Ethical Issues that May Arise in Multi-client Representations[1]

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EXECUTIVE SUMMARY

The ethical rules impose on every attorney the duty to deal fairly, honestly and with undivided loyalty, including avoiding conflicts of interest, maintaining confidentiality, and honoring the client's interests over his or her own. The issue explored in this paper is whether coverage counsel can engage in multi-client representation when the clients are not directly adverse in the coverage dispute, but coverage counsel later learns of information about the underlying case that each client may wish to keep confidential from the other. The specific type of multi-client representation discussed here involves two entities engaging a single law firm for representation in a coverage dispute against their respective separate insurers under their respective separate policies to obtain coverage from a common single occurrence involving litigation in which both entities are co-defendants (the "Underlying Action").

Coverage counsel is not precluded from representing both clients even where counsel becomes aware of information in the multi-client representation that one or both clients would not want to be disclosed to the other if: a.) the information will not materially interfere with counsel's ability to represent each client competently, and b.) coverage counsel prevents any disclosure of confidential information.[2]

HYPOTHETICAL SCENARIO[3]

Two unrelated entities are co-defendants in an underlying action. Both entities engage the same law firm to serve as coverage counsel in disputes against their respective insurers under separately acquired insurance policies. Each client has separate defense counsel. Coverage counsel attends mediation in the Underlying Action where coverage counsel learns of separate confidential settlement demands and offers with the underlying plaintiff that is not intended to be shared among the co-defendants.

ANALYSIS

I. No conflict of interest if no material interference with counsel's independent legal advice and advocacy.

At the outset of each engagement, lawyers need to assess the potential ethical issues under the relevant Rules of Professional Conduct. Model Rule 1.7 provides guidance for the lawyer-client relationship where there is a potential conflict of interest among current clients.[4] Here, a determination is needed as to whether there is a material

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[2] This paper focuses solely on ethical considerations under the Model Rules of Professional Conduct (the "Model Rules"), with special attention to conflicts of interest and confidentiality. Other potential lines of analysis, e.g., attorney disqualification, attorney malpractice liability, etc., are not addressed.

[3] The scenario in this hypothetical is fictitious, but representative of such situations. Nothing in this paper should be taken as a representation of real-life events or attorney- client interactions of the law firms represented on the panel.

[4] MODEL RULES OF PROF'L CONDUCT r. 1.7 (ABA 2019) provides in relevant part:

> "(a) A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

limitation on coverage counsel's ability to provide competent independent advice and advocacy concerning each client's dispute with their respective insurers due to the multi-client representation.

Although coverage counsel's *clients are directly adverse* in the Underlying Action, coverage counsel does not represent them in that controversy, and each of the coverage counsel's clients has separate defense counsel for those issues.[5] However, Section (a)(2) of the Model Rules of Professional Conduct states that a conflict of interest can still arise even if there is no direct adversity.[6] On the other hand, one state Supreme Court determined that there was not a material limitation on the lawyer's representation of either client when the goals of the two clients were essentially identical.[7] In all situations, a conflict of interest may exist if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for either client will be materially limited as a result of the lawyer's representation and other responsibilities to the other client.[8]

In our hypothetical multi-client representation, coverage counsel simultaneously represents both clients in what is very similar, but, in some sense, mostly unrelated legal work. Each client has a contractual dispute under their respective policies, which are separate independent contracts (even if with the same insurer). Coverage counsel's legal strategy will be formulated based on independently assessed factors, including the specific, possibly unique, language of each client's policy, the potentially unique triggering event under each client's respective insuring agreement, potentially unique exclusions, endorsements, deductibles and sublimits, each insurance carrier's reason for denial or reservation of rights, and each client's unique relationship with their own insurer.

The clients in our scenario, however, as co-defendants in the Underlying Action, may have adverse economic interests. This would certainly be true if either client's defenses in the Underlying Action lead to increased liability for the other client. This will also be true if settlement with the underlying plaintiff will be accomplished jointly, and a reduction in the share of one client's payment results in a greater payment by the other. In a Florida case, *Orchid Island Golf & Beach Community Ass'n, Inc. v. Palm Coast Development of Vero Beach, Inc.* No. 312008CA013188, 2011 WL 13201792, at *3 (Fla.Cir.Ct. Nov. 22, 2011), the court determined the issue of whether a law firm should

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> (1) the representation of one client will be directly averse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

[5] For purposes of this paper, MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1) is not at issue.

[6] Direct adversity means representing two clients on opposite sides of the litigation or transaction. Direct adversity may also arise if the lawsuit requires cross – examination of another client. See *Smith v. Smith,* 2019 WL 1312867, at *4 (Ohio Ct. App. Mar. 21, 2019).

[7] *Saline Mem'l Hosp. v. Berry,* 321 Ark. 588 (1995) (Holding that the representation of insurer would not materially limit firm's representation of hospital and no appearance of impropriety was created as would require disqualification.)

[8] MODEL RULES OF PROF'L CONDUCT r. 1.7, Cmt. 8 (ABA 2019).

be disqualified due to a conflict of interest between two current clients. The court decided in favor of the law firm and held that the law firm should not be disqualified because the evidence did not support a conclusion that when the law firm undertook representation, the representation would be directly adverse to an existing client. The dispute between the existing clients involved a breach of contract due to non-payment of fees by one client to the other. The plaintiff asserted that a partner at the firm once advised it on the implementation and validity of the fees and thus should be disqualified from representing the defendant.

The Florida court applied Rule 4-1.7 of the Rules Regulating the Florida Bar,[9] and relied on the comments to resolve the existing client conflict issue. The comment states, "[S]imultaneous representation of clients whose interests are only economically adverse, such as representation of competing enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest."[10]

In *Orchid Island*, in addition to arguing that the defendant's counsel should be removed pursuant to the rule 4-1.7 of the Rules Regulating the Florida Bar, the plaintiff argued, that an actual violation of the Rules Regulating the Florida Bar is not necessary for the Court to disqualify defendant's counsel where there is an appearance of impropriety.[11] The court held "that it is unrefutable *[sic]* that the subject matter of the fee was discussed… there was no testimony or evidence to suggest that Quinn [counsel] ever undertook any research or examination of impact fees or rendered any formal opinion."[12]

The critical question to coverage in multi-client representation is whether the economically adverse interests of the clients will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering

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[9] *R. Regulating Fla. Bar 4-1.7* provides in relevant part:

> (a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:
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> (1) the representation of 1 client will be directly adverse to another client; or
>
> (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
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> (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

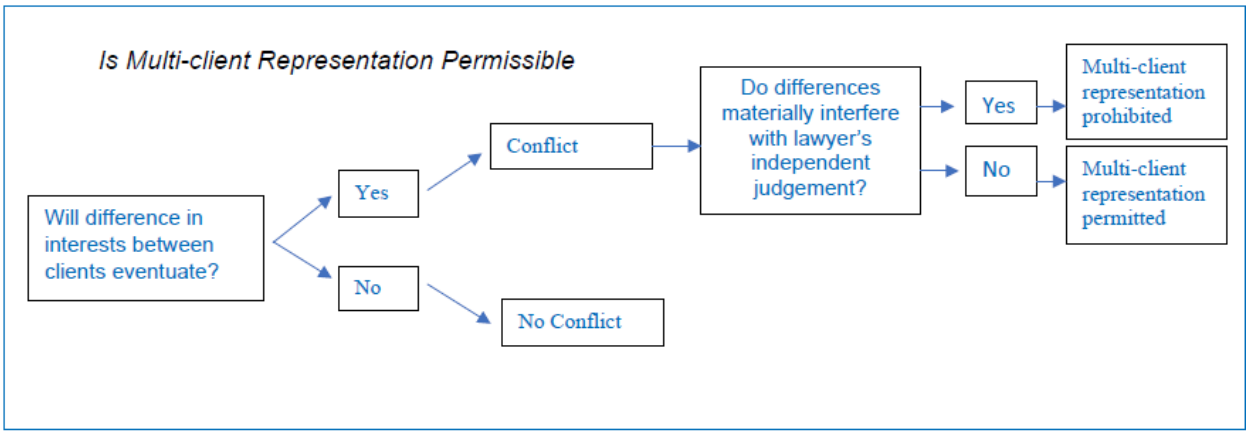
[10] *R. Regulating Fla. Bar 4-1.7* cmt.

[11] *Orchid Island Golf & Beach Community Ass'n, Inc.,* 2011 WL 13201792, at *8.

[12] *Id.* at 9.

alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.[13] If so, coverage counsel shall not engage in the multi-client representation.

The law firm in *Orchid Island* was not disqualified despite the existing client conflict because it did not take any affirmative action to prejudice its other client. In multi-client representation, coverage counsel must perform its due diligence and create a legal strategy best fit for each client. In the hypothetical, the parties are seeking coverage under separate insurance policies. Each denial may have its own rationale. All unique circumstances require evaluation, but nothing in this hypothetical scenario appears to indicate that a material interference with coverage counsel's independent judgement will arise. This conclusion does not change even if the rationale for each insurer's denial is similar.[14]



If a material limitations conflict arises, the conflict is not waivable. A non-consentable material limitation exists if a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.[15] If a disinterested lawyer would conclude that the client should not agree to representation, then the lawyer cannot properly ask the client to consent to representation.[16] Under the facts presented in the hypothetical, coverage counsel can represent each client with independent judgement. The outcome of one coverage dispute is not dispositive of the other. For these reasons, a disinterested attorney could conclude that it is acceptable for the clients to participate in the multi-client representation.

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[13] MODEL RULES OF PROF'L CONDUCT 1.7, Cmt. 8 (ABA 2019); *Iowa Supreme Court Attorney Disciplinary Bd. v. Willey*, 889 N.W.2d 647 (Iowa 2017); *In re Opinion No. 17-2012 of Advisory Comm. on Prof'l Ethics*, 107 A.3d 666, 672 (2014).

[14] It is worth noting that it may be to both clients' economic benefit if coverage counsel's increased efficiency leads to a lower fee for each by having one attorney represent them.

[15] See *Albert M. Greenfield & Co. v. Alderman*, 2001 WL 1855056, at *1 (Pa. Super. Ct. May, 14, 2001); See also *Times Fiber Commc'ns, Inc. v. Trilogy Commc'ns, Inc.,* No. CV 950552603S, 1996 WL 698016, at *3 (Conn. Super. Ct. Nov. 29, 1996) (Discussing disqualification of a patent attorney pursuant to rule 1.7 of Connecticut Rule of Professional Conduct which adopted rule 1.7 of the Model Rules of Professional Conduct).

[16] *Albert M. Greenfield & Co.*, 2001 WL 1855056, at *6.

The Court of Appeals of Ohio, in *Smith v. Smith* 2019 WL 1312867, at *1 *(Ohio Ct. App. Mar. 21, 2019)* provided a little guidance on the meaning of a "material limitation conflict".[17] The court decided to disqualify the attorney under Ohio's rule 1.7 due to a conflict under part (a)(1) direct adversity and (a)(2) material limitation. When analyzing whether a material limitation existed pursuant to part (a)(2) of the rule, the *Smith* court determined that a conflict arises "if there is a *substantial risk* that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client." *Smith v. Smith 2019 WL 1312867, at *4.* The court in *Smith* relied on the rule's comments that a material limitation exists if a decision for which the lawyer must advocate on behalf of one client in one case will create a precedent likely to severely weaken the position taken on behalf of another client in another case. *Id.*

Coverage counsel in our hypothetical multi-client representation will not advocate for a position that will create a precedent to the detriment of the other client. Because the clients share a common single occurrence in the Underlying Action and are pursuing coverage from their respective insurers, counsel's coverage position may be the same for each client. Thus, a favorable outcome for one client is likely advantageous for all clients. Indeed, a winning precedent in one case may bolster the likelihood of a favorable judgment in the other client's favor or an increased likelihood that the other insurer will make a prompt and fair offer to settle the coverage dispute.

II. Coverage Counsel in multi-client representation must maintain each client's confidences and prevent disclosure relating to the representation.

Coverage counsel engaged in multi-client representation must maintain each client's individual confidences and prevent disclosure of information related to the representation of each client. Pursuant to rule 1.6 of the Model Rules of Professional Conduct, a lawyer has a duty not disclose information related to the representation unless the client gives informed consent. The disclosure is impliedly authorized, or the disclosure falls within an exception.[18] Counsel must make reasonable efforts to prevent inadvertent

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[17] The court evaluated Ohio Rules of Professional Conduct rule 1.7; Conflict of Interest: Current Clients. Ohio's rule 1.7 is substantially similar to rule 1.7 of the Model Rules of Professional Conduct .OHIO RULES OF PROF'L CONDUCT, r. 1.7(2020) provides in relevant part:

> "(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:
>
> (1) the representation of that client will be directly adverse to another current client;
>
> (2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests."

[18] See MODEL RULES OF PROF'L CONDUCT r. Rule 1.6 (ABA 2019) provides in relevant part:

> "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> …
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

or unauthorized disclosure or unauthorized access to information relating to the representation of his or her client.

Coverage counsel in multi-client representation is tasked with maintaining the confidences of multiple clients who have distinct coverage disputes but are co-defendants in an underlying lawsuit. Multi-client representation is not joint representation. Coverage counsel is not required to disclose to independent, unrelated clients, and counsel is prohibited from voluntarily divulging any information related to the other client, absent implied authorization or a waiver of confidentiality between the clients. No client is entitled to information regarding the other's coverage dispute.

Additionally, coverage counsel must act competently and use reasonable measures to safeguard all information related to the representation of all clients.[19] Because the multi-client representation involves some overlap of information, there is a possibility that information from one client can inadvertently be shared with the other. Coverage counsel must be especially cautious that information learned while present at a mediation on behalf of more than one client is not mistakenly revealed to an unintended client.[20]

If information is inadvertently shared, coverage counsel is not automatically in violation of the rules of professional conduct if counsel has made reasonable efforts to prevent the access or disclosure. Comment 18 of rule 1.6 *Confidentiality of Information* of the Model Rules of Professional Conduct states the factors to be considered in determining the reasonableness of the lawyer's efforts which include, but are not limited to, sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients.[21]

III. Best Practices

Multi-client representation presents challenging ethical questions that do not have clear answers under the Model Rules of Professional Conduct. Although we conclude that the Model Rules do not preclude coverage counsel from multi-client representation, we suggest best practices to avoid an ethical violation.

First, coverage counsel should thoroughly evaluate the multi-client representation from the perspective of a disinterested attorney. If counsel concludes that representation

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For purposes of this paper the information obtained by coverage counsel does not fall within an exception.

[19] MODEL RULES OF PROF'L CONDUCT r. Rule 1.6(c) (ABA 2019) (stating "lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.")

[20] An accidental disclosure is not an automatic violation of Model Rule 1.6(c) if counsel exercises due care to avoid the disclosure and protect the client's confidences.

[21] MODEL RULES OF PROF'L CONDUCT r. 1.6, Cmt. 18 (ABA 2019).

of any client will impair the ability to represent another client, consider withdrawing from representation of one of the clients. This should be done at the earliest possible time so that counsel does not become disqualified from representing all clients arising out of this common occurrence.

Second, inform the client fully. Coverage counsel should clearly communicate the scope of representation and why multi-client representation will not impair coverage counsel's ability to represent the client. Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could affect the interests of the client.[22] When representation of multiple clients is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege and the advantages and risks involved. Multi-client representation is not joint representation, but due to the similarity in interest and co-defendant status in the underlying case, it is easy for a client to conflate the two. Therefore, it is imperative that coverage counsel engages in clear communication with each client and distinguishes the role of coverage counsel from that of their respective defense counsel in the Underlying Action.

Third, confirm in writing separately, with each client that coverage counsel has advised the client of the scope of representation, and that the client has no concerns with the multi-client representation or any concerns of the client have been adequately addressed.

Finally, reevaluate regularly. If at any stage in the representation coverage counsel concludes that a material impairment has or will arise, inform the client, take all necessary steps to protect the interests of all clients, and consider withdrawing from representation of one or all of the clients.

[22] MODEL RULES OF PROF'L CONDUCT r. 1.7, Cmt. 18 (ABA 2019).