CHAPTER 3

CONFLICTS OF INTEREST INVOLVING CURRENT CLIENTS; INTERMEDIATION

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§3.1 INTRODUCTION

Conflicts of interest involving *current clients* of a lawyer or the lawyer's firm raise some of the most difficult problems. (For the rules governing conflicts involving former clients, see chapter 5). Clear conflicts analysis and resolution are particularly important in light of the imputation consequences of Washington Rule of Professional Conduct (WRPC) 1.10—whereby the conflicts of one lawyer are imputed to the entire firm (including distant offices that may never have heard of the particular client or, for that matter, the affected lawyer). WRPC 1.10 is discussed in chapter 6.

The basic rules governing conflicts of interest between a lawyer's current clients are contained in WRPC 1.7 and 2.2. WRPC 1.7 sets out the general conflicts of interest rule and, for the most part, sets forth the principles on which all other conflicts rules rely. WRPC 2.2, the rule governing "intermediation," presents an alternative approach to certain kinds of conflicts problems.

§3.2 CONFLICTS OF INTEREST INVOLVING CURRENT CLIENTS: RULE 1.7

RULE 1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). 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.

* * *

WRPC 1.7(a) deals with direct adversity and provides that, absent full disclosure and informed written consent, a lawyer may not represent a client (the "First Client") if that representation will be "directly adverse" to another client (the "Other Client"). WRPC 1.7(b) is both broader and narrower than WRPC 1.7(a) and provides that, again absent full disclosure and informed written consent, a lawyer may not represent the First Client if the representation of the First Client would be "materially limited" by the lawyer's responsibilities to an Other Client, a third person, or the lawyer's own interests. As is discussed below, WRPC 1.7 also establishes certain categories of conflicts that cannot be waived.

(1) Current clients with adverse interests: Rule 1.7(a)

WRPC 1.7(a) presents a black-and-white rule on its face. If there is direct adversity, then the lawyer may not represent the First Client against the Other Client absent, at a minimum, informed consent of both clients. However, the rule does not define "direct adversity." Although it may be easy to find direct adversity in a litigation context, Comment 11 to ABA Model Rule 1.7 notes that "[c]onflicts of interest in contexts other than litigation sometimes may be difficult to assess." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 93 (ABA 4th ed 1999).

We are not able to articulate an absolute standard of what is and is not "direct adversity." There are, however, several reasons to apply a broad standard for determining direct adversity. First, the conflict rules are premised on the lawyer's duties of loyalty and confidentiality, which are interpreted broadly by the courts. Second, there is the risk that the Other Client will later charge in a malpractice suit that the Other Client thought the lawyer was representing the Other Client's interests as well. The lawyer may have difficulty in defending this allegation if it cannot be shown that the lawyer made clear to the Other Client that the lawyer was not representing that party's interests.

A fair rule of thumb would be that direct adversity exists *at least* in circumstances in which: (1) the lawyer is preparing documents that the lawyer knows will be reviewed and commented upon by the Other Client; (2) the lawyer is reviewing or commenting upon documents prepared by or for the Other Client; (3) the lawyer is giving advice about rights and remedies under or otherwise

interpreting a document to which the Other Client is a party (at least to the extent the issue concerns the rights and obligations of the Other Client); or (4) the lawyer is involved in negotiations with the Other Client or its representatives.

Direct adversity, on the other hand, does not exist simply from the representation of competitors. As the comments to the ABA Model Rules note, "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients." For example, a lawyer should be able to represent multiple broadcasters in the same market even though they compete against each other for listeners. *See Curtis v. Radio Representatives, Inc.,* 696 F. Supp. 729, 735-36 (D.D.C. 1988).

(a) Reasonable belief representation is proper

As discussed below, if direct adversity between existing clients is found, it may be possible to resolve the conflict by seeking the informed written consent of both clients. However, even if both clients would be willing to consent and waive a specific conflict, a lawyer facing a direct adversity situation may not seek consent unless the lawyer first reasonably believes that seeking consent will not adversely affect the relationship with the other client. Note that the focus of the rule is on the attorney-client *relationship* rather than the quality of the representation. *See* Hazard & Hodes, THE LAW OF LAWYERING §1.7:207 (1998).

The "reasonable belief" test has both subjective and objective components. First, the lawyer must subjectively believe that the representation is proper. Second, this belief must be objectively reasonable under the circumstances. "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Comment 5 to ABA Model Rule 1.7.

The "reasonable belief" requirement in many instances may end the conflicts analysis because the lawyer may conclude that he or she cannot accept the representation without damaging the lawyer's (or the law firm's) relationship with the Other Client. For example, a lawyer would reasonably conclude that he or she cannot represent the First Client in a hostile takeover bid of the Other Client without harming the relationship with the Other Client and should, therefore, decline the representation.

The reasonable belief standard is factual and circumstance-based. As such, the results could be different depending on the sophistication of the clients and the nature of the relationship between the lawyer and the client. For example, different conclusions as to reasonableness might be reached with respect to large corporations as compared with individuals, or when the lawyer's representation of the client is of a limited nature.

(b) Informed consent

If a lawyer is to represent current clients in a situation involving direct adversity, WRPC 1.7(a) requires informed consent of the clients to the conflict representation. That is, the lawyer has a duty to consult with both clients and to disclose all material facts that each client would need to evaluate the conflict and for the clients to decide, in their discretion, whether to consent.

As is discussed in §3.2(3), there are some kinds of conflicts that cannot be waived even if all affected clients consent after full disclosure. The fact that a client can waive a conflict after

being given sufficient information to constitute informed consent does not mean, however, that it is always permissible for a lawyer to make the disclosures necessary to obtain that consent. A former client conflict example may illustrate the point. Suppose, for example, that a lawyer previously represented First Client in obtaining a patent. Suppose that Other Client then asks the lawyer to represent it in exploring possible means of working around First Client's patent. Theoretically speaking, this kind of former client conflict can be waived by First Client and Other Client. As a practical matter, however, it may well be that this plan is the last thing that Other Client would want First Client to know. Consequently, an effective waiver is not possible because adequate disclosure of the basis of the conflict cannot be made.

Most waiveable conflicts do not present such difficult problems, but this does not mean that lawyers would be well advised to treat their disclosure obligations cavalierly. The only truly safe way for a lawyer to proceed is to make sure that both the potential advantages and disadvantages of granting consent are explained in a way that is sufficient for the recipient not only to understand that a choice must be made but also to understand the actual or potential benefits and burdens of that choice. To a degree, the extent of the required disclosure will depend upon the sophistication of the parties whose consent is sought. For example, if consent is sought from in-house counsel on behalf of a sophisticated client, perhaps less information, or a more broadly formed waiver, is permissible. On the other hand, if the lawyer is seeking consent from an unsophisticated individual client, more disclosure and explanation may be required. Informed consent requires that the client have reasonably adequate information about the material risks of such representation to that client. "What is required for consultation or full disclosure will, of course, turn on the sophistication of the client, whether the lawyer is dealing with inside counsel, the client's familiarity with the potential conflict, the longevity of the relationship between client and lawyer, the legal issues involved and the ability of the lawyer to anticipate the road that lies ahead if the conflict is waived." ABA Opinion 93-372.

Nevertheless, a strong argument can be made that a lawyer who drafts a conflicts waiver letter should ideally include at least the following:

- A clear identification of the clients to be represented and any to be opposed.
- A clear identification of the work to be undertaken and of any limitations on that work.
- A discussion of whether the conflict could conceivably lead the lawyer to be less zealous or eager on any client's behalf.
- A discussion of how client confidences and secrets will be handled and of whether there is any potential risk of an adverse use of client confidences and secrets.
- A discussion of whether greater conflicts are presently foreseeable and of the effects if those conflicts come to pass (e.g., another lawyer may have to be brought in to duplicate the work).
- A request that the client consider each of these issues with care before reaching a decision, and an offer to answer any additional questions that the client may have before a decision is reached.
- At least when Oregon conflicts rules may also be implicated because of the multi-state nature of a matter or of a firm's practice, a recommendation that the client consult independent counsel before deciding whether or not to consent, as is required by Oregon DR 10-101(B).

Two further points may also be worth noting. One is that clients who are asked for conflicts waivers in business matters are often inclined to want to grant waivers so that proposed transactions can proceed with a minimum of fuss and discomfort. The other is that erring on the side of too much disclosure is probably safer than erring on the side of too little. The lawyer who is concerned that the discussion of a particular risk may cause a client to withhold consent is the lawyer who ought to make sure that the discussion of that risk is included in the letter.

Again, there may be circumstances in which the lawyer cannot even seek the consent. For example, "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Comment 5 to ABA Model Rule 1.7.

(c) Advance consent

Lawyers should consider, in the proper circumstances, seeking advance consent from clients or prospective clients. "Advance consent" is consent to particular conflicts that do not exist at present but may arise in the future. For example, a lawyer might condition his willingness to serve as tax counsel on an isolated matter for Bank X to the agreement of Bank X that the lawyer and the lawyer's firm may represent specific borrowers in lending transactions with Bank X in the future.

There is some debate on the efficacy of advance consent. The ABA Committee, in Formal Opinion 93-372, concluded that advance consent was permitted under the Model Rules but expressed a "guarded view." The Committee's concern was whether the client was truly informed.

Informed consent by the client is as necessary for effectiveness of a prospective waiver as for a contemporaneous waiver, but in the nature of things the consent is much less likely to be fully informed. Given the importance that the Model Rules place on the ability of the client to appreciate the significance of the waiver that is being sought, it would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicting clients would survive scrutiny. Even that information might not be enough if the nature of the likely matter and its potential effect on the client were not also appreciated by the client at the time the prospective waiver was sought.

Keep in mind that an advance consent ideally should address both current client conflicts under rule 1.7 and potential former client conflicts under rule 1.9. Again, the level of sophistication of the client should have direct bearing on whether the consent sought was sufficiently informed. In addition, the nature and scope of the consent must be clearly set forth. As the ABA Opinion noted:

> For example, a prospective waiver from a client bank allowing its lawyer to represent future borrowers of the bank could not reasonably be viewed as permitting the lawyer to bring a lender-liability or a RICO action against the bank, unless the prospective waiver explicitly identified such drastic claims.

ABA Formal Opinion 93-372. *See also* OSB Legal Ethics Opinion 1991-122 (re efficacy of prospective waiver).

(d) Necessity of a writing

Note that WRPC 1.7(a) requires that the consent to adverse representation be in writing. Therefore, reliance on an oral waiver to the conflict is contrary to the WRPCs. Moreover, it is extremely risky. Perhaps the most important lessons concerning conflicts of interest are to recognize the conflict, deal with directly, and put it in writing.

It is not necessary, however, for the clients themselves to sign the written consent. The definition of "written consent" would encompass a letter from the lawyer confirming oral consent of the client. *See* Preamble to WRPC (Terminology), reprinted in Appendix A. Nevertheless, the better and safer practice is to have the client sign the consent.

(2) Representation materially limited by responsibilities to one other than the client: Rule 1.7(b)

RULE 1.7 CONFLICT OF INTEREST; GENERAL RULE

* * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). 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.

* * *

WRPC 1.7(b) does not use the direct adversity language that is contained in WRPC 1.7(a). Instead, an WRPC 1.7(b) conflict is present whenever the lawyer's representation of a client may be materially limited by the lawyer's obligations to another client, a nonclient or the lawyer him- or herself. As a practical matter, however, three points are worth noting. First, this is not an "either/or" situation. Many WRPC 1.7(a) conflicts are also WRPC 1.7(b) conflicts. Second, conflicts waiver letters must be written to all affected or potentially affected clients under either rule (there may only be one affected client under a WRPC 1.7(b) conflict, while a WRPC 1.7(a) conflict necessarily involves at least two affected clients), and the components of the waiver letters will be more similar than different.

Finally, WRPC 1.7(b), like WRPC 1.7(a), creates a class of current client conflicts that cannot be waived. Under WRPC 1.7(b), a lawyer cannot proceed unless the lawyer can reasonably conclude that the representation of the client whose consent is being sought will not be adversely affected by the limitation that triggered the conflict. For present purposes, however, the categories of per se nonwaiveable conflicts under the two sections of WRPC 1.7 are likely to be the same. See §3.2(3).

The Conflicts Rules do not define "material limitation." Whether something is a material limitation depends on the facts and circumstances of the particular situation. Several other rules contain examples of potential material limitations, including WRPC 1.8(a) (business relation between the lawyer and the client), WRPC 1.8(f) (the lawyer receiving payment from a person other than a client) and WRPC 1.8(i) (representation of a client where lawyer is related to opposing counsel).

Because the material limitations issue is often judged by bar disciplinarians and angry jurors after Murphy's Law has been applied to a transaction and things have gone awry, the safest course is again to make disclosure and seek consent in any close cases.

(3) Nonwaiveable conflicts

As is noted above, there are certain types of current client conflicts that cannot be waived under either WRPC 1.7(a) or WRPC 1.7(b). The official comments to ABA Model Rule 1.7 make clear that nonwaiveable conflicts can include attempts to represent two or more parties to a business transaction whose interests are "fundamentally antagonistic"—even if an argument can be made that the parties may also share some interests in common. But what does it mean to say that the interests of parties are fundamentally antagonistic?

In some jurisdictions, for example, the simultaneous representation of buyers and sellers or other sets of parties in similar relationships has been held under the rules of those jurisdictions to present a nonwaiveable conflict. *See, e.g.*, *In re Johnson*, 707 P.2d 573 (Or. 1985). *See also Baldasarre v. Butler*, 625 A.2d 458 (N.J. 1993) (nonwaiveable conflict exists if, but only if, a transaction is "complex"; unfortunately, no definition of "complex" transaction is given, nor is it explained whether complexity must be determined with or without regard to sophistication of clients involved). In other jurisdictions, a less strict rule may be applied—at least if all parties appear to be taking informed and consistent positions on all material terms.

As of the time of this publication, there do not appear to be any Washington disciplinary decisions or ethics opinions that address this issue. At a minimum, therefore, business lawyers should think twice (or perhaps even more than twice) before agreeing to the simultaneous representation of parties such as buyer and seller or lender and borrower. Even if such conflicts are subsequently determined in Washington to be waiveable, the risk that a subsequently disappointed party may assert, and that a jury or disciplinary body may agree, that the lawyer did not give sufficient disclosure of all potential points of conflict to all interested clients may well be unacceptably high.

§3.3 LAWYER AS INTERMEDIARY: RULE 2.2

RULE 2.2 INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

* * *

As can be noted, WRPC 2.2 contains some language that is similar to the language of WRPC 1.7. Lawyers who become confused about the relationship between WRPC 1.7 and WRPC 2.2 have nothing to be ashamed of. In fact, this confusion has led to a presently pending proposal before the Ethics 2000 Commission that could result in a combination of these two sections into a single integrated section. Pending further case law or black-letter clarification of the relationship between these two sections, the following points seem worth noting:

• WRPC 1.7 and WRPC 2.2 overlap in the sense that both provisions allow a single lawyer or law firm to represent multiple would-be partners or incorporators with similar bargaining power and whose interests appear to be reasonably consistent as long as all clients consent after full disclosure.

• WRPC 2.2 allows a single lawyer to mediate a preexisting dispute between parties—something that WRPC 1.7 does not allow.

• On the other hand, this does not mean that WRPC 2.2 should be viewed by business lawyers as an easy alternative to WRPC 1.7, which contains significantly lower standards for multiple representations in a context outside of dispute resolution/mediation. There is no particular reason to believe, for example, that the disclosure and consent obligations under WRPC 2.2 are lower than the comparable obligations under WRPC 1.7.

• Similarly, the specific requirements of WRPC 2.2 that are discussed below will often prove just as restrictive in practice as the WRPC 1.7 requirements. *See, e.g.*, Utah State Bar Op. No 116 (1992) (holding that lawyers cannot simultaneously represent divorcing spouses as clients under Utah RPC 1.7 or RPC 2.2 and assertions that RPC 2.2 "implies that the parties have a common interest that overrides their separate interests"). *See also In re Herzog*, 710 So. 2d 793 (La. 1998) (affirming stipulation for discipline under Louisiana RPC 1.7 and 2.2 of attorney who had attempted to act as intermediary in corporate merger).

WRPC 2.2 provides that in the *appropriate circumstances* a lawyer may act as an intermediary for both clients as long as: (1) the lawyer consults with each client concerning the advantages and disadvantages of the common representation, including the effect on the attorney-client privilege, and obtains each client's written consent; (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with each client's best interests; that each client will be able to make informed decisions, and that there is little risk of material prejudice to either of the client's interests; and (3) that common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(1) Nature of intermediary role

Note that a lawyer's role as an intermediary is as a counselor and not an advocate. That is, the lawyer's job is to seek common ground between clients in the best interests of each client rather than seeking to obtain an advantage for one party over the other. As such, the lawyer cannot provide strategic and confidential negotiating advice to one party that the lawyer does not share with the other party. It would also be inappropriate for a lawyer in an intermediary role to give tactical advice to one party against the other.

(2) Circumstances in which intermediary role may be inappropriate

The lawyer must make a reasonable determination that he or she is capable of serving as an intermediary. Relevant factors may include: (1) the complexity of the transaction; (2) prior or existing relationships with any of the parties; (3) the sophistication of the parties and each party's ability to make informed decisions; (4) the degree to which the parties' interests differ; (5) the risk that intermediation may fail; (6) the lawyer's ability to be impartial; and (7) the likelihood of contentious negotiations or hostility in the future.

These factors help highlight the circumstances in which a lawyer could or could not serve as intermediary. A common situation in which a lawyer serves as intermediary is in the formation of companies and the preparation of shareholder/owner agreements. The interests of the parties may be aligned, the issues in such documents may be fairly well defined, and the lawyer should be able to explain to the clients the options and have the clients jointly instruct the lawyer how such documents should be drafted. Another situation would be the representation of multiple shareholders in the sale of 100 percent of the stock of the company.

The examples above should be contrasted, however, with situations in which there are substantial differences between the interests of the parties. For example, it is generally not possible for a lawyer to act as an intermediary between buyer and seller or lender and borrower in complex transactions. There are too many issues and too much divergence of interests for this to be safely accomplished.

Even in areas in which intermediation is common, other factors could preclude a lawyer from serving as an intermediary. For example, if the lawyer is able to communicate with only one of the clients, it is difficult to act as an intermediary. When the level of sophistication or power between the two clients is significantly different, or when the parties have unequal bargaining positions, intermediation may not be advisable. Similarly, when the lawyer has a longstanding client relationship with one of the parties, declining to serve as an intermediary may be prudent:

> Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Comment 7 to ABA Model Rule 2.2.

(3) Duty to consult with all parties

WRPC 2.2 also requires that an attorney consult with each client concerning the decisions to be made and the considerations relevant to making them while the attorney is acting as an intermediary. The ongoing consultation must be conducted impartially, in the best interests of all of the clients, and with due regard to the agreed balance between disclosure and confidentiality, so that each client may make adequately informed decisions.

One of the matters that should be the subject of consultation is the effect of intermediation on the attorney-client privilege. That is, as between the clients, unless the clients otherwise consent, there is no privilege and, therefore, everything that the lawyer tells to one party (or that party tells to the lawyer) is not subject to the privilege and is discoverable. In fact, a lawyer serving as an

intermediary should tell the parties that there should be no confidentiality as between either client and the lawyer and that all material communications between the lawyer and one client will be shared with the other client. If such an understanding is not acceptable to the parties—for example, if one of the parties does not want to have confidential communications shared with the other party—then intermediation will not be appropriate.

Serving as an intermediary also *may* not be appropriate if the lawyer consults with only one of the parties and relies on that party to both pass on information and provide the lawyer with instructions. WRPC 2.2(b) requires that while serving as an intermediary, "the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions." When communication is limited but the lawyer and the parties nonetheless conclude that service as an intermediary is appropriate, it would be particularly important to have this procedure memorialized in writing and agreed to by all parties. See Appendix H.

(4) Duty to withdraw

WRPC 2.2 requires that the intermediary withdraw if any client so requests or if the lawyer determines that any of conditions necessary to serving as an intermediary cease to exist. This risk of withdrawal and the possible additional costs associated with obtaining new counsel should be the subject of the informed consent sought from the clients. WRPC 2.2(c) provides that upon withdrawal "the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation." In other words, one of the risks of a "failed" intermediation is a non-consentable conflict with respect to the subject of the joint representation and, therefore, the lawyer cannot represent any of the parties concerning this matter.

On the other hand, if one of the clients to the joint representation simply wants separate counsel, but does not object to the lawyer continuing to represent the other party, it should not be necessary for the lawyer to withdraw from the representation.

In short, a lawyer should not serve as an intermediary if there are danger signals such as:

- substantial and material differences of position between the parties;
- uncertainty whether the parties can reach agreement;
- reluctance or refusal by one party to share confidential information with the other; or
- communications by the lawyer to or through only one client.

Even with adequate disclosure and written consent, a lawyer should be extremely confident in his or her ability to identify and communicate to each client all of the material issues that each client should consider in connection with the intermediation and the various options available to each client. This task is more difficult to the extent that the clients are not similarly situated with respect to such things as economic position or levels of sophistication.

§3.4 ILLUSTRATIVE EXAMPLE

Assume that a lawyer (or law firm) has two clients—Longstanding Client A and Newer Client B. Assume further that A and B inform the lawyer that they have decided to engage in some sort of business transaction together. Speaking only to current client-based conflicts-of-interest issues, what are the lawyer's options? The answer will, of course, depend in part on the nature of the proposed transaction and in part on the nature of the clients and the lawyer's relationships with each of them.

• If, for example, A wishes to buy something from or sell something to B, it is clear that the lawyer is free under WRPC 1.7 to represent either A or B, but not both, as long as both A and B consent after full disclosure. As Washington law presently stands, however, it is not at all clear whether a lawyer can use either WRPC 1.7 or WRPC 2.2 to represent both A and B in a transaction of this type.

• If, on the other hand, A and B wish to start a business together, it is likely that both WRPC 1.7 and WRPC 2.2 would allow the simultaneous representation of A and B as long as their interests appear reasonably aligned and both consent after full disclosure.

• No one should assume, however, that representing parties with conflicting interests is a risk-free proposition. If, for example, a lawyer fails to make adequate disclosures to his or her clients or fails to see that the continuing requirements of WRPC 2.2 are fully complied with, the lawyer is at risk of both civil and disciplinary liability.

• The fact (if it be a fact) that a lawyer can ethically represent multiple current clients does not always mean that it is in the lawyer's or the clients' best interests to do so. If, for example, the lawyer chooses to represent both A and B in a single matter at the same time, the lawyer may find that if A and B subsequently have a falling-out with respect to the joint matter, the lawyer will be left with no clients at all. Sometimes discretion truly is the better part of valor, and it is better to seek clearance up front and while everyone is still friendly to represent one and only one client on a particular matter or set of related matters.

§3.5 CARDINAL POINTS

1. Clearly identify who are, and who are not, your clients. Advise everyone of the decision in writing.
2. As a practical if not also technical legal matter, conflicts of interest are always present whenever a lawyer represents one current client adversely to another current client (even on entirely unrelated matters) and are often though not always present whenever a lawyer represents multiple current clients who are ostensibly on the same side of a matter.
3. Whether under WRPC 1.7 or under WRPC 2.2, some conflicts cannot be waived.
4. For those current client conflicts that can be waived, thoughtful and carefully written conflicts waiver letters are absolutely essential.
5. Sometimes less is more. The fact that a lawyer may ethically and in theory represent multiple current clients in a particular matter or set of matters does not mean that it is necessarily in the lawyer's or the clients' best interests to do so.