

Serving Two Masters: The Ethical Risks of Joint Representation of Bond Sureties and Principals

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In construction litigation, principals and sureties on payment and performance bonds are often represented by a single lawyer or law firm. This dual approach is often convenient for principals and sureties because the liability of a surety is usually derivative from the liability of a principal, and the surety will tender the defense of a case to the principal. A combined defense saves time and money for both parties. However, anytime a lawyer attempts to serve two masters simultaneously, he or she must be aware of certain pitfalls. At the outset of any multiple representation, a lawyer must fully appreciate and analyze the conflicts that could arise in light of the ethical duties owed to each client.

The General Rule Governing Multiple Representation

The Rules Regulating the Florida Bar embody the ethical duties of Florida lawyers. These rules are modeled after the American Bar Association's Model Rules of Professional Conduct, with certain variations. The Rules are often written in broad strokes and do not draw bright lines in the area of simultaneous representation of multiple clients. Understandably, they do not account for every pitfall that a lawyer may encounter when representing multiple clients and do not contain an explicit prohibition. A lawyer must supplement the Rules with personal conscience and

the advice of professional peers. Rule 4-1.7¹ provides some guidelines to multiple representation. It provides, in pertinent part:

4-1.7. Conflict of Interest; Current Clients

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer shall not represent a client if:

- (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) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a position adverse to another client

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when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Subsection (a) expresses the general rule that loyalty to a client prohibits representation directly adverse to a client without that client's consent. For example, it would forbid a lawyer from representing opposing parties in litigation.

Subsection (b) addresses other situations wherein a lawyer's duty of loyalty might be compromised by simultaneous representation. The comments to Rule 4-1.7 provide examples, such as instances where a lawyer may have a financial interest in one client and not the other, or where a lawyer has a long-term social relationship that could impact dual representation. The existence of a possible conflict of this nature does not preclude a multiple representation. Rather, a lawyer must examine whether the possible conflict would "materially limit" his or her responsibilities to another client, and based on subsection (c), consult with both clients regarding the risks involved.

Evaluating the Propriety of Multiple Representation

The undertaking of a multiple representation is a multi-step process that requires caution. The question of whether the interests of the parties are directly adverse, addressed in Rule 4-1.7(a), is only the threshold inquiry. Once the lawyer determines that the potential clients' interests are not directly adverse,

the lawyer must then consult the clients and disclose potential conflicts of interest and acquire their informed consent to the representation. Although not required in Florida, best practices dictate that this understanding be memorialized in writing.

Identify Conflicts of Interest

Ordinarily, a lawyer benefits a client by exercising his or her professional judgment for the exclusive benefit of that client. In multiple representation, however, this narrow focus may be compromised since the lawyer is advocating for the benefit of the whole. A lawyer must determine whether the representation will be adequate. The absence of exclusivity must not adversely affect the interests of the individual clients.

The most recognizable conflict is when the representation of one client is directly adverse to the other. Rule 4-1.7(a) states that a lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client. For instance, most lawyers would know not to represent a buyer and a seller in a transaction. Such a divided loyalty would damage his or her ability to represent either client effectively. Even so, the rule makes an exception when the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client and both clients consent after consultation.

The comment to Rule 4-1.7 states that loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. As a general proposition, a lawyer should not advocate against a person the lawyer represents in another matter, even if it is wholly unrelated. For instance, a conflict of interest would exist where a lawyer represented a bond surety on one project and a bond claimant against the surety on an entirely different project. On the other hand, the comment to Rule 4-1.7 explains that simul-



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taneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require the consent of the respective clients. The prohibition against conflicts of interest only applies when the representation of one client is directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality might be compromised.

The lawyer's conflict analysis must go beyond the detection of direct adversity. Subtle conflicts may exist even where two client's interests appear generally aligned at the outset of the representation. A lawyer who is considering a multiple representation must explore the facts and circumstances for below-surface conflicts. For example, a lawyer may be retained to represent a subcontractor and a general contractor in a lawsuit brought by a worker injured by an unsafe condition created by the subcontractor. Assume that the defense of the general contractor was tendered to the subcontractor pursuant to a contractual indemnification provision in the subcontract. The subcontractor and the general contractor's interests may appear united in such a case because the liability of the general contractor is purely derivative. However, the lawyer might learn that the general contractor's own negligence contributed to the injury. Suddenly, the parties' interests diverge as each might benefit from shifting part of the blame to the other.

Consultation and Consent

After a lawyer considers all the possible conflicts of interest and determines that the multiple representation will not adversely affect his or her representation of each party, a lawyer must then seek the consent of the parties to the multiple representation. The Florida Rules go beyond the ABA's Model Rules to include a subsection requiring "Explanation to Clients," which expressly requires a consultation in multiple representation cases. Rule 4-1.7(c).

In the construction context, consultation is required when a lawyer is asked to represent the principal and surety on a bond or the owner and contractor together pursuant to an indemnification agreement. Rule 4-1.7(c) requires the lawyer to alert the clients at the outset of the representation to the pros and cons of the joint representation.

Before discussing the nature of the consultation, it is important to emphasize that prior to seeking the client's consent, a lawyer must make his or her own determination that the multiple representation will not affect the interests of any one client. The comment to Rule 4-1.7 explains that, as indicated in subsection (a)(1) with respect to representation directly adverse to a client and subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly provide representation on the basis of the client's consent. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. The comment gives the example of when a lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure needed to permit the other client to make an informed decision. In such cases, the lawyer cannot properly ask the latter client to consent.

The client consultation should include a discussion of the advantages of multiple representation, some of which may be obvious to the clients. Undoubtedly, the parties will reap a shared benefit from economies of joint representation. A multiple representation will generally expedite and simplify issues, and the parties will gain the strength of a united front.

As part of the consultation, the lawyer should discuss the arrangement for compensation for the joint



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representation, in case one party will be paying the fees of another. Rule 4-1.8(f) forbids a lawyer from accepting compensation for representing one client from someone other than that client. The exception is where the client consents after consultation, the arrangement will not interfere with the lawyer's professional judgment and the client-lawyer relationship, and the client confidences will be protected as required under Rule 4-1.6. Thus, this pre-representation consultation is the appropriate opportunity to determine the payment arrangements, obtain the required client consent, and approach the issue of treatment of confidential communications.

Documentation

As a final precaution, the informed consent of the clients should be reduced to writing. Since 2006, Rule 4-1.7 now expressly requires the client's informed consent to be confirmed in writing or on the record. Where there has been a conflict of interest, the burden of establishing disclosure and consent is on the lawyer. Any doubts will be resolved in favor of the client. Courts have approved the use of a detailed engagement letter to achieve the adequate consultation and to verify that informed consent was achieved, which should also summarize the lawyer's analysis concluding that no present impermissible conflicts exist and that future conflicts are unlikely. It should summarize the advantages and disadvantages of common representation and should document the client's election regarding confidential communications.

Ethical Concerns During Multiple Representation

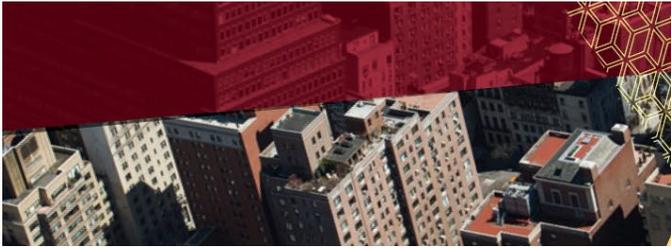
A cornerstone of the attorney-client relationship is a lawyer's duty to communicate with the client. In the context of joint representation, lawyers must remember they have a continuing ethical responsibility

to keep each client reasonably informed about the status of a matter.

The duty to communicate applies to each client in a multiple representation. A lawyer must avoid the misperception that a surety or indemnitee client is merely an "accommodation" or a "token" representation based on their derivative liability. The rules do not carve out an exception for such "nominal" representation, and such a perspective is likely to lead to an ethical violation. Rather, a lawyer's ethical duties are equivalent to each member of a common representation, and the lawyer must attempt to disclose relevant information to each on a reasonably equal basis.

The comment to Rule 4-1.4 explains that the goal of communication with the client is to give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they may be pursued. The client should be advised of the status of a matter, even when the client has delegated authority to the lawyer. The comment clarifies that the duty to communicate is grounded in reality—a lawyer is not ordinarily expected to describe trial or negotiation strategy in detail. The client should be consulted in matters of strategy. However, the lawyer has the final decision-making authority on the specific means to accomplish the client's stated objectives, such as which witness to put on the stand or which documentary evidence to use at trial.

The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's requirements as to the character of the representation.



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Confidentiality of Information

Above all else, clients expect a lawyer to hold confidential information inviolate. Rule 4-1.6 prohibits a lawyer from revealing information relating to representation of a client except as provided in the Rule or unless the client consents after disclosure. This principle facilitates full and frank communication between the client and lawyer.

In the construction context, when a lawyer represents a principal and its surety, he or she is bound by the duty of confidentiality to refrain from disclosing information about one to the other, but is also bound by a duty of loyalty to each. This double-edged task can be tricky. If the surety seeks information from the lawyer about the principal, the lawyer encounters a dilemma. On one hand, the lawyer may feel only the obligation to tell the surety information that is readily discoverable about the principal while holding confidential details private. If the surety had independent counsel it would not be entitled to this confidential information, so the surety is not unduly prejudiced. However, if the confidential information involves the principal's attempt to avoid its indemnity obligations to the surety, the lawyer should advise the principal of the conflict and make clear that it is not to be consulted as to issues that may jeopardize the lawyer's obligations to the surety. Likewise, if the surety seeks information regarding the principal's financial whereabouts, the lawyer should make clear that it is not authorized to disclose this confidential information. For these types of common potential conflict scenarios, best practice would be to address in the initial consultation and memorialized in writing.

Consultation before Settlement

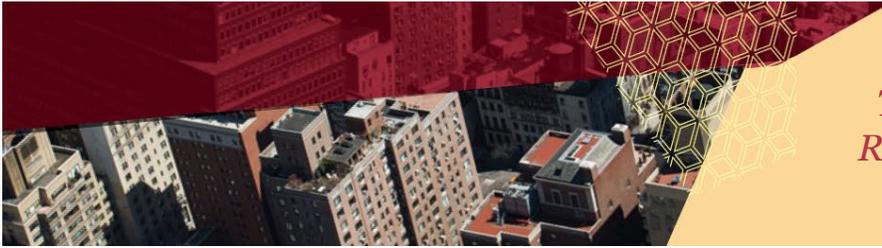
Rule 4-1.8(g) addresses the settlement of claims for multiple clients. It prohibits a lawyer who represents two or more clients from participating in making an aggregate settlement of the claims of or against the

clients, unless each client consents after consultation. The settlement consultation must include a disclosure of the existence and nature of all the claims involved and of the participation of each person in the settlement.

A less obvious conflict may arise when multiple parties represented by a single lawyer are not in agreement about pursuing a settlement opportunity. Although not an opinion involving a bond claim, a Colorado attorney was determined to be liable for legal malpractice because a conflict that arose during settlement negotiations was not satisfactorily resolved.¹ During the course of the trial, the plaintiffs in the initial case offered to settle for approximately \$54,000.00. All of the defendants were represented by the same attorney, but only two of the three defendants would agree to the offer so the action went to trial. After trial, the jury awarded a sum of \$214,830 in actual damages and \$849,020 in punitive damages jointly and severally against all of the defendants.

The two claimants who wanted to settle subsequently filed suit against their attorney for malpractice. The essence of their claim was that the attorney had failed to evaluate properly and advise them of the full extent of their potential liability, and that the attorney had undertaken and continued representation of all three defendants notwithstanding their divergent interests in the company, their personal animosities toward one another, as well as their conflicting views about settlement.²

After the claimants prevailed, the appellate court upheld the verdict against the attorney, holding that it was not error for the trial court to allow the original plaintiffs' attorney to serve as the claimants' expert to testify that original action would have settled if there had been separate representation in the trial of the claimant/defendants.³ The expert had testified that if the defendants had been represented by separate



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counsel, they would have been able to settle the case.⁵ In essence, one of the primary theories of negligence was that defendant's failure to reconcile the conflict of interest materially contributed to the failure of settlement negotiations.⁶

The result in this case suggests that when parties are in disagreement as to the propriety of reaching a settlement agreement, that the lawyer consult with each and either evaluate whether a settlement can be achieved on behalf of that individual client or recommend that the individual client retain separate personal counsel to evaluate the client's individual circumstance.

Consequences of Violations of Ethical Rules in Joint Representation

When a lawyer jointly represents more than one client in the same matter, potential conflicts of interest can arise and that lawyer may face any one or more of the following unpleasant situations. A lawyer may be forced to withdraw from representation. Additionally, a lawyer or his or her law firm could be disqualified. Also, the client could initiate a Bar complaint against the lawyer and subject the lawyer to discipline. Further, the lawyer or his or her firm may be required to disgorge earned fees or even be sued for legal malpractice.

CONCLUSION

A lawyer contemplating joint representation should carefully consider the representation before it is accepted, recognize and address existing and potential conflicts, fully disclose the joint representation to both clients, including its benefits and disadvantages, and get consent and, most importantly, reduce such discussions to writing. Following these few simple steps allows the clients and the lawyer to utilize and benefit from joint representation without subjecting the lawyer, the firm

and/or the clients to unnecessary risk and financial loss.

By examining some of the ethical concerns regarding joint representation, this article provides a starting point for undertaking and navigating what could be a complex and delicate representation. If you are seeking more information in any of these areas, the Construction Law Team is here to help. To learn more, visit us at www.carltonfields.com/constructionindustry.

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1 Rules Regulating the Florida Bar, Rule 4-1.7 (2006).
2 *Scognamiglio v. Olsen*, 795 P.2d 1357, 1358 (Colo. Ct. App. 1990).
3 *Id.* at 1358 - 1359.
4 *Id.* at 1361.
5 *Id.* at 1362.
6 *Id.* at 1358-1359.