Ethical Pitfalls for Plaintiffs' Employment Lawyers

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I. Introduction

From distressed clients to de-stressing ourselves, we handle a wide array of personal, financial, technical, and ethical issues. We are constantly straddling the line of zealous advocacy and often find ourselves taking the heat from angry clients, opposing counsel, and judges. Yet, we take this all in stride, because we love what we do, and we love getting good results for good people.

However, a positive attitude and a client-oriented practice is not enough to save even the most diligent attorney from ethical pitfalls. Substantively, some of the biggest potential ethical problems for attorneys include: competence beyond the scope of our usual practice, handling client property, representing multiple clients, and even handling our own mental wellness. When we make mistakes and IF the Bar comes knocking, we need to know how to handle a disciplinary complaint. But most importantly, we need to know the ethical rules of our profession and be mindful of how we represent ourselves through traditional and new forms of media.

II. Substantive Competence

The American Bar Association's Model Rules of Professional Conduct Rule 1.1 mandates that: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Most, if not all, state Professional Rules parrot this definition.[1]

Employment law practice has increasingly entered an era of specialization and technical expertise, and so our "legal knowledge" must now encompass a much broader array of subject areas. In the employment practice, we are faced with legal questions referring to forensic discovery and document retention, social media and technology use, medical and economic damages, and a host of other topics that we have to understand. These topics can all turn into potential mine fields for the unwary attorney. For example, a client's retention of electronic documents on their personal computer's hard drive can open the door to costly and time consuming forensic discovery and motions practice, counterclaims for conversion, and possible claims for sanctions based on interpretation of forensic reports.

Yet a lack of experience in these areas should not prevent a diligent attorney from taking a meritorious case, as co-counsel and experts are available to assist navigating these mine fields. In many areas, there are few attorneys and even fewer who represent employees. An early, global view of a client's case can sometimes reveal substantive issues that you'll need to seek help for. Many attorneys partner together if both have knowledge in a particular area (substantive or geographic) – this is common and often used for a client's benefit. Similarly, for example, if a client admits to keeping documents

[1] *See, e.g.,* Illinois Rules of Professional Conduct Rule 1.1; Texas Disciplinary Rules of Professional Conduct 1.01; Virginia Rule of Professional Conduct Rule 1.1.

on their hard drive, you already know that someone with forensic expertise is required. If a client admits to a medical issue or a complex financial issue, then you already know that a medical expert, treating provider, or an economics expert will be required. If you don't know of any one with the expertise you're looking for – ask! The NELA exchange (and/or a local affiliate exchange) can be a great resource for pinpointing both what and who you may need to assist your client. Ultimately, there are plenty of ways to find the right person.

Additionally, keeping up to date with technological trends is critical to competent representation – some firms have moved completely to the Cloud, which has the convenience of easy access to all files anywhere in the world (but potential drawbacks in terms of privacy). If the internet is out, or the server is down, then access is crippled. Having a reliable technical team to help you remedy these technological failures can keep your practice up and running. Other firms just continue to work on office computers linked by a network server in-house or on individual computers and rely on emails and external media to exchange information. This is fine too, provided you know who to call when a hard drive dies or a blue screen appears.

All signs and portents show that technology is going to continue evolving and influencing the way we practice law. As technology becomes cheaper and more cost effective to the client to use, firms will continue to switch to these new technologies. For example, some attorneys bring their tablets to depositions to show exhibits. Some courts are even permitting jurors to use tablets to view exhibits at trial. Use of a tablet can significantly cut down on printing and copying costs charged to the client. It may take a while to learn how to use a tablet, but there are CLEs and courses that teach technology use.

III. Handling of Client Property

Trust accounting is often touted as the biggest reason for all State Bar attorney disciplinary actions. Some states, such as California, have Ethics and Client Trust Account "Schools" for those attorneys who are disciplined for client trust violations. Many CLE programs are offered to teach attorneys the proper way to safe keep their client's property. The rule of thumb is simple, but often difficult to do effectively: don't commingle client funds. Reconcile your trust account often, at least each billing cycle. Review all bank statements. Create a trust account ledger, if needed. Give each client an individual ledger. Microsoft Excel can be very helpful in doing this.

On the rise in problems with handling client property is the preservation and management of a client's electronic data. This includes not just electronic documents in the form of Microsoft Word files or PowerPoint slides, but also emails, text messages, and all meta-data. Technology makes discovery more invasive and opposing counsel frequently ask for all of this information, right down to the minutia so they can identify if items were modified, copied, or deleted. This can be especially problematic if some of

the electronic data is not the client's or the client's data is stored on a piece of company equipment.

It may be necessary to retain a forensic vendor to image your client's computers, phones, and email accounts, so you can prevent spoliation problems. You also maintain a baseline image of all the devices, so that if you lose chain of custody to the other side (i.e. giving them the client's computer or phone for their own 'forensic examination'), you can defeat any alleged discrepancies in the other side's investigation and analysis of the devices. You do not want to be in a situation where opposing counsel accuses your client of manipulating data and you have no "before" image of the device to compare against the proffered "after" image.

Ethical obligations with respect to a client's property don't end once the law suit does – there is still the matter of client file retention. ABA Model Rule 1.16(d) states:

> "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law."

State Bars may vary as to the length of time a lawyer is required to retain their client files. For example, while Illinois uses a 7-year records retention period, New Hampshire has a retention period of six years that starts after final distribution, rather than from the date of the conclusion of the representation. *See* Illinois Rules of Professional Conduct 1.15(a); New Hampshire Rules of Professional Conduct Rule 1.15(a). Similarly, Texas requires that "[C]omplete records of … account funds and other [client] property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." *See* Texas Rules of Professional Conduct 1.14(a). Check with your State Bar, as well as your malpractice insurance carrier, for your retention limit.

Five to seven years may seem like a very long time to hold onto a client's documents and accounting records related to a client's funds, especially in a busy practice with multiple clients! The boxes can add up and take up valuable space. And scanning voluminous documents to create electronic files for retention can be a time-consuming and expensive task. If your State Bar permits it, work with your client on retention terms. Your client may give you permission to shred or delete files sooner. In Texas, for example, after termination of the representation or in conjunction therewith it is permissible to ask the client(s) if he/she/they would like to pick up their file, or in the alternative if you have their permission to properly dispose of it, e.g. by shredding and obtaining a certification of destruction.

IV. The Wellness-Discipline Connection

There is a correlation between the physical, emotional, and mental wellness of an attorney and their behavior. Burn out, anxiety, the inherent high stresses and pressures of legal work, "compassion fatigue," and ultra-competitive and judgmental working environments have created serious wellness problems for many attorneys. *See, e.g.,* Hazelden-ABA study, February 2016.[2] The study revealed that 21% of respondents reported problem drinking and/or some drug abuse, but only 7% reported seeking help. Additionally, 28% experience problems with depression, 19% with anxiety, and 12.5% with ADD, but again most did not seek help. The study indicated that these statistics are higher among attorneys than the general population. For example, about 6% of the general population has a drinking problem, as compared to 21% of the attorney respondents. This pattern was also consistent for anxiety, ADD, and depression. These issues are a contributing cause, and often times the main cause, of many disciplinary problems with bar associations.

Before you can take care of your clients, you have to take care of yourself. It is critical that you seek help in managing any wellness issues that you face. Seek counseling for substance abuse and see a medical professional for depression, anxiety, or ADD. State bars have confidential employee assistance programs for lawyers with wellness issues affecting their practices. For example, in Texas all communications with the Texas Lawyers' Assistance Program are confidential by statute and other states have similar confidential programs. Additionally, seek solace from your friends and fellow attorneys. Ask if they will help co-counsel your cases, or refer out cases to experienced practitioners if you cannot handle them properly. This is not a weakness or a personal failing – it is a professional requirement.[3] And if you need to, take a leave of absence.

Ultimately, you must seek the right help for your wellness issues – and you must give help when you see other attorneys struggling with wellness problems. It is comforting to know that we are never alone in our struggles, and that if someone else has persevered, so can we.

V. What to Do When You Receive a Bar Complaint

First and foremost: take it seriously. Even if the complaint has little merit, treat it like you would treat a complaint served on a client. Pay close attention to all the deadlines. Give a prompt, detailed, substantive response to all questions. Locate and

[2] The study, which surveyed 15,000 lawyers from 19 states is discussed in the Texas Bar Journal: https://www.texasbar.com/AM/Template.cfm?Section=Table_of_Contents&Template=/CM/ContentDisplay.cfm&ContentID=32751.

[3] For example, Virginia Rule of Professional Conduct 1.16(a)(2) states: "Except as stated in paragraph (c), a lawyer **shall not** represent a client or, where representation has commenced, **shall** withdraw from the representation of a client if: the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." Shall is mandatory.

retain all documents or correspondence that touches upon the details of the complaint and provide these along with your response, and supplement this production as necessary. Critically, cooperate and be transparent with the State Bar officials. Even if this is a frustrating experience for you, a complaint is *not* a finding of professional misconduct. In short: take a deep breath and a step back.

It may be necessary to retain counsel – do not hesitate. If you have questions about the process, or would prefer to be represented by someone who specializes in disciplinary defense, seek legal advice from an attorney with this specialty in your jurisdiction. State and local bar associations may have listings of these attorneys; many will also advertise themselves and their practices, perhaps in publications and legal periodicals. Get recommendations from other attorneys. Contact NELA's E&S Committee for advice; contact your malpractice carrier. All inquiries made to the E&S Committee are strictly confidential. You can also apply for a NELA SAFER grant, which, if approved, will provide you with funding to help pay for legal defense of a disciplinary action.

VI. Professionalism

Professionalism is all about being a competent and respectful advocate for your client and the legal system. It requires being mindful of your interactions with the tribunal, opposing counsel, and your own client. Following your State Bar's rules as they relate to these distinct relationships can help prevent many ethical pitfalls. *See* e.g., Texas Lawyer's Creed.[4]

Even though we, as attorneys, know the requirements of candor, honesty, and professionalism with our colleagues, often our client may not understand the nuances of those duties. For example, they may see a friendly interaction with opposing counsel as a direct violation of your duty to zealously advocate on their behalf. This is why it is important at the outset of the case to address the roles and responsibilities of the client against the roles and responsibilities of the attorney. The client should know that it is the client who decides when to settle the case, but that it is the attorney who decides on the strategy. The client should also know that they cannot control or influence the attorney's obligations of civility and courtesy to opposing counsel.

You may encounter conflicts between the duty to your client and the obligations to opposing counsel when it comes to deadline extensions. Allowing a late filing may not be in your client's best interest. In *Environment Specialist, Inc. vs. Wells Fargo Bank Northwest NA,* Rec. No. 15063, at 9-10, the Virginia Supreme Court reversed a $1,200 sanction levied at plaintiff's counsel who refused to allow a defendant to file a late answer and avoid a default judgment request. The court explained:

[4] https://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal&Template=/CM/ContentDisplay.cfm&ContentID=22241 [need to fix this link]

In 1987, this Court issued an order requiring all new attorneys in Virginia to take a mandatory course on professionalism, which is designed to encourage attorneys to uphold and elevate the standards of honor, integrity, and courtesy in the legal profession. https://www.vsb.org/site/about/professionalism (last visited Feb. 3, 2016). Additionally, in 2008, responding to the efforts of the Virginia Bar Association, this Court endorsed the Principles of Professionalism for Virginia Lawyers, which articulate standards of civility to which all Virginia lawyers should aspire. http://www.vsb.org/pro-guidelines/index.php/principles (last visited Feb. 3, 2016). These principles include guidelines on how counsel is expected to interact with clients, judges and court personnel, and opposing counsel. With respect to opposing counsel, attorneys should "[c]ooperate as much as possible on procedural and logistical matters," "[c]ooperate in scheduling discovery, negotiations, meetings, closings, hearings or other litigation or transactional events, accommodating opposing counsels' schedules whenever possible," and "agree whenever possible to opposing counsel's reasonable requests for extensions of time that are consistent with [an attorney's] primary duties to [the] client's interests." See Virginia State Bar, About the Bar-Professionalism, See Virginia State Bar, Principles of Professionalism, Id.

It is important to recognize, however, that the principles of professionalism are aspirational, and, as we stated when this Court approved their adoption, they "shall not serve as a basis for disciplinary action or for civil liability." Id. Moreover, the principles themselves recognize that conflicts may arise between an attorney's obligations to a client's best interests and the professional courtesy of agreeing to an opposing counsel's request for an extension of time. Id. In this case, it is clear that the trial court sanctioned plaintiff's counsel "for its failure to voluntarily extend the time in which Wells Fargo might file its answer." However, in this case, counsel may not have been acting in his client's best interests if he had agreed to the requested extension of time. In fact, ESI directed counsel not to agree to the requested extension.

We applaud the bench and the bar as they encourage the aspirational values of professionalism. But there is a difference between behavior that appropriately honors an attorney's obligation to his client's best interest, behavior that falls short of aspirational standards, and behavior that is subject to discipline and/or sanctions. In this case, Wells Fargo was in default. Counsel for ESI satisfied his obligation to pursue his client's best interest, and in this case followed the client's express direction. Counsel did not engage in behavior that could be characterized as unprofessional, an ethics violation or behavior that is subject to statutory sanctions. Accordingly, we reverse the trial court's order awarding $1200 in sanctions against plaintiff's counsel for counsel's failure to voluntarily extend the time in which Wells Fargo could file its answer.

In *Environment Specialist, Inc.*, at page 8, the Court further recognized:

> … fourteen states have established professionalism commissions as joint efforts between bar associations and the judiciary. See ABA, Professionalism Commissions, http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/profcommissions.html (last visited Feb. 8, 2016). Fourteen more state bar associations have professionalism committees. Id. Thirty-eight states plus [DC] have codes or creeds for professionalism in legal practices. See [ABA], Professionalism Codes,http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last visited Feb. 8, 2016).

A simple discovery extension should be straightforward, but in a contentious litigation with an invested client, the client may believe that playing hardball is the right strategy. As an attorney, you may disagree. To a client with whom you have never discussed the roles and responsibilities of your respective positions in the relationship, you may sound disingenuous, or worse, sympathetic.

This is why frequent, responsive communication and education between the attorney and the client is key to maintaining professionalism across the case. The Texas Lawyer's Creed requires Texas lawyers to agree to "advise my client of the contents of this creed when undertaking representation." Many states have similar requirements. You might find that having the professionalism discussion early, perhaps more than once, with your client can stave off future bar complaints and even improve relationships with opposing counsel.

That said, you cannot control the behavior of your opponents. It would not be appropriate to suggest that your behavior is always the cause of bad behavior by opponents. But, you can control yourself, not them, and always hope that the Court recognizes the true bad actor if an issue arises.

VII. Multiple Client Representation

Another tricky area that employment attorneys may face is the issue of multiple client representation. This issue arises in two contexts. First, potential conflicts are a concern that also arises in all non-class multiple representations, for example, where an attorney simultaneously represents two or more former employees who have been terminated, harassed, or retaliated against by the same employer. Second, potential conflicts between class members is a standing concern in all class and collective action work. To avoid ethical pitfalls, be proactive up front about dealing with potential conflicts among class members and in multiple representation situations.

A. Multiple Client Representation

As a general rule, multiple representations of any kind must not adversely affect the lawyer's ability to adequately represent each client. The Commentary to ABA Rule 1.7 provides that, ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. S*ee, e.g., Virginia Rule 1.7*.

Important issues to consider include:

- Conflicting stories;
- Available funds to pay a judgment/settlement;
- Limits on insurance policies;
- Free Flow of information; and
- Settlement (terms of confidentiality and other impediments).

Before beginning a multiple representation, ask yourself first if you can ethically do so. Perform a careful conflicts analysis to determine whether an actual or potential conflict prevents you from taking on a joint representation. For example, in a multiple representation is one client's recollection of the facts different from and adverse to another client's recollections? Are there facts that are favorable to one client and unfavorable to another? Does the defendant have the funds to pay full value settlements or judgments to both clients, or will taking on an additional client necessarily compromise the recoveries of both? Is one of the clients compromised in some fashion, e.g., they "purloined" company documents, whereas the other is not? Does combining the cases weaken the value of the uncompromised client's claims? And so on. The overarching issue is whether taking on the multiple representation creates a situation where zealously representing one of the clients puts you in a position directly or potentially adverse to the other client(s). *See* ABA Model Rule of Professional Conduct 1.7. Erring on the side of caution, if the multiple representation passes through a careful conflicts analysis, *then* consider how to safeguard the interests of each of your new clients.

ABA Model Rule of Professional Conduct 1.7(b)(4) requires that the clients give written consent for the multiple representation. The attorney must explain to them the nature of any potential conflicts of interest that they'll face in sufficient detail so they can understand why it may be desirable for them to have independent counsel. One particularly important discussion should involve the attorney client privilege. According to Comment 30 of the ABA Model Rules of Professional Conduct 1.7:

> A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation

eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

A client may change their mind knowing of the representation knowing that the privilege may not attached to possible later litigation with their co-litigant. However, the duty of confidentiality would apply. Comment 31 of the ABA Model Rules of Professional Conduct 1.7. Yet, if a client asks you not to reveal information critical to the continued common representation, then your ability to effect competent representation will be severely impacted.

Thus, one very important key to multiple client representation is *communication.* Advise every possible client of their rights, their defenses, and their liabilities and get written consent that the client understands. That way, you have documented that you have faithfully performed your duties. (*See* Attached Sample Client Waiver for Multiple Client Representation).

B. Avoiding Conflicts in Class and Collective Actions

In class and collective actions, simultaneous representation of many clients is a necessary feature of the action itself. Moreover, in class and collective action work it is often not possible to get a meaningful recovery without combining groups of employees together. The collective action mechanism in 29 U.S.C. § 216(b) of the Fair Labor Standards Act exists precisely for the purpose of making it possible for groups of employees (each member of which may not have a large enough claim to pursue individually) to jointly pursue a recovery. As such any potential conflicts between the individuals who join in a collective or class action often are superseded by the reality that their individual claims are not economically feasible to pursue on their own. Nonetheless, there are certain steps that are important to take to prevent conflicts from arising in collective and class action work.

Including language in attorney client agreements creating class steering committees and vesting power in the steering committee to agree to settlement is one vehicle for heading off conflicts in advance. Another is including language in the attorney client agreements concerning how any collective settlements will be divided (*e.g.*, pro rata based on weeks worked in the relevant window of recovery). Another wise preventative step is to include language in court approved notices which binds any opt-ins to the terms of the fee agreements already signed by class reps and named plaintiffs. It is also important to avoid the appearance of impropriety in reaching out to potential class members during the court-supervised notice process.

One built-in feature of class and collective action work which helps plaintiffs' attorneys to avoid conflicts with clients is the settlement approval process. In collective actions it is standard practice to get court approval of any settlements and doing so insulates the plaintiffs' attorney(s) from any client criticisms concerning how settlement funds are divided between clients as well as the amounts of any attorneys' fees and cost reimbursements that are paid. Essentially, the funds are distributed under the supervision

of the court and with the court's blessing thereby cloaking counsel with something akin to quasi-judicial immunity.

VIII. Social Media

It is not just Facebook. You have to make an effort to know the basic social media cites that the Court would be familiar with – *and then ask your client about the others that they use*.

You have to advise your clients that social media outlets and posts can be the subject of discovery. While defendants often portray the plaintiff as trying to keep his posts secret and hiding them, many plaintiffs just do not realize that a message they posted to grandma or a former classmate may be relevant to litigation and discoverable in the litigation process. Clients have to be advised of the modern risks inherent in social media communications – and prudent counsel should consider giving such advice in writing and during their first meeting with the client. Many plaintiffs have no idea of the scope of discovery requests to come unless we educate them.

Clients are not the only ones who have social media problems – attorneys do, too! Whether we are posting about our cases, advertising our services, or reaching out to customers, clients, and colleagues in our professional network, we must tread carefully and stay within the bounds of our State Bar guidelines. Also, please remember that the Internet, and by extension social media, crosses jurisdictional lines, and so what is appropriate for one state may violate the rules of another state.

Observe your State Bar's advertising rules with respect to social media outreach. For example, Florida does not require its advertising rules to apply to a lawyer's social media profile used for personal purposes, but would apply those rules to a lawyer's social media business profile as well as any profiles it considered to be a hybrid of personal and business.[5]

Importantly, beware of creating an attorney-client relationship with individuals through your websites! ABA Formal Opinion 10-457 has recognized that by enabling communications between prospective clients and lawyers, websites may give rise to inadvertent lawyer-client relationships and trigger ethical obligations to prospective clients under RPC 1.18.

Also note that your Internet and social media investigations of potential parties, witnesses, or jurors may have potential ethical implications. For example, friending a potential witness to learn more information about them would violate Virginia Rule of Professional Conduct 8.4(c)'s prohibition against "dishonesty, fraud, deceit or misrepresentation." *See also Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. No. 2009-02*. Presumably, this would apply to LinkedIn requests, but perhaps even accessing

[5] *See* Florida Bar Standing Committee on Advertising Guidelines for Networking Sites. http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758BB54A5985257B590063EDA8/$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement.

a profile if a footprint is then sent to the witness's profile page allowing them to see that you made contact.

And, of course, monitor your own client's social media communications to ensure they are not engaging in improper activities via social media which could later be attributed to you. For example, plaintiffs in class actions putting up their own website to get sign ups, or plaintiffs posting or deleting content to their Facebook pages that might be harmful to their claim.

In *Isaiah Lester v. Allied Concrete Co.*, Case No. CL.08-150, Charlottesville Circuit Court (2011):

- Wife died in traffic accident with cement truck. Jury awarded $10.6 million to husband.
- Defense counsel saw an unflattering, post-accident picture of husband "partying" on his Facebook page. Following a discovery request, husband's counsel instructed husband to "clean up" his Facebook page. Husband deleted his entire Facebook page. Husband then inaccurately testified at trial that he did so on his own, without prompting by counsel.
- Post-trial, counsel's involvement came to light.
- Sanctions of $542,000 assessed against counsel, $180,000 against husband. Counsel referred to the Bar.

IX. Conclusion

The foregoing paper has addressed some of the areas of modern law practice that can create the biggest potential ethical pitfalls for attorneys. These include:

- The importance of substantive competence beyond the scope of our usual practices;
- Handling client property ethically and properly;
- Wellness issues that can impact upon the ethical practice of law;
- How to handle State Bar complaints to minimize risks and potential damage;
- Professionalism – how to avoid conflicts between ethical duties to clients and ethical duties to opposing counsel;
- Avoiding client conflicts in multiple client and class action representations; and
- Ethical hazards inherent in modern social media communications.

The overarching issue touching upon all of these areas is the importance of knowing and following the ethical rules of our profession. Of course, no paper can address every potential ethical issue that might arise. However, for any ethical questions that may arise, NELA provides very helpful guidance on ethical issues through NELA's Ethic and Sanctions Committee. The E&S Committee is staffed by NELA members who have

developed significant substantive and practical expertise in addressing ethical issues. All ethics inquiries made to the E&S Committee are strictly confidential and will be responded to after confidential discussions among E&S's ethical experts. Attorneys who run into serious ethical problems also can also apply through E&S for a NELA SAFER grant, which, if approved, will provide funding to help pay some of the costs of legal defense of a disciplinary action. More information about NELA's E&S Committee and NELA SAFER grants is available to NELA members on the NELA Exchange.

SAMPLE CONFLICTS WAIVER – JOINT REPRESENTATION

Personal and Confidential

[DATE]

[CLIENT A]
[CLIENT B]
[CLIENT C, etc]

Re: Joint representation in claims against [DEFENDANT]
Waiver of Conflicts of Interest

Dear all:

As you all know, I have discussed with you the pros and cons of my jointly representing all of you and that I would ultimately put this down in writing. That time has occurred. Nothing in this letter should be anything that we have not discussed before. I have merely put it in writing for all of our protection as we move forward in the litigation.

There are many benefits to joint representation. The most obvious is the strength in numbers. Whenever there is joint representation, however, the possibility of a conflict of interest always exists. Although there is no conflict at this moment and there have been no conflicts in the past, the types of potential conflicts that could occur in the future include:

1. Adverse claims.

Although I have no knowledge that any such claims exist, it is possible that during the course of our representation, I might learn that one of you has a claim against another or that you might have something damaging or harmful to say about another that might be relevant to the other person's claims.

2. Waiver of Attorney-Client Privilege and Sharing of Information.

When a lawyer represents a single client, the client's communication with his or her lawyer is protected from disclosure by the attorney-client privilege. But because this is a joint

representation, when each of you shares information of common interest in our case against [DEFENDANT] with me, I cannot properly represent one of you in the case without being able to share all of this information with the others.

In addition, communications between two or more of you occurring during the case are not confidential in any dispute that might arise between you in the future. All communications between us, however, will be treated as privileged and confidential as to third parties at all times.

3. Differing Values of Claims.

As we discussed, the value of your claims are not easy to calculate and might differ. Although we generally regard them as similar, how a judge, jury or [DEFENDANT] values them might differ. The differing values of your cases might have an impact on settlement, which I explain in the following two paragraphs.

4. Settlement Division.

It is my intent to seek a cash settlement for each of you. Preferably, we will be able to negotiate separate settlements for each of you. If [DEFENDANT] insists on paying one lump sum to settle all of your claims, a conflict will arise if you disagree as to how much of this sum should be given to each of you after the reduction of attorneys' fees and costs.

You all might wish to agree on a formula now in order to lower the chances of these conflicts later on, or you can all choose to work that out later in the event we reach this point. Keep in mind we can make separate demands.

While we do not have to have this figured out right now, please let me know your decision on how to allocate any potential lump sum offers in writing as soon as possible. I could not represent one of your interests in conflict with the others in that process.

5. Non-cash Aspects of Settlement.

It is possible, although unlikely, that [DEFENDANT] would like to offer one or more of you something other than money as part of its settlement offer. This would have an impact on the amount of money [DEFENDANT] would offer to pay and the value of each of your claims might be different depending on your employment status with [DEFENDANT]. If [DEFENDANT] makes special offers to each of you, rather than a lump sum, this will pose no settlement division problems. If [DEFENDANT] insists on making a lump sum payment to settle all your claims, unless you can agree with one another about the proper division of the cash portion of the settlement, an actual conflict between you will arise. Again, I could not represent one of your

interests in conflict with the others in that process.

6. Legal Representation in the Event of an Actual Conflict.

I do not presently see any conflict of interest between you. You all share similar interests and positions and have very similar claims. However, because of the potential for a conflict, I am required to obtain your consent in writing to the representation of all of you in this matter.

In the event any actual conflicts were to develop in the future between you, I could not continue to represent all of you. However, to the extent possible, I might choose to continue to represent one or more of you.

If you have any questions about this letter, please discuss them with me or another lawyer before signing.

Very truly yours,

Acknowledgment and Consent

I understand that a potential conflict may exist or arise between me and the other individuals receiving this letter and, having considered the potential for conflicts, consent to [FIRM] representing all of us in our claims against [DEFENDANT] and its owners and managers.

Date: _____ _____

[CLIENT A]

Date: _____ _____

[CLIENT B]

Date: _____ _____

[CLIENT C]