

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

Formal Opinion 2019-4: Representing Multiple Individuals in the Context of a Governmental or Internal Investigation

TOPICS: Multiple Representations; Informed Consent; Confidential Information; Conflicts of Interest

DIGEST: A lawyer serving in the role as “pool counsel” may concurrently represent multiple individuals as witnesses or potential witnesses in connection with a governmental investigation or corporate internal investigation, subject to the rules governing conflicts of interest and confidentiality.

With regard to conflicts of interest: The lawyer must determine, before serving as pool counsel, whether the proposed representation will involve a concurrent conflict of interest. That would be the case, where, for example, one prospective pool client would testify adversely against another prospective pool client. If the lawyer determines that there is a conflict of interest but that the lawyer can nevertheless represent each prospective client competently and diligently, the lawyer may represent the individuals, but only with the informed consent of each client confirmed in writing. Even where there is no conflict of interest triggering the Rule 1.7 obligation to obtain informed client consent to the multiple representation confirmed in writing, the Rule 1.4 obligation to explain a matter to the extent reasonably necessary to permit the client to make informed decisions may require the same disclosures about the risks and advantages of the multiple representation. The advisable course is for the lawyer to confirm in writing the client’s consent to the multiple representation in any event. Once the representation commences, the lawyer must identify, and respond appropriately to, any conflicts of interest that may arise.

With regard to confidentiality: Both before interviewing a prospective client, and before undertaking to represent an individual as a client, pool counsel must secure the individual’s informed consent insofar as the lawyer expects to use or disclose the individual’s confidential information for the benefit of others. Given the breadth of the confidentiality duty, it will be difficult as a practical matter to avoid using clients’ and prospective clients’ confidential information in representing others in the pool, and therefore the lawyer must secure their informed consent to the lawyer’s use of their confidential information insofar as necessary in representing others. The lawyer and clients have alternatives as to whether to enter into an understanding, in advance, that the lawyer may disclose clients’ confidential information to other clients in the pool. Such an understanding also requires informed consent.

RULES: 1.0(j), 1.4, 1.6, 1.7, 1.8(f), 1.16, 1.18

QUESTIONS: May a lawyer concurrently represent multiple individuals in the same governmental investigation or corporate internal investigation?

OPINION:

I. Introduction

This opinion addresses a lawyer's simultaneous representation of multiple individuals, such as corporate employees, who are potential witnesses in a governmental or corporate internal investigation.¹ The opinion involves the application of familiar rules and principles regarding conflicts of interest and confidentiality to a context that is somewhat different from those we have addressed in prior opinions. For instance, consider the following scenario:

A government regulatory agency or prosecutor commences an investigation of possible corporate wrongdoing and, in response, the corporation retains outside counsel to conduct an internal investigation and advise the corporation regarding its legal liabilities, obligations, and possible responses. The corporation recognizes that a number of employees are likely to be witnesses to the conduct under scrutiny, but unlikely to face civil or criminal liability for that conduct. The corporation also recognizes that those employee-witnesses would benefit from legal advice from a lawyer other than the corporation's own in-house or outside counsel. However, for financial reasons, the corporation is unwilling to pay the legal fees for a separate lawyer to represent each individual employee.

The corporation offers to compensate a single lawyer (or law firm) to represent a pool of multiple employees (or several law firms to each represent different pools of employees). The lawyer would be available, among other things, to advise each of the clients regarding whether and in what circumstances to submit to interviews and/or provide testimony; to communicate on each client's behalf with corporate or government counsel; to review documents and to prepare each client for questioning by corporate or government counsel; to negotiate the terms of each client's interview and/or testimony; and to accompany and advise each client when the interview and/or testimony takes place.²

This is not an unusual situation. It is common for a single lawyer or law firm to represent two or more individuals in connection with the same corporate, regulatory, or criminal investigation. The types of investigations are varied and include, for example, internal corporate

¹ The analysis in this opinion is also relevant to the situation where one lawyer simultaneously represents multiple third-party witnesses in a civil litigation. Whether the fact-finding takes place in civil discovery or in a corporate internal or government investigation, the lawyer will face similar questions regarding conflicts and confidentiality.

² This Opinion does not address every possible ethics issue raised in a multiple-client scenario, but focuses on conflicts of interest and confidentiality obligations. Other Rules not analyzed here may apply, depending on the facts and circumstances. Most obviously, representing individuals in a government investigation requires a certain level of knowledge and expertise, and a lawyer should not undertake the representation unless the lawyer is competent to do so. *See* Rule 1.1.

investigations, federal, state, or local criminal investigations or prosecutions, and civil regulatory (e.g. Securities and Exchange Commission) or non-governmental organization (e.g. Financial Industry Regulatory Authority) investigations or enforcement actions. The lawyer in such circumstances is often referred to as “pool counsel” in reference to the lawyer’s “pool” of clients typically comprising current or former employees, officers, or agents of the same organization.³ The client group may also consist of individuals who are not employees of the same company but who are for other reasons similarly situated in the context of the investigation. The organization under scrutiny typically pays the pool counsel’s fees on behalf of the clients, but is not itself a client of the pool counsel.⁴

While it is conceivable that pool counsel in some situations might represent multiple individuals as “joint clients” who coordinate legal strategy and decision making, this Opinion addresses the more typical situation in which pool counsel in an investigation represents multiple individuals concurrently but separately. In a joint representation (such as when one lawyer advocates for co-plaintiffs or co-defendants in a litigation, negotiates on behalf of business partners in a transaction with a third party, or advises spouses about the disposition of their common property), the co-clients have a common purpose, make decisions together regarding the objectives and direction of the lawyer’s representation, and presumptively consent to the sharing of otherwise confidential information that is material to the representation.⁵ Our understanding is that such joint representations are less common in corporate and governmental investigations when one lawyer or firm represents a pool of similarly-situated individuals. Rather, in the pool counsel situation arising in response to a government or corporate investigation, it is more common for the representations to be structured as concurrent but separate representations, where there is no expectation that the clients will coordinate strategy or decision-making with one another. Nonetheless, much of the guidance in Comments to Rule 1.7 and in opinions relating to joint representation is applicable to the pool counsel arrangement.

³ The term “pool counsel” is a commonly-used term of art in white collar practice referring to a lawyer’s or law firm’s representation of two or more individuals in a single investigation.

⁴ See NYCBA Prof’l Ethics Comm., Formal Op. 2004-02 (2004) (addressing the circumstances where counsel simultaneously represents a corporation and its officers or employees in the context of a governmental representation).

⁵ See, e.g., NYCBA Prof’l Ethics Comm., Formal Op. 2017-7 (2017) (addressing disclosures to jointly represented clients when the representation does not involve a conflict of interest); NYCBA Prof’l Ethics Comm., Formal Op. 2016-2 (2016) (addressing joint representation of a party to an adjudication and a non-party witness).

II. Addressing Conflicts of Interest at the Outset of a Multiple Representation

a. Rule 1.7 Analysis in General

Before undertaking any concurrent representation of multiple clients in connection with a single investigation, pool counsel must first engage in an analysis under Rule 1.7 to “determine whether a conflict of interest exists” and, if so, “whether the conflict is consentable.” Rule 1.7, Cmt. [2]. Under Rule 1.7(a), pool counsel would have a “concurrent conflict of interest” if “the representation will involve the lawyer in representing differing interests.”⁶ That will be the case if the representation of one client is, or is significantly likely to become, adverse to another client, or if there is otherwise “a significant risk that a lawyer’s exercise of professional judgment” on one client’s behalf “will be adversely affected” by the lawyer’s responsibilities to other clients “or the representation would otherwise be materially limited” by such other responsibilities. *See* Rule 1.7, Cmts. [2] & [3]. If there is a concurrent conflict of interest, the lawyer may represent the multiple clients only 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.” Rule 1.7(b).

Conflicts of interest must be addressed before undertaking a representation. *See* Rule 1.7, Cmt. [2]. Therefore, a lawyer seeking to serve as pool counsel to multiple individuals in an investigation must initially engage in an analysis under Rule 1.7 to determine whether there are conflicting interests among the potential pool clients and, if so, whether such conflicts are those to which the clients may consent. An example of a non-consentable conflict is a situation where Client A will testify against the interests of Client B.⁷ Another example, addressed below in Part III, occurs when one client insists that the lawyer maintain the confidentiality of information that the client has disclosed, but the lawyer would need to disclose the information to another client in order to represent that client competently and loyally. *See* Part IIIC, below. Typically, lawyers will make some preliminary assessments even before conducting an intake interview with a prospective client and will not consider representing any prospective client whom the lawyer reasonably believes would have a non-consentable conflict of interest with one or more other clients in the pool.

The lawyer’s obligation includes not only identifying whether the prospective clients’ interests conflict from the very outset, because it is already apparent that the representation of one client will be materially limited by the lawyer’s duty of competence, loyalty or

⁶ Rule 1.0(f) defines “differing interests” as “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.”

⁷ The most obvious example will be where Client A is expected to incriminate Client B or otherwise disclose information that would be embarrassing or detrimental to Client B. But there may be other ways in which Client A’s expected testimony may be contrary to Client B’s interests, such as where Client A’s recollection of events has independent corroboration and is so starkly different from Client B’s recollection that one might infer that Client B is testifying falsely. *See* Part IV, below. In these scenarios, the conflict-of-interest risk is two-fold. First, pool counsel’s advice to Client A regarding Client A’s testimony may be adversely affected, consciously or unconsciously, by pool counsel’s regard for Client B’s interests. Second, Client B may perceive that pool counsel was disloyal in assisting Client A in testifying adversely to Client B’s interests.

confidentiality to another client, but also determining whether there is a significant risk that the clients' interests will conflict later in the representation – for example, if there is a likelihood that one client will testify adversely to the interests of another. Comment [8] to Rule 1.7 explains that “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 the representation of a client. (Emphasis added). See NYCBA Prof’l Ethics Comm., Formal Op. 2017-7 (“[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.”). If there is a significant risk, but nevertheless the lawyer reasonably believes that each client will receive competent and diligent representation, the lawyer must obtain each client’s informed consent before accepting the representation. In some cases, the lawyer may decide not to represent a prospective client because of concern about the concurrent conflict of interest, or a particular prospective client may decide not to give consent, in which case that individual cannot be included in the pool.

Even if the lawyer, after interviewing prospective clients and gathering other available information, does not perceive a significant risk that the lawyer’s representation of any one client will be adversely affected by the lawyer’s duties to another client, the advisable course is for the lawyer to obtain informed consent from each potential client, confirmed in writing, of the risks and advantages involved in the multiple representation. Even assuming there is not a concurrent conflict of interest under Rule 1.7, Rule 1.4 may require the lawyer to make essentially the same disclosures to pool clients about the implications of the multiple representation. See NYCBA Prof’l Ethics Comm., Formal Op. 2017-7 (“Disclosures to Joint Clients When Representation Does Not Involve a Conflict of Interest”) (explaining that even absent a Rule 1.7 obligation, the Rule 1.4 obligation to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation” will likely require the lawyer to make disclosures to co-clients). While Rule 1.4 does not require the disclosures to be in writing, it is nevertheless advisable that such disclosures be confirmed in writing. See *id.*, citing Formal Op. 2004-02.

b. Identifying Potential Conflicts of Interest Among Potential Pool Clients

Even before meeting with each potential pool client, a lawyer may conclude – based on information provided by corporate or government counsel, or based on the lawyer’s independent preliminary investigation – that certain individuals should not be in the pool of clients because their interests are likely to conflict with the interests of other potential clients. For example, if a potential client is a “target” of the investigation – meaning that a prosecutor considers him or her to be a “putative defendant” – that person will need a separate lawyer as a general matter.⁸ That

⁸ See, e.g., U.S. Dep’t of Justice, Justice Manual, Section 9-11.151 (defining “target” as “a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant”). Courts have cautioned against representing multiple witnesses when one or more is a target of the investigation. See *In re Grand Jury Investigation*, 447 F. Supp. 2d 453, 459 (E.D. Pa. 2006) (“Through the divergent legal positioning of the target witnesses and the non-target witnesses, the Law Firm has entered a web of ethical quandaries from which neither attorney nor client can escape

is primarily because a target's decision to cooperate with or to contest the government's investigation takes place under, and is influenced by, circumstances that are dramatically different from those of a mere witness with little to no risk of personal jeopardy. In addition, targets may have information that they do not want the lawyer to share with other pool clients, and non-target pool clients may have information that is prejudicial to the target clients. In such a case, the targets' interests would be that the other pool clients do not disclose such adverse information to investigators, while it will likely be in the other clients' best interest to make such disclosures in order to be fully forthcoming. The same lawyer or law firm cannot represent two clients with adverse interests such as these in the same investigation.

To determine whether there is a concurrent conflict and, if so, whether it is a consentable one, the lawyer should *separately* interview each prospective client (while explaining that they are prospective clients in a pool representation). The lawyer may then conclude whether the prospective clients appear to have conflicting interests or not, and whether the lawyer can represent each prospective client competently and diligently.⁹ The objective will be to learn enough information to make an informed judgment about whether a situation is likely to arise in which the lawyer's professional judgment, competence or loyalty would be compromised.

While it is beyond the scope of this opinion to set forth all the best practices for conducting preliminary fact-gathering, at a minimum, the lawyer should: (1) identify other potential clients and explain that prior to undertaking the representation the lawyer must first evaluate whether there are any conflicts among the multiple individuals; (2) attempt to ascertain whether each potential client has engaged in wrongdoing, or may be perceived to have done so; and (3) attempt to ascertain whether each potential client has information relevant to the other potential clients, and the nature of such information – *i.e.*, whether the information may be adverse or harmful to any other potential pool client.

As discussed below in Part IIIA, to avoid being disqualified from representing others as a result of a prospective client's disclosures, the lawyer should reach an initial understanding with the prospective client regarding the lawyer's use of the prospective client's confidential information in the subsequent representation of others. Even with such an understanding, the lawyer should strive to identify conflicts of interest with the minimum amount of disclosure by the prospective client and terminate the interview once it appears that the prospective client cannot or will not be represented.

unharmful."); *cf.* Rule 1.7, Cmt. [23] (representing co-defendants in a criminal case creates a conflict "so grave" that the representation ordinarily should not be undertaken).

⁹ As a general matter, the lawyer may not want to conduct fact-gathering meetings with multiple clients simultaneously, both because the representations are structured as separate, not joint, representations, and for possible strategic reasons. Prosecutors or regulators may question the credibility or bona fides of potential witnesses who have spoken with each other about the matter in question, suspecting that they have coordinated their stories. Indeed, counsel's own credibility may be tested to the extent that clients have discussed the investigation with each other at counsel's direction, with counsel's participation, or even merely in counsel's presence. Accordingly, factual communications about the matter between counsel and multiple concurrently represented individual clients are typically conducted individually, rather than jointly.

c. Obtaining Informed Client Consent to the Multiple Representation

If the representation would involve a concurrent conflict of interest, but one to which consent may be given,¹⁰ the client's consent must be both informed and confirmed in writing.¹¹ Rule 1.0(j) defines "informed consent" to mean "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." In the context of a concurrent representation of multiple clients, informed consent requires explaining "the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved." Rule 1.7, Cmt. [18]; *see also* Rule 1.4(b) (lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"). As noted in Section IIA, even if the lawyer concludes that the pool representation does not involve a conflict of interest, the lawyer still has an obligation under Rule 1.4 which may require explaining the implications of the multiple representation and obtaining the clients' agreement.

At a minimum, the lawyer must fully explain to each prospective client, in the context of the particular investigation, the risks of multiple-party representation and the prospective client's alternatives. This includes the "possible effects on loyalty, confidentiality and the attorney-client privilege," Rule 1.7, Cmt. [18] – for example, that the lawyer's advice may be adversely affected by concern for another client or that the client's confidential information may be used or disclosed to the client's disadvantage. If pool counsel vigilantly monitors conflicts as discussed below in Part IV, the principal risk is that "divergence of interests will [later] require the attorney to withdraw from representation." NYCBA Prof'l Ethics Comm., Formal Op. 2004-02 (2004). This would entail the financial cost of retaining new counsel, as well as possible opportunity costs of one or more clients missing a chance to act quickly in a fast-paced investigation. Among the alternatives are that prospective clients retain separate counsel or go unrepresented.

The lawyer should also explain the benefits of the pool counsel arrangement. As we discussed in Formal Op. 2004-02, which addressed a lawyer's simultaneous representation of a corporation and its employee in a governmental investigation, one obvious advantage to a multiple representation is ordinarily that a third-party such as the client's employer will pay the attorney's fees. Other significant advantages to the clients often include pool counsel's acquisition of a "detailed and broad knowledge of the relevant facts" by virtue of hearing how multiple witnesses experienced the events under scrutiny. *See* NYCBA Prof'l Ethics Comm., Formal Op. 2004-02 (2004).

¹⁰ Part IV describes a situation where there may be a concurrent conflict of interest, but one to which clients may give informed consent, namely, where two clients have materially different recollections.

¹¹ The requirement of Rule 1.7 that consent be "confirmed in writing" may be satisfied by a writing from the lawyer to the client memorializing the discussion (such as an engagement letter) and, per Rule 1.0(e), the writing need not be counter-signed by the client.

In addition to carefully explaining the risks, advantages and alternatives, pool counsel must ensure that each client understands the terms of the prospective representation. The requisite disclosures may vary with the circumstances of the particular matter. The following is a non-exhaustive list of factors that are likely to be among those that pool counsel should explain to the potential clients in a pool representation:

- The identity of all other clients in the pool;
- The lawyer’s ongoing obligation to monitor the multiple representation for conflicts after it commences;
- How the lawyer will handle the client’s confidential information, including that the client’s consent to the attorney’s use of confidential information for the clients’ mutual benefit will not be revocable (as discussed further in Section III, below);
- How the attorney-client privilege will function between and among the concurrently represented clients;¹²
- How a conflict of interest among the clients will be handled, should one be discovered after the representation begins (as discussed further in Section IV, below);
- That if the corporation (or another third party) will be paying the lawyer’s fees, the client must give informed consent to this arrangement as well as to the multiple representation;¹³
- That the client may benefit from consulting with a separate lawyer for advice specifically on the question of whether to be represented by pool counsel.

In giving these explanations, the lawyer must consider the relative sophistication of the potential clients and must increase the depth of explanation as necessary to ensure that prospective clients understand what is discussed.

¹² How the attorney-client privilege applies in any given pool counsel arrangement is a question of law outside the scope of this Opinion. If privileged information is to be shared among pool clients, pool counsel may have to consider this question and discuss it with the clients.

¹³ Rule 1.8(f) provides that a “lawyer shall not accept compensation for representing a client . . . from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independent professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of the client is protected” by the confidentiality obligations of Rule 1.6. “Simply put, Rule 1.8(f) means that a lawyer owes a client the same duties owed to a client without regard to the source of the fees the lawyer is paid, with the added proviso that a client must give ‘informed consent’ to the arrangement.” NYSBA Ethics Op. 1000 (2014). Thus, where a third party, such as the clients’ employer, is paying for the costs of representation in a pool counsel situation, the lawyer must explain to each affected client that the lawyer’s loyalties run to the client and not to the third-party payor.

At the outset of the representation, in advising prospective clients about the possibility that conflicts of interest may arise, and that the lawyer may be required to end the representation as a result, the lawyer may also seek the prospective clients' advance agreement to how future conflicts will be addressed. This Committee discussed the use of advance conflict waivers in NYCBA Formal Op. 2004-02, and we refer readers to that earlier discussion. Advance conflict waivers may be used only to give informed consent to future conflicts that are consentable under the applicable conflict rule (e.g., Rule 1.7(b) or Rule 1.9(a)). Advance conflict waivers are more likely to be effective if they anticipate and describe the conflict with specificity. By way of example, in the pool counsel scenario, a client might give informed consent, in advance, that if two clients' differing recollections make it impossible for the attorney to represent both clients competently in the same matter, the lawyer may opt to represent one particular client rather than withdrawing from both representations. We do not undertake to consider all of the conflicts that may or may not be consentable in advance.

III. Treatment of Client Confidences in a Multiple Representation

Before undertaking a representation, it is especially important that pool counsel address the lawyer's confidentiality obligation. This obligation extends beyond attorney-client privileged information and other information imparted by the particular client. A lawyer's confidentiality duty, whether to prospective clients (under Rule 1.18(b)), current clients (under Rule 1.6), or former clients (under Rule 1.9(c)), extends to all information gained in or relating to the representation, whatever its source, that is protected by the attorney-client privilege, that would be embarrassing or detrimental to the client if disclosed, or that the client has requested be kept confidential. In general, Rule 1.6(a) provides that a lawyer may not "reveal" a current client's confidential information "or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" without the client's informed consent; Rules 1.18(b) and 1.9(c) similarly provide that the confidential information of former clients and former prospective clients may not be revealed or used to their disadvantage.

In meetings with prospective clients, pool counsel must take into account the confidentiality obligation owed to prospective clients under Rule 1.18. As discussed below in Section IIIA, before obtaining confidential information from a prospective client, pool counsel should obtain the prospective client's informed consent to the lawyer's use of the information that is disclosed to the lawyer, and should reach any further agreements necessary to avoid undertaking a confidentiality obligation that will disable the attorney from later representing others.

Before undertaking a representation (if pool counsel concludes that an individual may be represented consistently with Rule 1.7), pool counsel must adequately explain to each prospective client the lawyer's obligations regarding confidential client information and must secure the prospective client's informed consent regarding how confidential information will be handled. This is a necessary element of informed consent as discussed above in Part IIC. The principal questions of client confidentiality presented by a pool representation are: (1) which client confidences may the lawyer *use* to the benefit of the other pool clients; and (2) which client confidences may the lawyer *disclose* to the other pool clients? The ordinary expectations regarding confidentiality in an individual representation cannot be maintained in a pool

representation. In a singular individual representation, a lawyer may neither use nor disclose confidential information gained during or related to the representation, absent client consent. In a pool counsel arrangement, however, effective representation requires that each client's information become part of the lawyer's stockpile of information, available to be used by the lawyer for other clients' benefit. As discussed below in Section IIIB, the client must give informed consent to this *use* of his or her confidential information. And as discussed below in Section IIIC, to the extent that pool counsel seeks authorization in advance to *disclose* a client's confidential information to other clients, pool counsel requires the client's informed consent to that as well.

a. Confidentiality Obligation to Prospective Clients in the Initial Intake

Even prior to agreeing to represent an individual along with others in a governmental or internal investigation, pool counsel owes a duty of confidentiality to prospective clients with whom the attorney meets in order to ascertain whether the representation may be undertaken and whether the individual wishes to retain the attorney. *See* Rule 1.18. This Committee has previously offered guidance regarding the duty to prospective clients in NYCBA Prof'l Ethics Comm., Formal Op. 2013-1, and NYCBA Prof'l Ethics Comm., Formal Op. 2006-2.

At the intake interview, pool counsel must attempt to ascertain whether a conflict of interest will foreclose representing any given prospective clients. In doing so, the lawyer should avoid learning more information than necessary to identify the problem. Therefore, once a disabling conflict becomes apparent, the lawyer should end the interview.

Absent a prior agreement to the contrary, if pool counsel learns confidential information from a prospective client, pool counsel must refrain from using or disclosing the information. *See* Rule 1.18(b) ("Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."). But, as a practical matter, it may be difficult to represent others in the pool without, at the very least, *using* information learned from all of the clients and prospective clients insofar as the information contributes to the attorney's understanding of the facts relevant to the investigation. If pool counsel learns information that is significantly harmful to the prospective client, pool counsel might later be barred from representing another client adversely to the prospective client; unless adequate procedural steps were taken (including screening the attorney who received disqualifying information), the attorney's law firm may later be barred in that situation as well. *See* Rule 1.18(d)(2)(i)-(iv).¹⁴

¹⁴ We do not here consider whether, and in what circumstances, the representation of a witness in a governmental or internal investigation would be "materially adverse" to a former pool client or to a former prospective pool client under Rule 1.9(a) or Rule 1.18(c), other than to note the following. The representation of a witness – e.g., in providing advice and preparing the witness to be interviewed by investigators or to testify in a deposition or before the grand jury – is not invariably "materially adverse" to a third party about whose conduct the witness testifies. However, there may be circumstances where a witness's testimony incriminates a third party or is otherwise sufficiently prejudicial to a third party that even though the witness and the third party are not adverse parties in a legal proceeding, representation of the witness is "materially adverse" to the third party. As noted in Part IIC, it may be possible to consent in advance to this conflict arising out of a duty to a former or prospective client.

At minimum, for reasons similar to those discussed more extensively below in Section IIIB, the lawyer should ordinarily secure the prospective client's informed consent for pool counsel to *use*, for the benefit of the pool representation, any confidential information learned from the prospective client. Additionally, the lawyer might pose careful questions to the prospective client, to attempt to identify a potential conflict of interest before the prospective client discloses significant, sensitive information.¹⁵ Pool counsel should consider what, if any, other procedural steps to take to avoid or reduce the risk that the attorney will be disabled from representing others in the pool because of a confidentiality obligation to a prospective client.¹⁶

b. The Lawyer's Use of One Client's Confidential Information to Benefit Other Pool Clients

A pool counsel arrangement presupposes that each client's confidential information may be *used* for the benefit of other pool clients insofar as the lawyer deems it necessary to do so in order to competently and diligently assist and advise other clients, consistent with the attorney's obligations under Rules 1.1, 1.3 and 1.4, among others. As a practical matter, the lawyer cannot avoid using – as opposed to disclosing – what the lawyer has heard or read in connection with representing one pool client (for example, in client debriefings or in reviewing a client's documents, or in communications with company or government lawyers). As the lawyer acquires knowledge relating to the governmental or internal investigation, the lawyer will necessarily be informed by that knowledge when advising and otherwise assisting clients, and will draw on the fullness of that knowledge for the benefit of all of the clients.

Rule 1.6 provides that a lawyer generally may not use a client's confidential information to benefit a third party without the client's informed consent. An arrangement in which prospective clients give informed consent to the lawyer's use of confidential information, learned while representing them for the mutual benefit of all the pool clients, furthers one of the principal advantages to the clients of concurrent representation – that is, the lawyer's ability to draw on a greater depth of knowledge based on the aggregation of information from the multiple clients to the benefit of all the representations. The more a lawyer knows about the underlying facts, or about the course of the investigation (e.g., who is being interviewed, what questions are being asked) the better the lawyer can prepare and position each client.

To obtain informed consent, the lawyer should inform the client before the retention of the risks and advantages to permitting the lawyer to *use* all information learned for the benefit of all the representations. Informed consent requires the client to understand that if the client

¹⁵ One possible course of action is to ask each potential client whether he or she has any information relevant to the investigation that the client would not want disclosed to any other potential client. A simple “yes” would alert the attorney to a potential problem without conveying potentially disqualifying information.

¹⁶ One possibility is for pool counsel to secure the prospective client's informed consent, in advance, to the attorney's representation of others in the pool. *See* Rule 1.18(d)(1). Another is for the lawyers conducting intake to limit their exposure to prospective clients' confidential information and then for the law firm to screen those lawyers from the representation of the pool clients. *See* Rule 1.18(d)(2).

authorizes the lawyer to use information for other clients' benefit, the client's authorization will not be revocable, even if the client terminates the representation, because the client's information cannot be unlearned, and the lawyer could not practically continue representing the other pool clients without using all the relevant information obtained in the multiple representations.¹⁷ If a prospective client declines to consent to this arrangement, or does not understand it well enough for consent to be "informed," then the prospective client cannot be represented as part of the pool of clients and therefore should not be accepted into the pool.¹⁸

c. The Lawyer's Disclosure to Other Pool Clients of One Client's Confidential Information

A lawyer may take a different approach, however, with regard to whether to *disclose* to other pool clients one client's confidential communications (and other client-specific information). There are essentially two broad alternative arrangements.

Under one approach, a client may agree that client-specific confidential information disclosed to the lawyer may be disclosed to all other concurrently represented clients at the lawyer's discretion, unless and until the disclosing client revokes this authorization. (This is the presumptive understanding in a joint representation, discussed in Formal Op. 2017-7.)¹⁹ Under this model, each client consents in advance to the lawyer's disclosure to all clients of each

¹⁷ Ordinarily, a client's consent to a lawyer's use or disclosure of confidential information is revocable, and once the client revokes consent, the lawyer may no longer disclose or use the client's confidential information. *See, e.g.*, NYCBA Formal Op. 1997-2 (1997) (juvenile client may revoke consent to lawyer's sharing of confidential information with others in a social services agency); NYSBA Ethics Op. 1061 (2015) (client may revoke consent to the lawyer's reporting of the client's credit history). But that is not necessarily the case when other clients who have reasonably relied on the consent would be significantly disadvantaged by its revocation, because they would be denied their lawyers' ongoing services. *See* NYSBA Ethics Op. 1061 (2015) (The Restatement says that "if the revoking client lacks valid reasons for the revocation of consent, then whether the lawyer may continue representing a non-revoking client 'depends on whether material detriment to the other client or lawyer would result and, accordingly, whether the reasonable expectations of those persons would be defeated.' . . . When a lawyer jointly represents two co-defendants pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the joint clients, and one of the clients later revokes consent, whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent.") (quoting Restatement (Third) of the Law Governing Lawyers); *cf.* D.C. Bar Ethics Op. 317 (2002) ("Repudiation of Conflict of Interest Waivers"); *see also* note 18, *infra*.

¹⁸ Rule 1.6 provides that a lawyer may knowingly reveal confidential information or use such information for the benefit of a third party, even without the client's "informed consent" under Rule 1.0(j), when "the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." *See* Rule 1.6(a)(2). If a pool counsel arrangement is adequately explained, some might regard a prospective client's general agreement to the arrangement as implicitly authorizing at least the lawyer's *use* of the client's confidential information for others' benefit. However, the better practice is to obtain explicit "informed consent" from *all* prospective clients to the use of their confidential information to benefit others in the pool, in order to avoid having to make a judgment regarding whether any particular client possesses or lacks the sophistication and experience to understand the confidentiality implications of the pool counsel arrangement.

¹⁹ *See* NYCBA Formal Op. 2016-2 ("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."); NYCBA Formal Op. 2017-7 (same); *see also* Rule 1.7, cmt. [31].

client's confidential information, including attorney-client privileged communications. The client's consent must be "informed" by an explanation of the risks, benefits and alternatives. Among other things, the client must understand the legal implications with respect to the preservation of the privilege. Additionally, the lawyer must explain the implications of later revoking consent.²⁰

Under the other approach, a client may stipulate that the lawyer may not disclose to the other clients information that the client provides to the lawyer unless and until the client gives informed consent with regard to particular information. Under this arrangement, while the lawyer is authorized to *use* the client's confidences for other clients' benefit, the lawyer may not *disclose* those confidences to the other clients without the source-client's specific consent.²¹ If employing this method, the lawyer should ensure that each client in the pool understands that one or more clients in the pool are taking this approach. See Rule 1.4(b).

The choice by pool counsel and their individual clients between these options (or other intermediate alternatives) will reflect administrative and strategic judgments. On one hand, some clients may find it simpler to give the lawyer authorization at the outset to determine which confidential information to disclose to other clients. On the other hand, some clients may feel more comfortable with a process whereby the lawyer has to confirm with the client each time the lawyer wishes to disclose confidential information to other clients. Some clients want the security of knowing that they can share their most sensitive information exclusively with their lawyer.

The lawyer should explain that if the client authorizes the lawyer to disclose confidential information to others: (i) the lawyer will exercise independent professional judgment to determine whether to share information and what information should be shared with each client; and (ii) the decision will be made consistently with the lawyer's duties to serve the clients' best interests, to accomplish the clients' objectives in the representation and to provide reasonable advice. *See, e.g.*, Rules 1.1, 1.2 and 1.4.²²

²⁰ Ordinarily, if a client in a pool representation revokes consent, pool counsel can effectively represent others going forward without disclosing the client's confidential information to others. But it may not be feasible for the lawyer to effectively represent others without *using* previously disclosed information for the benefit of others, since the information may not be segregable in the lawyer's mind. In order to avoid having to terminate the pool representation whenever one client revokes consent, at the outset of the representation the lawyer should secure each pool clients' irrevocable consent to the *use* of his or her confidential information in the pool representation insofar as necessary to effectively represent others. *See* note 15, *supra*.

²¹ This arrangement is also possible in a joint representation, although it is not the norm. *See* NYCBA Formal Op. 2016-2 ("Although the presumption of shared confidences is the default rule, that rule may be modified by agreement with the clients, under certain circumstances."); NYSBA Ethics Op. 1070 (2015) (exception to presumption of shared confidences "where the lawyer has promised confidentiality with respect to a disclosure"); Rule 1.7, cmt. [31] ("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 even as among the commonly represented clients.").

²² In general, pool counsel would not be expected to disclose *all* information learned in the course of representing each pool client to all of the other pool clients. Much of the information learned from one client may simply be irrelevant to the decisions that other clients will make. From a strategic perspective, learning certain information may even disadvantage a client. For example, even where an attorney is authorized by a client to share all

In addition, the lawyer should explain the potential consequence of sharing or disclosing confidential information in a multiple representation. In some situations, the lawyer's obligation under Rule 1.6 to hold Client A's information in confidence may be in tension with the lawyer's obligation under Rule 1.4 to disclose that information to Client B because the information the lawyer learned from Client A is material to the representation of Client B. If so, the lawyer cannot simply withhold the information based on the Rule 1.6 obligation to Client A. Nor, absent Client A's informed consent, can the attorney simply disclose the information based on the Rule 1.4 obligation to Client B. This conflict of interest may require the lawyer's withdrawal from representing the client who cannot be adequately represented without the disclosure. *See* NYCBA Prof'l Ethics Comm., Formal Op. 2005-2 ("Conflicts Arising Solely from Possession of Confidential Information of Another Client").

In any case, before commencing the representation, in order to best balance the demands of Rules 1.6 and 1.4, pool counsel should obtain each client's informed consent to the method of information-sharing the representation will employ.

IV. Addressing Conflicts of Interest After the Representation Commences

Once the representation begins, pool counsel must monitor the representation for conflicts of interest.²³ If a conflict arises, as in the situations described above in Sections II and III, the lawyer must engage in essentially the same analysis under Rule 1.7 as was required before commencing the representation; that is, the lawyer must determine whether, going forward, the lawyer can provide competent representation to all concurrently represented clients. *See* NYCBA Formal Op. 2016-2. The lawyer must withdraw from the representation or, if permissible under Rule 1.7(b), obtain informed consent, confirmed in writing. *Id.*; 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). *See* Rule 1.16(b)(1).").

For example, if Client A turns out to have information that inculcates Client B, the lawyer may have to withdraw from representing both clients, both to avoid disloyalty to Client B and to avoid the possibility that the exercise of professional judgment on behalf of Client A will be adversely affected by concern for Client B. Alternatively, if Client A confides information to

information with other clients, the lawyer will generally determine that each client is better off as a witness not knowing exactly how the other clients would testify, to avoid inadvertently influencing recollections. When so authorized, pool counsel would ordinarily be expected to disclose to each client only that information learned from other clients that, in the lawyer's judgment, is needed to enable a client to fully understand the status of the investigation, to understand the reasons for the lawyer's actions and advice, or to make informed decisions about whether or how to testify or other decisions relating to the investigation.

²³ *See* NYCBA Formal Op. 2016-2 ("lawyer also has an ongoing duty to monitor conflicts throughout the representation"); *see also* Rule 1.7, Cmt. [22A] ("Even if a client has validly consented to waive further conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises."). Moreover, as additional individuals are added to the pool over the course of the engagement, pool counsel must engage in the analysis and procedures described in this opinion and, as relevant, secure the existing clients' informed consent.

pool counsel that Client B would *need* to know, but insists that the information not be disclosed to Client B, the lawyer may have an unconsentable conflict that requires withdrawing from the representation of one or both clients. *See generally* NYCBA Formal Op. 2005-02 (2005).

Similarly, although it is not uncommon for two witnesses to the same event to have different memories of that event, when Clients A and B turn out to have *materially* different recollections, the lawyer must determine whether the difference is easily explainable by the vagaries of memory, or whether the difference is so great that one or the other client's credibility is threatened to the potential prejudice of that client in the eyes of the investigator. This, too, could rise to the level of a conflict under Rule 1.7, because the lawyer may be motivated, if only unconsciously, to adversely influence, or otherwise attempt to avoid a discrepancy in, the testimony of one or both clients.

CONCLUSION

A lawyer serving in the role as "pool counsel" may concurrently represent multiple individuals in connection with a governmental investigation or corporate internal investigation, subject to the rules governing conflicts of interest and confidentiality.

With regard to conflicts of interest: The lawyer must determine, before serving as pool counsel, whether the proposed representation will involve a concurrent conflict of interest. If the lawyer determines that there is a conflict of interest but that the lawyer can nevertheless represent the prospective client competently and diligently, the lawyer may represent that individual, but only with informed consent confirmed in writing. Even where there is no conflict of interest triggering the Rule 1.7 obligation to obtain informed client consent to the multiple representation confirmed in writing, the Rule 1.4 obligation to explain a matter to the extent reasonably necessary to permit the client to make informed decisions may require the same disclosures about the risks and advantages of the multiple representation. The advisable course is for the lawyer to confirm in writing the client's consent to the multiple representation in any event. Once the representation commences, the lawyer must identify, and respond appropriately to, any conflicts of interest that may arise.

With regard to confidentiality: both before interviewing a prospective client, and before undertaking to represent an individual as a client, pool counsel must secure the individual's informed consent insofar as the lawyer expects to disclose the individual's confidential information or use it for the benefit of others. Given the breadth of the confidentiality duty, it will be difficult as a practical matter to avoid using clients' and prospective clients' confidential information in representing others in the pool, and therefore the lawyer must secure their informed consent to the lawyer's use of their confidential information insofar as necessary in representing others. The lawyer and clients have alternatives as to whether to enter into an understanding, in advance, that the lawyer may disclose clients' confidential information to other clients in the pool. Such an understanding also requires informed consent.