

Multiple Representations Create Conflict Hazards

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Which of the following multiple clients would you agree to represent?

A. A husband and wife who come to you for estate planning.

B. Two long-time friends who seek joint representation in establishing a partnership to manufacture and sell a new product.

C. A brother and sister who ask for your assistance in contesting their other sister's attempt to be appointed guardian of their elderly mother.

Surprisingly, each scenario might lead to serious ethical problems and potential malpractice exposure. For example, let's assume that the husband in scenario A has been married before and has children from that previous marriage. The couple has three children from the existing marriage. The wife comes from a wealthy family and brought substantial assets to the marriage. Under these circumstances, the chances for a conflict of interest between the husband and wife are considerable.

If the wife leaves everything to her husband and dies, the husband would presumably be free later to share his wife's wealth with the children from his first marriage. This may not be what the wife intends, thus setting up just one of many potential conflicts.

In example B, let's suppose that one friend has all of the money and the other has invented the product. What if the product is a flop and the partnership loses money? What if the product is a wild success and one partner decides he or she is entitled to a greater percentage than the other? What if the partners have irreconcilable differences over the management of the partnership and decide to dissolve it? Who gets the right to the patented product? In short, the conflict possibilities are endless.



Message to lawyers representing two or more clients in the same transaction: friends and lovers may turn on each other — and on you.

There may be hidden conflicts in scenario C as well. What if the siblings contesting the guardianship cannot agree on whether the mother should be free to manage her own affairs or have one of them appointed as guardian. What if one of the contesting siblings is paying all of the legal fees and decides he or she wants to drop the matter before running out of money? What if one contesting sibling later suspects that the other is merely trying to gain control of the mother's assets?

Severe consequences

If you don't recognize these potential conflicts up front, the consequences can be severe. Lawyers who take on multiple representations face the prospect that one of the clients will sue

over the perceived conflict. These suits usually include allegations that the attorney conspired with one client to the detriment of the other. The result: the attorney now has a legal malpractice claim and an ARDC complaint to defend.

Although firms of all sizes are faced with this issue, smaller firms confront it more often. Small firms tend to have "smaller" clients who are reluctant to hire independent counsel for each party to the transaction. These

clients often succeed in persuading the naive attorney to represent them all. The clients argue that they simply cannot afford to involve more than one attorney in the matter. Unfortunately, we have found time and time again that these same clients will not hesitate to sue the attorney later and allege a conflict.

Here are a few other examples of multiple representations that can create conflicts for attorneys:

- buyer and seller
- guardian and ward
- majority and minority stockholders
- a corporation and its directors or officers
- general partner and the limited partners
- multiple criminal or civil defendants

How to decide about multiple representation

Use the following steps to determine when and how you may represent multiple parties:

Ask a colleague. An attorney cannot represent one client if the representation (a) will be directly adverse to another client or (b) will be materially

limited by the attorney's responsibilities to another client, unless the attorney *reasonably* believes that the representation will not be adversely affected as a result. To satisfy this test, which is based on the Rules of Professional Conduct, the attorney must ask the right background questions and use a little foresight and a lot of common sense.

Is it ever reasonable for an attorney to represent a buyer and a seller on the same deal, regardless of how friendly the parties are? Not in my opinion. You may be too close to the matter to objectively decide whether the dual representation is reasonable.

We recommend that you seek an informal opinion from a colleague on whether the reasonableness standard has been met. If you are in a small firm, ask a disinterested partner. If you are a sole practitioner, have a reciprocal arrangement with a respected colleague. Be careful, however, to summarize the essence of the potential conflict without disclosing any client confidences. If your colleague finds the multiple representation to be unreasonable, don't do it.

Disclose and get consent. Assuming that the multiple representation is reasonable, the Rules of Professional Conduct require each client to consent to the arrangement in writing after full disclosure. The disclosure must include an explanation of the implications of the joint representation and its advantages and disadvantages.

The key to this requirement is that the consent of the client be made on an

informed basis. This in turn necessitates a thoughtful and thorough discussion of the potential conflicts. It also means that you cannot use one universal consent form to handle all situations. While you are grousing about the time and effort involved in drafting a truly effective consent letter, keep in mind that this one little piece of paper may save you from an ARDC complaint or a legal malpractice claim.

Get consent of all clients. Never assume that one party to the transaction or case has the authority to engage you to represent the other "related" parties. For example, don't file an appearance for all of the limited partners based upon the "approval" of only one of the partners. Before proceeding, you must obtain the written, informed consent of each partner as described above.

Expect the worst. Remember that even if the multiple representation does not violate the Rules of Professional Conduct, it may be grounds for a civil cause of action for legal malpractice or the return of legal fees. (See the recent case of *Hendry v Pellard*, 73 F3d 397 (DC Cir 1996), in which the court held that lawyers who represent clients with conflicting interests can be forced to disgorge their legal fees without any evidence that the clients sustained damages from the joint representation.) Therefore, in assessing whether to take on the joint representation, consider the worst case scenario. Example B is a perfect illustration of a nasty malpractice claim

just waiting to happen.

Watch for late-blooming conflicts.

If a conflict does appear at a later date, don't assume that you can continue to represent all of the clients by virtue of their written consent. Rather, again ask yourself whether your representation of one client will adversely affect your representation of the others. While the answer may have been "no" before the potential conflict arose, it may be "yes" once the full scope of the conflict is known to you. Consequently, you may have a duty at that point to withdraw from representing one or all of the clients.

Send a nonengagement letter. Finally, if you wisely decide not to represent one or more of the parties, make sure that you send them a nonengagement letter by certified mail unequivocally stating that you are not their counsel. The letter should also urge the unrepresented party to seek his or her own counsel immediately. If you don't send the nonengagement letter, the "non-client" may later surprise you by contending that you were representing him or her.

In short, attorneys need to exercise great care and discretion in determining whether to represent multiple parties. The safer course is to avoid these conflict-ridden situations. If you do agree to a joint representation, however, be sure to satisfy all of the requirements with respect to obtaining the clients' consent and be ready to reassess the situation and withdraw if a conflict does arise.