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

Formal Opinion 2017-7: Disclosures to Joint Clients When the Representation Does Not Involve a Conflict of Interest

TOPIC: Joint Representation

DIGEST: When a joint representation does not involve a conflict of interest between the joint clients that would require the lawyer to obtain the clients' "informed consent" to the joint representation, the lawyer must nevertheless explain the implications of the joint representation to the extent "reasonably necessary to permit the client[s] to make informed decisions regarding the representation." This may require the lawyer to explain, for example, that information disclosed to the lawyer by one joint client cannot be withheld from the other joint client(s) if it is material to the representation, and that in the event of a dispute between the joint clients, information that would otherwise be protected by the attorney-client privilege as against third parties will not be protected as between the joint clients. The lawyer should ordinarily provide all such required explanations before commencing the joint representation.

RULES: 1.4; 1.6; 1.7

QUESTION:

When a joint representation of clients does not entail a conflict of interest that triggers the informed consent requirement of Rule 1.7 of the New York Rules of Professional Conduct (the "Rules"), must the attorney nonetheless make disclosures pursuant to Rule 1.4 of the Rules regarding the implications of the joint representation? What kinds of disclosures should the attorney consider making, and when should such disclosures be made?

OPINION:

I. Introduction

This Opinion addresses a lawyer's professional obligations to multiple clients whom the lawyer represents in the same matter, where the lawyer's representation of the clients does not give rise to a conflict of interest that triggers the informed consent requirement of Rule 1.7. For instance, consider the following scenario:

> A lawyer is asked to draft wills for spouses who have the same estate-planning objectives. After speaking at length with the prospective clients, the lawyer reasonably concludes that representing them jointly would not give rise to a conflict of interest requiring each spouse's informed consent[1]

[1] This opinion employs the commonly used term "joint representation" to describe a lawyer or law firm's representation of two or more clients in a single matter on a coordinated basis. Examples of joint representations include the following: representation of more than one plaintiff or defendant in a (….continued)

II. Joint Representations Do Not Always Give Rise to Rule 1.7 Conflicts of Interest

Joint representations often give rise to a conflict of interest under Rule 1.7(a)(1), which provides that a conflict of interest exists when "the representation will involve the lawyer in representing differing interests." Rule 1.0(f) defines "differing interests" to "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." As Comment [8] to Rule 1.7 explains:

> Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client.

As Comment [8] reflects, a conflict of interest that triggers Rule 1.7(a) includes not only a joint representation where the duty of loyalty, confidentiality or competence owed to one client will necessarily limit the lawyer's ability to represent the other client, but also where there is a "*significant risk*" that the lawyer's representation will, in the future, be materially limited by the lawyer's other responsibilities or interests.

Comment [8] acknowledges, however, that joint representations do not always involve a conflict of interest that requires the disclosure and consent prescribed by Rule 1.7:

> *The mere possibility of subsequent harm does not itself require disclosure and consent.* The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

(Emphasis added.)

Where there is a conflict of interest between joint clients, Rule 1.7(b) permits the lawyer to undertake or continue the joint representation if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and each client gives "informed consent, confirmed in writing." In order to obtain "informed consent," the lawyer must "communicate[] information adequate for the person to make an informed

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(continued….)

single lawsuit; representation of two or more individuals seeking to form a limited liability company or partnership; representation of spouses in estate planning; and representation of co-lenders or co-investors.

decision, and . . . adequately explain[] to the person the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j).[2]

But not all joint representations involve conflicts of interest requiring "informed consent" pursuant to Rule 1.7. For example, in advisory and transactional matters, the positions and interests of the joint clients may be aligned so closely and/or the scope of the representation may be so limited that a lawyer's representation of any one of them is unlikely to be adversely affected by the representation of the other(s). (In the litigation or investigation context, this is less likely to be the case.[3]) For example, authorities have concluded that the joint representation of spouses with common interests in the estate planning context does not invariably entail a conflict of interest. *See ACTEC Commentaries on the Model Rules of Professional Conduct* 101 (5th ed. 2016); Restatement (Third) of the Law Governing Lawyers § 130 cmt. c illus. 1 (Am. Law Inst. 2000). Even in situations where informed consent is not required, lawyers often, as a matter of professional judgment, obtain the joint clients' informed consent.[4] This may well be

[2] Lawyers may seek advance consent to possible future conflicts in some instances. *See* NYCBA Prof'l Ethics Comm., Formal Op. 2006-1: Multiple Representations, Informed Consent; Waiver of Conflicts.

[3] Joint representation of multiple parties to a litigation or concurrent representation of multiple parties involved in the same investigation often involves a conflict of interest because there is a significant risk that the clients will differ as to, for example, litigation strategy or cooperation and resolution. Close affiliation between multiple parties may render such differences far less likely – for example, where the parties are solvent, wholly-owned subsidiaries and parent corporations. *See* NYCBA Prof'l Ethics Comm., Formal Op. 2008-2. On the other hand, in some instances the existing or potential differences between clients may be so significant as to make the conflict of interest non-consentable. In addition, a conflict of interest is likely to be present when a lawyer is called on to assist clients in resolving questions regarding the relationship between them. *See* Rule 1.7, Comment [29]. For guidance regarding disclosures to be made to commonly represented clients in some litigation or investigation contexts where Rule 1.7 applies, *see e.g.*, NYCBA Prof'l Ethics Comm., Formal Op. 2016-2: Representing a Non-Party Witness at a Deposition in a Proceeding Where the Attorney Also Represents a Named Party ("Formal Op. 2016-2"); NYCBA Prof'l Ethics Comm., Formal Op. 2004-2: Representing Corporations and Their Constituents in the Context of Governmental Investigations.

[4] Some authorities appear to suggest that informed consent should always be obtained in a joint representation. *See, e.g.*, Roy D. Simon with Nicole Hyland, *Simon's New York Rules of Professional Conduct Annotated* 462 (2017) *("Simon's NY Rules")* ("But a lawyer who wants to represent multiple clients in the same matter – whether in litigation or in a transaction – may not do so unless each affected client gives informed consent."); Geoffrey C. Hazard, Jr., William Hodes & Peter R. Jarvis, 1 *The Law of Lawyering* § 12.14 (4th ed. 2015 Supplement) ("Despite the advantages of multiple-client representation in many situations, there are always some risks to the client that must be taken into account – not least of which is [the lawyer's inevitable accentuation of shared rather than individual interests] . . . . Ultimately, it is up to the clients to determine whether the advantages of sharing a lawyer justify the risks in each case. That is the mission of the disclosure and consent protocol set out in Rule 1.7(b).").

prudent, but if there is no conflict of interest between the joint clients, then the lawyer is not required by Rule 1.7 to seek informed consent to the joint representation.[5]

III. Required Disclosures to Joint Clients Under Rule 1.4

When Rule 1.7 does not apply to a joint representation, Rule 1.4 may nevertheless require the lawyer to make disclosures to the joint clients concerning aspects of the joint representation. Rule 1.4 addresses communications between a lawyer and client and, in particular, requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(b). There are important differences between the representation of a single client in a matter and a joint representation, and those differences may not be understood by a client who is not familiar with, or who has not previously participated in, a joint representation. For that reason, Rule 1.4 will likely require the lawyer to explain certain implications of the joint representation. The type of explanations required in any particular joint representation will depend upon the nature of the matter and the characteristics of the joint clients.

An explanation of how the lawyer will handle information received from the clients will, in most cases, be reasonably necessary to enable each client to decide whether to be jointly represented and, if so, what to communicate to the lawyer. This is a particularly important consideration because the lawyer's duty of loyalty to each jointly represented client generally prohibits the lawyer from continuing the representation while withholding, as between the clients, information material to the representation. *See* Formal Op. 2016-2, Section III; *cf.* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-450 (April 9, 2008).[6] As Comment [31] to Rule 1.7 recognizes:

> [T]he 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. . . . *At the outset of the common representation*

[5] Even if there is no conflict of interest under Rule 1.7(a) at the outset of a joint representation, a conflict may arise thereafter, and a lawyer should be alert to this possibility. If a conflict arises after the representation has been undertaken, the lawyer must ordinarily obtain the clients' informed consent (insofar as permitted by Rule 1.7(b)) if it was not previously obtained, or withdraw from one or both representations. *See* Rule 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)."); Rule 1.16(b)(1) (requiring a lawyer to withdraw from the representation of a client when the lawyer knows or reasonably should know that the representation will result in a violation of a Rule).

[6] ABA Formal Op. 08-450 concluded that: (i) at the time a joint representation is undertaken, the treatment of confidential information should be addressed with each client; and (ii) absent informed consent under Rule 1.6(a), the lawyer may not reveal confidential information to one co-client that would be harmful to the other, even a jointly represented client. *Id.* at 4-5. But "[if] 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)(1)." *Id.* at 5.

> *. . . , 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.*[7]

(Emphasis added.)

In other words, in any joint representation, the attorney must be satisfied that the clients understand that, at least to the extent relevant to the representation, information disclosed to the lawyer by one joint client may be shared with the other joint client. Although Comment [31] specifically addresses the joint representation of clients with differing interests, ensuring that the joint clients understand this is no less important where the lawyer concludes at the outset that the joint clients' interests do not and are not likely to differ.

Similarly, in any joint representation, the lawyer must be satisfied that the joint clients understand that information that would otherwise be protected by the attorney-client privilege as against third parties will not be protected by the attorney-client privilege as between the clients if they later become adverse to each other. *Cf.* Rule 1.7, Comment [30] ("With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.").

Whether other implications of the joint representation must be discussed with the joint clients will depend on the circumstances, including the nature of the clients' relationship with each other. One potentially important consideration is the understanding between the clients as to consultation and decision-making, such as whether both clients will be consulted by the lawyer and have to agree on how the lawyer should proceed, or whether, by agreement between the clients, one will delegate some consultation and decision-making to the other. Another is how a conflict of interest will be addressed if one should arise in the future. Even if, at the outset, the clients do not have and are not likely to develop differing interests, it may be reasonably necessary to address the possibility that a conflict of interest could arise later and, if so, what the consequences may be – particularly, whether the lawyer will have to cease representing one or both of the clients. Indeed, as a general matter, clients considering whether to be jointly represented should understand that if the joint representation ends for any reason – not only if a conflict of interest arises unexpectedly, but also if other circumstances change, such as one client deciding he prefers to be separately represented or failing to pay his share of the lawyer's fee – they may find themselves without counsel and facing the difficulty and expense of engaging new counsel.

This is not to say that Rule 1.4 *always* requires a lawyer to discuss the implications of a joint representation with joint clients. The lawyer must consider the experience and sophistication of

[7] Comment [31] to Rule 1.7 acknowledges that "[i]n 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 even as among the commonly represented clients."

the clients to determine whether, in a given situation, a particular explanation is required. For example, in the scenario set forth in Section I above, where the lawyer is asked to jointly represent spouses whom the lawyer has not previously represented, it would be important to explain implications of the joint representation that the clients would not otherwise understand. But there are circumstances where, because of factors such as the joint clients' sophistication or experience in being jointly represented, Rule 1.4 does not require further disclosures. For example, if a lawyer has repeatedly represented two large financial institutions as co-lenders, and reasonably believes that these clients already understand the implications of being jointly represented (perhaps because the lawyer has already disclosed such implications in a previous joint representation of these clients), there may be no need, when the lawyer is next retained to represent them as co-lenders, to reiterate what they already know.

In considering whether to make disclosures, and what disclosures should be made, the guiding principle under Rule 1.4 is whether a particular disclosure is necessary to enable each of the joint clients to make informed decisions regarding the representation. Even when disclosure is not required, however, a lawyer may find it prudent and sound practice to do so.

IV. Timing of Disclosures

When Rule 1.4 does require an explanation to the joint clients, a question of timing arises: Must the explanation be given before commencing the representation? Rule 1.4 is worded in terms of communications with a "client," not with a "prospective client," and thus could be read as not applying until after the representation begins. Moreover, unlike Rule 1.4, some other Rules are explicit that issues are to be addressed with a prospective client before the representation is commenced. *See, e.g.*, Rule 1.0, Cmt. [6] ("Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (*e.g.*, a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct." (citing Rules 1.2(c), 1.6(a) and 1.7(b)); Rule 1.5(b) (requiring disclosure to a client of the basis or rate of the fee and expenses "before or within a reasonable time after commencement of the representation"). On the other hand, some ethics opinions appear to assume that Rule 1.4 applies to pre-retention communications.[8] And the word "client"

[8] *See* ABA Model Rules of Prof'l Conduct R. 5.5, Comment [20] (citing Rule 1.4 and discussing a lawyer's obligation to inform a "client" that the lawyer is not licensed to practice law in a particular jurisdiction); ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-428 (2002) n.13 (discussing whether certain disclosures may be required by Rule 1.4 in the estate planning context "in order to enable the [potential client] to make an informed decision *whether to engage the lawyer*, especially when factors exist that might result in litigation to vitiate a gift or bequest" (emphasis added)); ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-425 (2002) ("The Committee is of the opinion that Rule 1.4(b) applies when lawyers ask prospective clients to execute retainer agreements that include provisions mandating the use of arbitration to resolve fee disputes and malpractice claims.").

in certain Rules has sometimes been interpreted to encompass prospective as well as current clients.[9]

We conclude that, before commencing the representation, the lawyer ordinarily must advise prospective joint clients of the implications of the joint representation where doing so is "reasonably necessary" to permit each client to make informed decisions about the joint representation, including the decision of whether to enter into a joint representation in the first place. It would be impractical and unhelpful to defer important disclosures about the differences between a separate representation and a joint representation to a point after which the clients have already decided to go forward with a joint representation. *See Simon's NY Rules* at 464 ("Full disclosure at the outset will not only alert the clients to the dangers of multiple representation, but will also alert the lawyer to problems when it is still possible to get separate lawyers for each client if any client will not consent or if any conflict turns out to be non-consentable."). If disclosures are deferred until after the engagement has begun, the disclosures (once made) may cause one or more joint clients to reconsider the decision to be jointly represented, discontinue the joint representation and retain new counsel, which would introduce many more complications than if the parties had proceeded by separate representation from the beginning. In addition, one or more of the clients may already have disclosed sensitive information to the lawyer without understanding that the information may be shared with the other client.

Finally, while Rule 1.4 does not require a lawyer to make disclosures about the implications of the joint representation in writing, it will often be sound practice for the lawyer to do so. *See, e.g.*, NYCBA Prof'l Ethics Comm. Formal Op. 2004-2 (stating that, where an attorney is representing a corporation and one or more of its constituents, and makes disclosures concerning, *inter alia*, sharing of confidential information and how the attorney-client privilege will operate, "[w]hile the New York Code does not require that such understandings be in writing, we strongly recommend that they be in writing").

Conclusion:

When a joint representation does not involve a conflict of interest between joint clients, such that "informed consent" is not required under Rule 1.7, Rule 1.4(b) still requires the lawyer to explain the potential implications of being represented jointly, to the extent an explanation is "reasonably necessary to permit the client[s] to make informed decisions regarding the representation." The nature of the required disclosures depends on the type of matter and the characteristics of the joint clients.

[9] In particular, prior to the adoption of a rule explicitly governing the confidentiality obligation to prospective clients, authorities understood that the ethical duty of confidentiality owed to a "client" under then-DR 4-101 of the Code of Professional Responsibility covered certain communications with a prospective client, as did the attorney-client privilege. *See* NYCBA Prof'l Ethics Comm. Formal Op. 2001-1 ("[I]nitial statements made when a prospective client in good faith intends to employ a lawyer are privileged even though the lawyer ultimately declines the engagement.").