Joint Representation: An Efficient, United Front? Or Tangled Web of Ethical Traps?

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II. Ethical Considerations
A. Duty of Loyalty
   A.1. “When a client engages the services of a lawyer in a given piece of business, he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion.” Flatt v. Superior Court, 9 Cal.4th 275, 286 (1994).
   A.2. “The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests,
rather than to enforce to their full extent the rights of the interest which he should alone represent.” \textit{Anderson v. Eaton}, 211 Cal. 113, 116 (1931).

A.3. An attorney’s duty of loyalty prohibits him or her from putting another’s interests above the client’s interests.

A.4. Joint representation must still account for duty of loyalty.

B. Duty of Confidentiality

B.1. Rule 3-100: prohibits an attorney from revealing information protected from disclosure by Business & Professions Code § 6068(e)(1)

B.1.a. B&P § 60608(e)(1): an attorney must “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

B.2. \textit{Zador Corp. v. Kwan}, 31 Cal.App.4th 1285, 1294 (1995): an attorney owes a duty of confidentiality to his joint clients as to the rest of the world; however, there is no confidentiality within the joint-client relationship

B.2.a. Anything one client discloses to the attorney is subject to disclosure to the other joint client(s)

B.2.b. Express consent for disclosure not required

B.2.c. Cal. Evid. Code § 962: attorney-client privilege generally will not protect communications that have taken place among the attorney and any of the joint clients when such communication is offered in a civil proceeding by one joint client as against another joint client(s)

C. Duty to Communicate

C.1. Rule 3-500: an attorney is required to keep his or her clients “reasonably informed about significant developments relating to the employment or representation”

C.1.a. Business & Professions Code § 6068(m): an attorney is required to “keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services”

C.1.b. Thus, an attorney MUST disclose information related to the representation, even if that information is a secret obtained from a joint client
III. Conflicts of Interest Generally

A. Rule 3-300: Avoiding Interests Adverse to a Client

A.1. A member shall not: enter into a business transaction with a client or knowingly acquire a pecuniary interest adverse to a client unless…

A.1.a. The terms are fair, reasonable, and fully disclosed in writing to the client;

A.1.b. The client is advised in writing that he or she may seek the advice of an independent counsel; and

A.1.c. The client consents in writing to the transaction

B. Rule 3-310: Avoiding the Representation of Adverse Interests

B.1. Written Disclosure = “informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client” (Rule 3-310(A)(2))

B.1.a. Inadequate disclosure can:

B.1.a.i. Zador: nullify consent and result in disqualification

B.1.a.ii. B&P Code § 6077: result in discipline


B.2. Written Disclosure is Required When:

B.2.a. The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

B.2.b. The member knows or reasonably should know of a previous relationship with a party or witness in the same matter that would substantially affect the member’s representation; or

B.2.c. The member has had a relationship with another person or entity the member knows or reasonably should know would be substantially affected by resolution of the matter

B.2.d. The member has or had a legal, business, financial, or professional interest in the subject matter of the representation

B.3. Informed Written Consent = “the client’s or former client’s written agreement to the representation following written disclosure”

B.4. Informed Written Consent is Required When:
B.4.a. A member seeks to accept representation of more than one client in the same matter where the clients’ interests potentially conflict; or

B.4.b. A member seeks to accept or continue representation of more than one client in the same matter where the clients’ interests actually conflict; or

B.4.c. Represent a client in a matter and at the same time in a separate matter accept a client whose interest in the first matter is adverse to the client in the first matter

B.5. Potential Conflicts/Adverse Consequences

B.5.a. Potential disagreements regarding strategy
B.5.b. Disagreement regarding whether to settle a case
B.5.c. Lack of attorney-client privilege
B.5.d. Lack of confidentiality between joint clients
B.5.e. Other circumstance specific potential adverse consequences

C. Rule 3-600: Corporate Representation and Related Conflicts of Interest

C.1. Corporation/Organization is the client

C.1.a. Rule 3-600(A): “In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself . . . .”

C.2. Representing the Organization and its Employees

C.2.a. Rule 3-600(E): “A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 3-310.” (emphasis added)

D. Rule 3-700(B): Failure to Obtain Written Consent

D.1. If the attorney is unable to obtain written consent from joint clients, the attorney must withdraw from representation of all or some of the joint clients, depending on the scope of any previously obtained consent.

E. Aggregate Settlement Rule
E.1. Rule 3-310(D): prohibits an attorney jointly representing two or more clients from entering into an aggregate settlement of the claims of or against the clients without the informed written consent of the joint clients

E.1.a. Finite source therefore there is an inherent conflict that has gone from potential to actual

E.2. Duty of Loyalty: attorney should avoid any conduct that could be construed as favoring one client over the other (such as proposing how to split the settlement). See ABA Formal Ethics Opinion 06-438.

IV. Advance Conflict Waivers

A. Advance Conflict Waivers seek to waive a conflict that is not yet in existence

B. Adequate Waivers

B.1. Key is **Quality** and **Adequacy** of the written disclosures such that the client reasonably understands the material risks that such waiver entails

B.2. ABA Model Rule 1.7/California Proposed Rule of Professional Conduct Rule 1.7 – a lawyer’s disclosure to a client must include:

   B.2.a. Disclosure of facts and reasonably foreseeable consequences
   
   B.2.b. Explanation that the lawyer is requesting the client to consent to a possible future conflict that may not be currently present
   
   B.2.c. Scope of the consent (whether the lawyer may be adverse to the client on any matter in the future, etc.)
   
   B.2.d. In considering whether an advance consent complies with this rule consider the following:

   B.2.d.i. The comprehensiveness of the lawyers explanation of the future conflicts that might arise and the consequences of such (See Visa U.S.A., Inc. v. First Data Corp., 241 F.Supp.2d 1100 (N.D. Cal. 2003))
   
   B.2.d.ii. The client’s degree of experience as a user of legal services
   
   B.2.d.iii. The presence of an ethics screen (See UMG Recordings Inc. v. MySpace, 526 F.Supp.2d 1046 (C.D. Cal. 2007))
   
   B.2.d.iv. Whether the client was advised to consult an independent attorney and whether he or she did so
B.2.d.v. Scope of the consent including whether the consent is limited to future conflicts unrelated to the present matter (*Zador Corp. N.V. v. Kwan*, 31 Cal.App.4th 1285 (1995))

B.2.d.vi. The client’s ability to understand the nature and extent of the consent

C. Unwaivable Conflicts of Interest

C.1. Inability to Provide Competent Representation

C.1.a. “As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.” *Klemm v. Superior Court*, 75 Cal.App.3d 893, 899 (1977).

C.1.b. Organizations and Their Constituents

C.2. Prohibited by Law

C.2.a. Statutory Bars to Representation

C.2.b. E.g. Business and Professions Code § 6131: former prosecutors are prohibited from consulting with the defense in a matter in which they were personally involved as prosecutors

C.3. Advancing Adverse Interests Before a Tribunal

C.3.a. Adversarial system relies on loyal advocates which would be jeopardized if the same lawyer were to advance adverse positions

C.3.b. E.g. *Woods v. Superior Court*, 149 Cal.App.3d 931 (1983): attorney represented family owned corporation thus was unable to represent husband in dissolution of marriage because of his duty of loyalty to the corporation which included a duty of loyalty to the wife


C.4. Inability to Provide Adequate Disclosure
C.4.a. Informed consent consists of disclosing information to the potential client which adequately portrays the risks and potential adverse consequences of waiving a conflict

C.4.b. If the information that is necessary to give informed consent consists of confidential information which an existing client has prohibited the lawyer from disclosing then it is impossible to provide the prospective client with the information necessary to obtain informed consent

C.5. Client Lacks Capacity to Give Informed Consent

C.5.a. A prospective client who lacks capacity in that he or she cannot appreciate the risks associated with conflicted representation is unable to give informed consent