to each client. Colo. RPC, cmt. [15]. Further, joint representation is

impermissible if the lawyer determines that one or more of the clients cannot reasonably give informed consent.

Certain conflicts are rarely consentable. For example, “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.” Colo. RPC 1.7, cmt. [23]. Colorado case law and the Rules of Criminal Procedure impose heightened considerations of consent relating to joint representation of co-defendants in a criminal prosecution. A criminal defendant’s constitutional rights to effective assistance of counsel may be violated when a defendant is represented by a lawyer who simultaneously represents conflicting interests. *See Armstrong v. People*, 701 P.2d 17, 19 (Colo. 1985). “Although joint representation does not per se violate the right to effective assistance of counsel, and although a defendant may waive the right to conflict-free representation if such waiver is made voluntarily and with full knowledge of the actual conflict, it is recognized that representation by one lawyer of two or more defendants in prosecutions arising from a single criminal episode invariably creates the possibility that a conflict of interest will arise.” *Id.* (citations omitted); *see also People v. Chew*, 830 P.2d 488, 489 (Colo. 1992) (under former Code of Professional Responsibility and despite written conflict waivers, concluding that defense attorney could not adequately represent the individual interests of jointly represented criminal co-defendants due to their different degrees of culpability). Where the same lawyer represents criminal co-defendants, the court must independently inquire with respect to the joint representation and must personally advise each defendant of the right to effective assistance, including separate representation. Colo. R.Crim.P. 44. Rule 44 of the Rules of Criminal Procedure further requires the court to take such measures as may be appropriate to protect each defendant’s right to counsel, “unless it appears that there is good cause to believe no

conflict of interest is likely to arise.” *Id.* However, the court may accept the defendant’s waiver of the right to conflict-free representation upon a showing that the defendant was fully advised of the existing or potential conflict and the likely effect of the conflict on the lawyer’s ability to provide effective representation, and the defendant voluntarily, knowingly, and intelligently waived his or her right to conflict-free representation. *See People v. Martinez*, 869 P.2d 519, 525 (Colo. 1994).

The lawyer also should consider the relationship between the prospective joint clients in determining whether the clients should, or can, provide consent to joint representation. *See Colo. RPC 1.7, cmt. [29]*. If the prospective clients are already in an antagonistic relationship, or if there is a likelihood of imminent litigation or contentious negotiation among them, the lawyer likely may not undertake a joint representation. Similarly, when there is a material inequality in the lawyer’s relationship with each of the prospective joint clients, the lawyer should consider with particular care whether informed consent is possible. If the lawyer is unlikely to be able to maintain impartiality between the jointly represented clients, the joint representation is improper. *Id.* For example, whether and how informed consent may be obtained requires careful evaluation in employer/employee representations or other circumstances in which the clients would not equally share the costs of the representation. The lawyer also should consider the relative sophistication of the prospective joint clients, and whether a less sophisticated client may sufficiently understand both the actual and potential conflicts of interest. The lawyer also may recommend or even, if appropriate, may require that one or more of the clients consult independent counsel concerning the giving of the requisite consent.

#### *E. Obtaining Informed Consent*

Upon determining that joint representation is permissible, the lawyer must secure the clients' informed consent before undertaking the representation. 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." Colo. RPC 1.0(e); *see also id.*, cmt. [6] (discussing informed consent and considerations related to whether the lawyer has made reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision). To be effective with respect to concurrent conflicts of interest, informed consent must be confirmed in writing. Colo. RPC 1.7(b)(4). "The writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing." Colo. RPC 1.7, cmt. [20]. The writing may take the form of a letter or email from the lawyer that outlines the substance of verbal discussions and advisement regarding the identified actual or potential conflicts, and confirms the client's oral informed consent. *Id.* Obtaining the client's signature and confirming informed consent in a retention agreement is advisable, but not required.

Information that should be conveyed to potential joint clients to obtain informed consent includes the implications of the joint representation, such as possible effects on loyalty, confidentiality and the attorney-client privilege. Colo. RPC 1.7, cmts. [18], [30], [31] & [32].

<sup>3</sup>These matters are considered below.

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<sup>3</sup> A lawyer may be required to communicate with the client concerning these subjects even if the lawyer has determined that no conflict of interest exists. See Colo. RPC 1.4(b); N.Y.C. Bar Ass'n Comm. on Prof. Ethics, Formal Op. 2017-7, "Disclosures to Joint Clients When the Representation Does Not Involve a Conflict of Interest" (2017).

1. *Duty of Loyalty*

Lawyers have duties of both undivided loyalty and confidentiality to all of their clients. *See Smith v. Mehaffy*, 30 P.3d 727, 733 (Colo. App. 2000). A lawyer jointly representing co-clients owes an equal degree of loyalty to each, and may not favor the interests of one client over another client. *See Nelson Bros. Profl Real Estate, LLC v. Freeborn & Peters, LLP*, 773 F.3d 853, 855, 857-58 (7th Cir. 2014).

The lawyer must advise the clients of those circumstances in which the lawyer reasonably believes that the joint representation may constrain the lawyer's duty of loyalty, and the likelihood that those circumstances may occur, in order for the clients to provide informed consent to the joint representation. The lawyer may wish to memorialize this explanation in the retention agreement. For example, the agreement might acknowledge that clients who are co-defendants in civil litigation have been advised and understand that each of them may have an interest in pursuing defenses that would shift blame to the other, but that each client foregoes its ability to assert those defenses in order to be jointly represented. The agreement also may identify any limitations on representation that arise from the joint representation – *i.e.*, areas in which the individual clients must assume greater responsibility for decisions than if they had been separately represented. *See Colo. RPC 1.7, cmt. [32]*. The retention agreement may also specify that the defendants have chosen to pursue a unified defense, utilizing a jointly engaged lawyer, and that each client understands that this lawyer will be prohibited from recommending a course of action to one client that would be injurious to a jointly represented co-defendant.

2. *Confidentiality and Information Sharing*

Rule 1.6(a) generally prohibits a lawyer from revealing any information relating to the representation of a client, unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. The confidentiality rule applies “not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” Colo. RPC 1.6, cmt. [3]. The duty of confidentiality extends to all joint clients in the representation and must be reconciled with the lawyer’s obligation under Rule 1.4 to keep each client reasonably informed about the status of the matter, and to promptly inform each client of any decision or circumstances with respect to which the client’s informed consent is required.

Compliance with both the obligation to maintain confidentiality and to reasonably and timely communicate appropriate information to each client requires the lawyer to explain to each jointly represented client, at the outset of the representation, the lawyer’s obligations under Rule 1.6 and how they might affect each jointly represented client. The lawyer should advise each client that information related to the joint representation will be shared between the joint clients and that the lawyer will have to withdraw if one joint client decides that some information material to the representation should be withheld from the other client. The lawyer also should memorialize, in the retention agreement or elsewhere, the clients’ consent to sharing information and their understanding of the possible impacts of withdrawal of consent to share information.<sup>4</sup> *See* Colo. RPC 1.7, cmts. [18] & [31].

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<sup>4</sup> Sophisticated parties may agree, as part of the retention agreement, that not all information will be shared: “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.” Colo. RPC 1.7, cmt. [31].

Another significant consideration for the lawyer is what will happen if the lawyer becomes aware of confidential information, the disclosure of which to one client will be harmful to the other jointly represented client's interests. *See* Am. Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 08-450, "Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters" (2008). The ABA opinion reflects skepticism that a client's prospective agreement consenting to the disclosure of harmful confidential information, given at the outset of representation, would meet the requirements for informed consent to disclosure:

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).

*Id.*, pp. 4-5 (emphasis added).

Contrary to ABA Opinion 08-450, some state courts and ethics committees have concluded that a lawyer engaged in joint representation either may or must reveal the confidential information to the other joint client when the jointly represented clients have agreed prospectively to the disclosure. *See A v. B.*, 726 A.2d 924, 929 (N.J. 1999) (commenting that explicit agreement on sharing of confidential information between jointly represented clients should be upheld, and separately finding that, under application of New Jersey RPC 1.6, law firm that prepared married couple's wills may disclose existence of husband's illegitimate child to wife); Mass. Bar Ass'n Ethics Op. 09-03 (2009) (lawyer must disclose to employer client the fact

of co-client employee's revocation of employment authorization, in part, because "the normal rule in joint client representation is that there is no confidentiality between joint clients, unless they agree otherwise, and that the lawyer should explain this at the outset of the representation"); D.C. Bar Ass'n Ethics Op. 327, "Joint Representation: Confidentiality of Information Revisited" (2005) (commenting that when jointly represented clients consent to the disclosure of confidential information by the lawyer to each co-client, thereby waiving confidentiality, the lawyer *must* reveal the confidential information if it is relevant or material to the representation of the other client)

Colorado courts have not examined or commented upon whether an explicit prospective waiver of confidentiality between jointly represented clients constitutes informed consent such that confidentiality may or must – or may or must *not* – be maintained if the lawyer receives information that one client requests the lawyer to not disclose to the other joint client.

Given the considerations discussed above, this Committee emphasizes the recommendation, found in comment [31] to Rule 1.7, that the lawyer advise each co-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." This follows the comment's observation that "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." *Id.* The lawyer also should consider whether the client's instruction not to share information is in fact a revocation of consent to the joint representation. Comment [21] to Rule 1.7 notes that a client that has given consent to a conflict may revoke the consent and terminate the lawyer's representation at any time, and that revocation may preclude the lawyer from continuing to represent other clients.

Comments [21] and [31], standing alone, do not dictate whether, if the lawyer withdraws from representation of one or both clients, the lawyer must comply with one jointly represented client's decision that harmful information be kept from another co-client. The Restatement (Third) of the Law Governing Lawyers provides helpful guidance on this issue:

... [T]he lawyer is required to withdraw unless the communicating client can be persuaded to permit sharing of the communication. Following withdrawal, the lawyer may not, without consent of both, represent either co-client adversely to the other with respect to the same or a substantially related matter.

In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further 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. In making such determinations, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person.

Rest. (3d) of the Law Governing Lawyers § 60, cmt. *l* (2000) (internal citations omitted).

In summary, at the outset of the representation a lawyer jointly representing clients should provide a sufficient disclosure that all material information relating to the representation will be shared between the clients, and obtain each affected client's informed consent. The lawyer also should advise each affected client that the lawyer will have to withdraw from the representation if one client instructs the lawyer not to disclose material information to the other joint client. If these circumstances do arise and the lawyer determines that withdrawal is necessary, the lawyer will then consider the extent of any existing agreement to disclose information between the parties and whether that agreement extends to the type of information identified, such that the client (who now wishes not to disclose information) provided prospective informed consent to the disclosure of the information. If the objecting client did not

provide effective informed consent to the disclosure, the lawyer has discretion to warn the affected client that a matter seriously and adversely affecting that client's interests has come to light, but that the other jointly represented client refuses to permit the lawyer to disclose the information. There may be further circumstances in which the immediacy and magnitude of the risk to the affected jointly represented client outweighs the interest of the communicating client in the continued secrecy of the information. In the limited circumstances implicated by the Restatement commentary, the lawyer should consider disclosing the substance of the harmful confidential information to the affected jointly represented client during the course of the lawyer's withdrawal. The lawyer should separately consider whether the information at issue is subject to permissive disclosure pursuant to Rule 1.6(b).

### 3. *Attorney-Client Privilege*

The lawyer should advise joint clients that, as between them, there is no attorney-client privilege for communications with the lawyer that are related to the joint representation, during the period of the representation. *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992). Equally important, the lawyer should advise that the privilege will not bar the use of any such communications in any later dispute between the jointly represented clients with respect to the subject matter of the joint representation. *See* Colo. RPC 1.7, cmt. [30].

### F. *Responsibility for Payment of Fees*

The lawyer should confirm, preferably in writing, the jointly represented clients' agreement on responsibility for payment of the lawyer fees and costs, including whether payment of fees and costs is a shared obligation. If the lawyer has identified any material limitations on

representation arising from the payment agreement between the jointly represented clients, these limitations should also be explained. The Committee has addressed a lawyer's ethical obligations under Rule 1.8 when the lawyer accepts compensation for representation from a source other than the client, including the necessity of obtaining the client's informed consent to the third party payer arrangement, as well as protection of confidential information, and practical considerations for the representation. *See* CBA Formal Op. 129, "Ethical Duties of Lawyer Paid by One Other than the Client" (2017),

*G. When Conflicts Later Arise*

Even if informed consent can be, and is, obtained at the outset of the joint representation, a conflict between the jointly represented clients may arise from developments later in the representation.<sup>5</sup> In that event, absent further informed consent<sup>6</sup> or a reliable prospective consent, the lawyer likely will have to withdraw from the representation of both clients. *See* Colo. RPC 1.7, cmt. [4]. Similarly, if one jointly represented client withdraws its earlier consent to a conflict identified and accepted at the outset, the lawyer must consider whether to withdraw from representation of both clients. *See* Colo. RPC 1.7, cmt. [21]. The withdrawing or terminating client then becomes a former client for purposes of Rule 1.9's prohibition against representation of another person in the same or a substantially related matter, if the continuing client's interests in the matter are materially adverse to the interests of the former client.

Conflict may arise among the jointly represented clients when an opposing party's settlement offer or other negotiating strategy, intentionally or otherwise, creates a wedge

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<sup>5</sup> The lawyer should note that "[w]hen a lawyer or law firm suddenly finds itself in a situation of simultaneously representing clients who either are presently adverse or are on the verge of becoming adverse, it may not simply drop one client like a 'hot potato' in order to treat it as though it were a former client for the purpose of resolving a conflict of interest." *Pamlab, LLC v. Hi-Tech Pharmacal Co.*, 2009 WL 77527, at \*3 (D. Colo. Jan. 9, 2009)

<sup>6</sup> When developments during the course of representation create a new conflict, the lawyer must again make full disclosure to the clients and advise them on the nature of the conflict, in order to seek and obtain informed consent for the joint representation to continue. The commentary in this section primarily addresses advance planning for these circumstances in order to minimize, to the extent possible, disruption to the representation.

between the lawyer's joint clients. This may occur in class action litigation, as well as in litigation involving a relatively small number of jointly represented clients. Parties negotiating jointly for concessions from an opponent may become adverse if the opponent concedes the matter bargained for, but to only one of the clients. Similarly, conflict may arise among jointly represented clients if an opponent offers settlement terms that vary between the clients (*e.g.*, one plaintiff client is required to release certain rights not jointly held with the other plaintiff client). In this instance, the lawyer may be required to withdraw if the clients cannot provide informed consent, confirmed in writing, to proceeding with the joint representation despite the conflict. *See* Colo. RPC 1.8(g) & cmt. [13].

It is prudent to consider expressly addressing in the retention agreement how the lawyer will proceed in the event an unresolved conflict arises from either developments in the matter or withdrawal of an earlier consent. In at least some circumstances, clients may, by advance or prospective waiver, provide informed consent to the lawyer's continued representation of one of the previously jointly represented clients while the other client obtains separate counsel. *See In re Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001) (the terms of an engagement letter that specified that, in the event of conflict between a corporate client and its employee, the law firm would cease to represent the employee and would continue to represent the corporate client, was held valid and served as effective consent to the lawyer's ongoing corporate representation under Rule 1.9); *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285, 1294-95, 37 Cal. Rptr. 2d 754, 759, 763 (1995) (an employee client's prospective waiver of his right to assert a conflict and seek disqualification of counsel for previously jointly represented corporation was held valid, "notwithstanding any adversity that may develop"); *see also* NY State Bar Assn. Eth. Op. 903, "Revocation of Consent to Conflict" (2012) (implying the validity

of an advance agreement that specifies (1) whether a lawyer may continue to represent either client after the other client revokes its consent, and (2) whether the lawyer may use or reveal confidential information obtained from the client that has revoked consent).

In determining whether to remain in the matter in the event of either a later-developed but unresolved conflict or a revocation of an earlier consent, the lawyer should carefully evaluate whether the conflict that has arisen was of the type fairly within the advisement to, and contemplation of, the clients at the time they gave their advance consent to future conflicts. The client's reasonable understanding of the material risk that the waiver entails generally determines the effectiveness of the waiver. *See Galderma Labs., LP v. Actavis Mid Atl. LLC*, 927 F. Supp. 2d 390, 396 (N.D. Tex. 2013). Informed consent by clients that are experienced users of the legal services involved and are reasonably informed regarding the risk that a conflict may arise is more likely to be effective. *Id.* at 397. Informed consent is also more likely to be effective when it is accompanied by advice of independent counsel and describes the material risk of waiving future conflicts. *See, e.g., Zador Corp., supra*, 31 Cal. App. 4th at 1294-95, 37 Cal. Rptr. 2d at 759, 763; *see also* Colo. RPC 1.7, cmt. [22] (“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.”).