

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS**

Formal Opinion 2016 -2: REPRESENTING A NON-PARTY WITNESS AT A DEPOSITION IN A PROCEEDING WHERE THE ATTORNEY ALSO REPRESENTS A NAMED PARTY

TOPICS: Limited Scope Representation and Informed Consent, Conflicts of Interest, Confidentiality, Solicitation of Clients

DIGEST: An attorney is ethically permitted to represent a non-party witness (the “witness” or “witness-client”) at a deposition in a proceeding where that same attorney also represents a party (the “party” or “party-client”), subject to the following limitations. First, such a representation may constitute a limited scope representation under Rule 1.2(c) of the New York Rules of Professional Conduct (the “Rules”). If so, the attorney must ensure that any limitations on the scope of representation are reasonable under the circumstances and must secure informed consent from the witness-client. Second, the attorney must evaluate whether representing the witness-client creates a conflict of interest with the party-client. If so, the attorney must determine whether the conflict is waivable and secure written conflict waivers before proceeding with the representation. The attorney also must continue to monitor the representation to ensure that appropriate steps are taken if a conflict of interest arises later in the proceeding. Third, the attorney must explain that both clients in a joint representation are entitled to receive information that is material to the representation. Thus, if one of the joint clients discloses confidential information to the lawyer that is material to the representation of the other joint client, the lawyer is obligated to share that information with the other client, unless an exception applies or the clients agree to a different arrangement. Fourth, when communicating with the deposition witness about the prospective representation, the attorney must comply with the ethical rules governing solicitation of clients.

RULES: 1.2, 1.6, 1.7, 1.8(f), 1.13, 4.3, 7.3

QUESTION: Is a lawyer ethically permitted to represent a non-party witness at a deposition in the same proceeding where the lawyer represents one of the named parties?

OPINION:

It is not uncommon for a lawyer representing a party in a litigation also to represent one or more non-party witnesses at their depositions in the proceeding. These representations frequently – although not always – arise in the context of representing a corporate or government litigant that wishes to (or is legally obligated to) provide representation to its constituents or affiliated individuals, such as officers, directors, employees or former employees, independent contractors, vendors, or even family members of the corporation’s employees or officers. The potential benefits of having the litigant’s attorney handle these representations include eliminating the need to hire multiple law firms, enhancing the attorney’s ability to coordinate litigation strategy,

and improving efficiency by reducing time needed for multiple attorneys to familiarize themselves with the case in order to prepare for non-party depositions.¹

Although attorneys are ethically permitted to enter into such representations, they must do so within the following ethical parameters. First, the attorney should determine whether the representation of the witness-client is a limited scope representation and, if so, must comply with the requirements of Rule 1.2(c). Specifically, the attorney must (a) ensure that any limitations on the scope of representation are reasonable under the circumstances, and (b) obtain informed consent to those limitations from the witness-client.² Second, the attorney must evaluate whether representing the witness-client creates a conflict of interest with the party-client. If so, before proceeding with the representation, the lawyer must determine whether the conflict is waivable and secure written conflict waivers. Furthermore, the attorney must continue to monitor the representation to ensure that appropriate steps are taken if a conflict of interest arises later in the proceeding. Third, the attorney should reach an agreement with the clients about how to treat confidential information that the attorney receives from each client. Fourth, in communicating with the witness-client, the attorney must comply with the rules governing solicitation of clients and communications with unrepresented persons. We will now address each of these requirements in turn.

I. COMPLYING WITH THE REQUIREMENTS OF RULE 1.2(c) CONCERNING LIMITED SCOPE REPRESENTATIONS

An attorney who represents a non-party witness solely for the purposes of defending the witness in a deposition may be engaged in a “limited scope” representation. Under Rule 1.2(c), any limitations on the scope of representation must be “reasonable under the circumstances,” and the client (in this case the non-party witness) must give “informed consent” to those limitations. The first step in complying with Rule 1.2(c) is to determine whether the representation is, in fact, a limited scope representation. In our opinion, a limited scope representation is one that limits or excludes services that the client would reasonably expect to be included in the representation under the circumstances. With this definition in mind, we discuss Rule 1.2(c)’s application to the representation of deposition witnesses.

¹ This Opinion does not address an attorney who represents the party-client only, but may meet with or interact with a witness in connection with preparing for a deposition. A lawyer in that situation should make clear to the deposition witness that he does not represent her and cannot give her legal advice.

² Rule 1.2(c) also provides that a lawyer engaged in a limited scope representation must, where necessary, provide “notice to the tribunal and/or opposing counsel.” Since a lawyer representing a witness at a deposition will generally state her appearance on the record at the deposition, we presume this requirement will be fulfilled.

A. Activities That One Might Reasonably Expect to Be Included in the Representation of a Deposition Client

Although there is no such thing as a “one-size-fits-all” representation, representing a non-party witness for the purposes of a deposition may involve the following activities:

- Reviewing relevant documents, testimony and other materials in order to understand the issues in the case and the potential relevance of the witness’s testimony;
- If the witness is also subpoenaed to produce documents, assisting the witness in identifying, collecting, reviewing and producing documents in response to the subpoena;
- Meeting with the witness in advance of the deposition to prepare for the testimony;
- Evaluating whether the potential testimony may expose the witness to criminal or civil liability, and providing advice on how to minimize such liability (or, if the potential liability implicates an area of practice that is outside the attorney’s expertise, advising her to retain competent counsel);
- Evaluating what impact the witness’s potential testimony may have on the case generally;
- Attending the deposition and interposing appropriate objections and offering appropriate guidance to the witness concerning the testimony;
- Ensuring that the deposition transcript is transmitted to the witness, assisting as needed with filling out an errata sheet, securing the witness’s signature on the transcript, and delivering the signed transcript to opposing counsel;
- Following up, as needed, with additional requests for information or documents from the witness;
- Answering any questions the witness has concerning the testimony and its implications for the witness or for the case generally.

In our view, the representation of a deposition witness that includes all of these activities is probably not a limited scope representation and, thus, not governed by Rule 1.2(c). Excluding one or more of these tasks may constitute a limited scope representation, if – under the circumstances – the client would reasonably expect those tasks to be included in the representation. For example, agreeing to represent a witness at her deposition, without meeting or speaking with the client first to prepare her testimony, would likely constitute a limited scope representation. On the other hand, representing a corporate employee at her deposition, but declining to advise her on issues relating to her employment, may not necessarily be a limited scope representation, depending on the reasonable expectations of the client. Nevertheless, the

safer course is to treat the representation of a deposition witness that excludes any of the above tasks as a limited scope representation and to comply with Rule 1.2(c).

B. Determining Whether the Limitations on the Representation are “Reasonable Under the Circumstances”

Assuming the representation of the witness-client is a limited scope representation, the attorney must then determine whether the limitations are “reasonable under the circumstances.” R. 1.2(c). The first step to evaluating the reasonableness of the representation is to identify what services will be included and – perhaps more importantly – what services are excluded. Excluding one or more of the tasks listed above does not necessarily render the scope of representation unreasonable. For example, a party-client with limited financial resources may be unable to pay for the attorney to assist the witness-client in collecting and reviewing documents in response to a subpoena. An even more financially strapped client may be unable to afford hours of preparation time before the deposition. Alternatively, a party-client may be willing to pay the attorney to prepare the witness for deposition, but not to advise the witness on her own personal liability. Whether the attorney can reasonably limit the scope of representation to exclude these tasks depends on the circumstances. *See, e.g.*, NYCBA Formal Op. 2015-4 (2015) (discussing examples of reasonable and unreasonable limitations on the scope of a local counsel representation); NYCBA Formal Op. 2004-2 (2004) (discussing “contractual limits on representation”). For example, it may be reasonable to exclude document collection if the witness is sophisticated and experienced in responding to document requests. Likewise, it may be reasonable to forego hours of deposition preparation, if the attorney concludes, based on independent evaluation of available evidence, that the witness’s testimony is likely to be relatively insignificant, uncomplicated, generally favorable to the party-client, and/or unlikely to expose the witness to liability herself. On the other hand, if the lawyer concludes that the testimony may be particularly complicated or may expose the witness to liability, such a limitation may not be reasonable. Rather than taking the risk of entering into an unreasonable limited scope representation, the lawyer should suggest that the witness cover the costs of these activities and – if that fails – simply not charge for them. If the lawyer is unable or unwilling to take these precautions, he should decline the limited scope representation.

Given the variety of considerations that may go into analyzing the reasonableness of a limited scope representation, the Committee cannot offer a bright-line rule.³ Below are some of the factors an attorney may need to consider in determining whether the limited scope representation is reasonable under the circumstances:

- Whether the witness faces potential liability for her own conduct in connection with underlying events and whether the attorney plans to advise the witness on those risks;

³ Certain limitations are clearly unreasonable. For example, if the party-client were to condition its payment of the witness-client’s attorney’s fees on the witness providing favorable testimony, that would obviously be an unreasonable limitation on the scope of representation.

- The sophistication of the witness and her experience with legal matters generally and deposition procedures in particular;
- Whether the attorney believes sufficient time has been allocated to prepare the witness's testimony;
- Whether the witness is sophisticated or experienced enough to handle the excluded tasks herself. For example, if document collection is excluded, is the witness is capable of searching for and identifying responsive documents to the subpoena without the attorney's assistance?;
- Assuming the party-client is paying for the witness's legal fees, whether the party-client has placed any conditions on the payment of those fees and what those conditions are;⁴
- Assuming the party-client is paying the witness's legal fees, whether the party-client has sufficient financial resources to enable the lawyer to devote the necessary time to the representation of the witness;
- Whether there is reason to believe that the witness is being subjected to (or may be vulnerable to) undue pressure from the party-client regarding the witness's testimony;
- Whether the witness has access to separate counsel to advise her on matters that are excluded from the representation.

C. Obtaining "Informed Consent" to the Limited Scope Representation

Assuming the limitations on the scope of representation are reasonable, the attorney must then obtain the witness's informed consent to those limitations. *See* R. 1.2(c). "Informed consent" is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j); *see also* NYCBA Formal Op. 2015-4 (attorney acting as local counsel in a lawsuit must advise the client about the risks of limiting the attorney's role in the litigation); NYSBA Ethics Op. 1061 (2015) (attorney who wishes to disclose client payment history data must obtain informed consent); NYCBA Formal Op. 2010-1 (2010) (discussing informed consent in the context of an agreement concerning the disposition of client files). The communication necessary to obtain informed consent will vary "according to the Rule involved and the circumstances giving rise to the need to obtain informed consent." R. 1.0, Cmt. [6]. The lawyer should ordinarily disclose "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

⁴ If the party-client is paying the witness's fees, the lawyer must also comply with Rule 1.8(f), which governs the payment of fees by a third party.

client’s or other person’s options and alternatives.” *Id.* Other 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 consent.” R. 1.0, Cmt. [6].⁵

In the context of limited scope representations, informed consent requires, at a minimum: (i) adequate disclosure of the limitations of the scope of engagement and matters excluded; and (ii) disclosure of the reasonably foreseeable consequences of the limitations, including the complications of having to retain separate counsel later if services outside the scope of the representation become necessary. *See* R. 1.2, Cmt. [6A]. As explained in ABA Formal Op. 472 (2015), “when lawyers provide limited-scope representations to a client” they must confirm the scope of representation, including the tasks the lawyer will perform and not perform. State bar associations outside of New York offer similar guidance. *See* Colorado Formal Op. 101 (1998, rev. by addendum 2006) (attorneys providing limited scope services should “clearly explain the limitations of the representation, including the types of services which are not being provided and the probable effect of limited representation on the client’s rights and interests”); D.C. Ethics Op. 330 (2005) (“a writing clearly explaining what is and is not encompassed within the agreement to provide services will be helpful in ensuring the parties’ mutual understanding”).

To meet Rule 1.2(c)’s requirements when representing a witness solely for the purposes of a deposition, an attorney should, at a minimum, disclose the following information:

- What services are included in the representation (*see supra* at Part I.A. discussing the services that may be involved in representing non-party deposition witnesses);
- What services are excluded from the representation (*see id.*);
- The implications of excluding certain services from the representation, such as the possible need to retain separate counsel to advise on those matters and the risk that the witness may face liability or other consequences if she does not secure legal advice with respect to an excluded service;
- Who will be responsible for paying the lawyer’s fees;
- The identity of the attorney’s other client(s) in the matter;
- Whether there are any conflicts of interest between the witness and the lawyer’s other client(s) and the implications of those conflicts of interest (*see infra* at Part II for further discussion regarding conflicts of interest);

⁵ Informed consent generally requires an affirmative response from the client. *See* R. 1.0, Cmt. [7]. Consent cannot be inferred from silence, although consent may be inferred “from the conduct of a client or other person who has reasonably adequate information about the matter.” *Id.*

- What will happen if a conflict of interest arises in the future, including who the attorney will continue to represent (*see id.*);
- How confidential information will be treated in connection with the joint representation (*see infra* at Part III for further discussion of confidential information);
- That the witness is not required to accept the limited scope representation and is free to retain separate counsel.

II. CONFLICTS OF INTEREST AMONG JOINT CLIENTS

Whenever an attorney who represents a party in a litigation takes on the representation of a non-party deposition witness, that creates a joint representation. *See* R. 1.7, Cmts. [29]-[33] (discussing special considerations that arise in joint or multiple representations). As discussed above, a nonparty witness and the party-client may benefit from being represented by the same lawyer. *See* R. 1.7, Cmt. [29] (explaining that some clients may prefer common representation to individual representation for synergistic reasons, and that, without common representation, some individuals might go unrepresented completely); NYCBA Formal Op. 2004-2 (discussing risks and advantages of jointly representing a corporation and its constituents). Despite these benefits, such representations present challenges because a lawyer is ethically required to provide the same degree of loyalty to the deposition witness as to his client in the litigation. Consequently, when a lawyer is asked to represent a nonparty witness at a deposition, he must first determine whether the new representation will create a conflict of interest with the party-client. In New York, a conflict of interest exists when “a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests.” R. 1.7(a)(1). “Differing interests” is defined as “every interest that will adversely affect the judgment or loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest.” R. 1.0(f).

If there is a conflict of interest between the party-client and the witness, the lawyer is prohibited from representing the witness, unless the lawyer “reasonably believes that he will be able to provide competent and diligent representation to each affected client” and “each affected client gives informed consent, confirmed in writing.”⁶ R. 1.7(b)(2). Attorneys must keep in mind that not all conflicts are waivable. There are some circumstances where joint representations are impermissible, regardless of whether the clients are willing to waive the conflict. As explained in Comment [29A] to Rule 1.7, “[i]n some situations, the risk of failure is so great that multiple

⁶ This rule applies regardless of whether the deposition witness is a corporate constituent of the client or an unrelated third party. Rule 1.13(d) (which governs the representation of organizations) states that a lawyer may represent both the organization and one of its constituents “*subject to the provisions of Rule 1.7*” (emphasis added). Thus, a lawyer who is asked by a corporate client to represent one of its constituents for a deposition must assess the engagement under Rule 1.7. Rule 1.13(d) additionally states that if a lawyer must obtain the organization’s informed consent under Rule 1.7 to represent a constituent, the organization’s consent cannot be given by that constituent.

representation is plainly impossible.” For example, “a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.” R. 1.7, Cmt. [29A]; *see also* NYCBA Formal Op. 2004-2 (discussing how to evaluate conflicts when asked to represent a corporation and its constituents). Thus, the lawyer must determine whether his relationship with the party-client is so strong that he would be tempted to favor that client’s interests over the deposition witness. Conversely, if the lawyer has a close, long-term relationship with a corporate executive who is being deposed in the case, he might be tempted to favor the executive’s interests over the interests of the corporation. In either case, the lawyer should decline to represent the deposition witness if he does not reasonably believe he can represent both clients with equal vigor.

The lawyer also has an ongoing duty to monitor conflicts throughout the representation. *See* Roy D. Simon with Nicole Hyland, *Simon’s New York Rules of Professional Conduct Annotated* 359 (2016) (explaining that the duty to monitor conflicts is “implied by the command not to ‘represent’ a client if a conflict exists under Rule 1.7(a), and by the command in Rule 1.10(e)(4) to check for conflicts when ‘an additional party is named.’”). Therefore, even if the lawyer concludes at the beginning of the matter that there is no conflict, the lawyer’s duty of loyalty must be assessed throughout the representation. Then, if a conflict does arise during the course of the joint representation, the lawyer must engage in the same conflicts analysis discussed above. First, he must determine whether he can continue to provide competent and diligent representation to both clients, as required by Rule 1.7(b)(2). Second, he must secure informed consent from both clients in order to continue the joint representation. If the conflict is not waivable or if either client refuses to waive the conflict, the lawyer may be forced to withdraw from representing both clients. *See* R. 1.7, Cmt. [4] (“If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b).”).

Conflicting interests may not be obvious at the outset of a representation. R. 1.7, Cmt. [5] (noting that “[u]nforeseeable developments . . . might create conflicts in the midst of a representation.”). Consider, for example, an attorney who represents a retail client being sued by a customer for injuries caused by an accident at the client’s store. The witness is an employee who observed a customer’s accident and is prepared to testify truthfully that the customer appeared to be inebriated. At first blush, there appears to be no conflict of interest between the retail client and the employee. During a conversation with the attorney, however, the employee discloses a criminal conviction that he lied about on his employment application. The employee worries that his deception will be revealed during the deposition. In this scenario, the interests of the employer and the employee diverge and the lawyer may no longer be able to represent both clients. In light of these significant risks, before agreeing to represent a nonparty witness, the lawyer should do his due diligence and try to assess the risk of a conflict arising at some point during the representation. *See* NYCBA Formal Op. 2002-4 (discussing the need to conduct a factual investigation before agreeing to represent a corporate constituent).

The lawyer may also consider obtaining prospective conflict waivers from both clients before undertaking the representation. *See* R. 1.7, Cmt. [22]-[22A] (discussing consent to future conflicts); NYCBA Formal Op. 2002-4 (discussing the use of prospective waivers when representing a corporation and its constituents); NYCBA Formal Op. 2006-1 (2006) (discussing

the use of advance conflict waivers in multiple representations). It may also be prudent to have an agreement that specifies what will happen if a conflict arises that is severe enough to prevent the lawyer from continuing the joint representation, notwithstanding the advance conflict waiver. Such an agreement might state, for example, that if a conflict arises that prohibits the lawyer from continuing to represent both clients, the lawyer will represent the party-client and will withdraw from representing the witness-client.

III. THE PRESUMPTION OF SHARED CONFIDENCES IN A JOINT REPRESENTATION

It is critical for lawyers to explain to both clients that the duty of confidentiality operates differently in a joint representation than it does in a single-client representation. Under Rule 1.6, an attorney must not “knowingly reveal confidential information” or “use such information to the disadvantage of a client or the advantage of the lawyer or a third person,” unless an exception applies. As a consequence, the client can reasonably expect that her communications with her attorney will not be disclosed to third parties. In a joint representation, however, that expectation of confidentiality is significantly circumscribed. Among joint clients, there is a presumption that confidential information that is material to the joint representation will be shared among the joint clients, unless some exception applies. *See* R. 1.7, Cmts. [30]-[31]; NYSBA Ethics Op. 1070 (discussing the presumption that client confidences are shared in joint representation but noting exceptions “where disclosure would violate an obligation to a third person or where the lawyer has promised confidentiality with respect to a disclosure”). The presumption of shared confidences exists, “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.” R. 1.7, Cmt. [31] (citing Rule 1.4, which governs the duty to communicate with clients).

Importantly, this presumption of shared confidences applies only to confidential information received from one joint client that is material to the other joint client’s representation. Therefore, in our scenario, the lawyer is not necessarily obligated to share all confidential information he receives from the party-client with the witness-client. He is only obligated to share information that is material to the lawyer’s representation of the witness-client for the purposes of her deposition. Confidential information that relates generally to the litigation, but is not material to the deponent’s representation, is not subject to the presumption of shared confidences and need not be shared with the witness-client. Unless the clients are particularly sophisticated in legal matters, it is unlikely that they will be aware of the presumption of shared confidences. Accordingly, before undertaking the joint representation, “the lawyer should 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.” R. 1.7, Cmt. [31]. The lawyer should also explain that “the prevailing rule is that, as between commonly represented clients, the privilege does not attach.” R. 1.7, Cmt. [30]. Thus, if there is a subsequent litigation between the two clients, it should be assumed that the privilege will not protect attorney-client communications that took place during the joint representation.

Although the presumption of shared confidences is the default rule, that rule may be modified by agreement with the clients, under certain circumstances. R. 1.7, Cmt. [31]. Thus, the clients

may agree that the attorney will not share certain confidential communications between the two joint clients, provided this limitation on shared confidentiality does not preclude the attorney from providing competent and diligent representation to both clients. *See* R. 1.7, Cmt. [31]. Lawyers who choose to represent deposition witnesses would be wise to avail themselves of this contractual option, by obtaining the witness's informed consent not to receive confidential communications that the party-client shares with the attorney about the case. If the attorney is unable to secure the witness's informed consent to this limitation, he should seriously consider declining the representation. Otherwise, the lawyer could find himself in a situation where the party-client instructs him not to share confidential information that the lawyer believes is material to the witness-client. If that occurs, the lawyer may be forced to withdraw from both representations. *See* R. 1.7, Cmt. [31].

A thornier issue is whether the attorney should agree not to share confidential information that he receives from the witness-client with the party-client. One of the risks of such an arrangement is that the witness may disclose confidential information to the attorney that would have a significant adverse effect on the party-client or on the case itself. Under those circumstances, the attorney would be prohibited from disclosing that information to the party-client and may be forced to withdraw from one or both of the representations. In light of this potential harm to the party-client, a lawyer should agree to withhold confidential information from the party-client only in rare circumstances, and only after the lawyer has explained to the party-client the significant risks of such an arrangement.

IV. COMPLYING WITH THE SOLICITATION RULE

When an attorney is asked to represent a non-party witness at a deposition, he must be mindful not to violate the ethical rules governing solicitation of clients.⁷ Rule 7.3(a) prohibits a lawyer from engaging in "solicitation" by "in-person or telephone contact, or by real-time or interactive computer-accessed communication, unless the recipient is a close friend, relative, former client or existing client." Solicitation is defined as:

any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

⁷ The attorney should also be mindful of the rules governing communications with unrepresented parties. Rule 4.3 states, *inter alia*, that "a lawyer shall not state or imply that the lawyer is disinterested" and "shall not give legal advice to an unrepresented person other than the advice to secure counsel." It should be noted, however, that "while lawyers generally are prohibited from rendering legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retention of counsel." NYCBA Formal Op. 2009-5 (2009).

R. 7.3(b). Given that the definition of solicitation incorporates the term “advertisement,” it follows that, for a communication to be a solicitation, it must also meet the definition of an “advertisement.” Rule 1.0(a) defines an “Advertisement” as “any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or the law firm. It does not include communications to existing clients or other lawyers.” In light of these definitions, a communication that does not have as its “primary purpose” the “retention of the lawyer” or is not motivated by “pecuniary gain” is not a solicitation. R. 7.3(b); *see also* N.Y. City 2015-6 (an attorney’s content on LinkedIn is not an “advertisement” if its primary purpose is something other than to attract paying clients).

Here, the central issue is whether a lawyer who makes an in-person or telephonic offer to represent a non-party witness at the request of the lawyer’s existing client violates Rule 7.3(a)’s limitation on soliciting new clients. An opinion issued by the New York County Lawyers’ Association addressed this question directly. *See* NYCLA Ethics Op. 747 (2014) (“NYCLA Op. 747”). NYCLA Op. 747 considered whether a lawyer is ethically permitted to offer representation to employees of a corporate client. The opinion’s analysis turned on the “primary purpose” of the lawyer’s communication with the employee. It concluded that the lawyer does not violate Rule 7.3(a) if the “primary purpose” of the initial communication with the employee is to conduct a factual interview, and only afterwards, the attorney offers to represent the employee. *See id.* The distinction between a permissible and an impermissible communication lies, therefore, in “the factual context and the lawyer’s motivation.” *Id.* If the “primary purpose [of the initial communication between the lawyer and the employee] is not to secure legal fees from a new client but to render competent representation to a current corporate client,” then Rule 7.3 is not breached. *Id.*

If it seems that NYCLA Op. 747 is threading the needle, it may be helpful to understand the context of that opinion. It was issued largely in reaction to *Rivera v. Lutheran Med Ctr.*, 22 Misc. 3d 178; 866 N.Y.S.2d 520 (Sup. Ct., Kings Cty. 2008), *aff’d*, 73 A.D.3d 891, 899 N.Y.S.2d 859 (2d Dep’t 2010), which disqualified the defendant hospital’s law firm from representing certain hospital employees, based on the solicitation rule. In *Rivera*, the defendant’s law firm arranged to represent several current and former employees of the hospital. The law firm then attempted to bar plaintiff’s attorneys from informally communicating with the employees on the basis that they were “represented persons” under Rule 4.2. The trial court concluded that the hospital’s law firm violated DR 2–103(A)(1) (the predecessor of Rule 7.3(a)) by making an uninvited offer to represent the employees. According to the court, the law firm’s motivation was to “gain a tactical advantage in the litigation by insulating [the witnesses] from any informal contact with plaintiff’s counsel.” *Rivera*, 22 Misc. 3d at 185. The court was particularly disturbed that the law firm offered to represent the employees before finding out what information they had and, therefore, without knowing whether the dual representation would be advantageous to either the current or the prospective clients. The court found the law firm’s conduct to be “particularly egregious” because it was an improper end run around the “laudable policy” benefits of informal discovery specifically noted by the Court of Appeals in

Niesig v. Team 1, 76 N.Y.2d 363 (1990). Accordingly, the court held that the law firm's actions amounted to improper solicitation and disqualified the firm.⁸ *Rivera*, 22 Misc. 3d at 187.

Attorneys seeking to represent a non-party witness should take certain precautions to avoid running afoul of Rule 7.3. One option is for the party-client to communicate with the non-party witness in the first instance to make them aware that the services of counsel are available. If the witness agrees to speak with the attorney in response to such an offer, any communication with the attorney after that would not constitute solicitation. During that initial meeting with the witness, the attorney should assess whether both clients' interests would be best served by joint representation and whether any conflicts of interests exist, before offering to represent the witness.

V. CONCLUSION

An attorney is ethically permitted to represent a non-party witness at a deposition in a proceeding where that same attorney also represents a party, subject to the following limitations. First, such a representation may constitute a limited scope representation under Rule 1.2(c). If so, the attorney must ensure that any limitations on the scope of representation are reasonable under the circumstances and must secure informed consent from the witness-client. Second, the attorney must evaluate whether representing the witness-client creates a conflict of interest with the party-client. If so, the attorney must determine whether the conflict is waivable and secure written conflict waivers before proceeding with the representation. The attorney also must continue to monitor the representation to ensure that appropriate steps are taken if a conflict of interest arises later in the proceeding. Third, the attorney must explain that both clients in a joint representation are entitled to receive information that is material to the representation. Thus, if one of the joint clients discloses confidential information to the lawyer that is material to the representation of the other joint client, the lawyer is obligated to share that information with the other client, unless an exception applies or the clients agree to a different arrangement. Fourth, when communicating with the deposition witness about the prospective representation, the attorney must comply with the ethical rules governing solicitation of clients.

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⁸ Other courts have taken a different view of such representations. In *Wells Fargo Bank N.A. v. LaSalle Bank Nat'l Ass'n*, 2010 WL 1558554 (W.D. Okla. April 19, 2010), for example, the court held that offering to represent the corporate client's former employees was not improper solicitation, stating: "[D]efense counsel was attempting to represent its client, the corporation, and also to protect the interests of the former employees whose conduct forms the basis for Plaintiff's claims in this case." Likewise, in *Dixon-Gales v. Brooklyn Hosp. Ctr.*, 35 Misc. 3d 676, 941 N.Y.S.2d 468 (Sup. Ct., Kings Cty. 2012), the court held that where insurance policies allowed the party to offer to pay for the employee-witness's legal fees, there was no violation of the non-solicitation rule. *But see Wade Williams Distrib. v. Am. Broad. Co.*, 2004 U.S. Dist. LEXIS 12152 (S.D.N.Y. June 30, 2004) ("The mere volunteered representation by corporate counsel of a former employee should not be allowed to shield information which there is no independent basis for including within the attorney-client privilege.").