

## ALASKA BAR ETHICS OPINION 2021-1

### Representation of Multiple Clients Charged in Criminal Cases

**ISSUE:** Under what circumstances, if any, may an attorney ethically represent multiple clients who have been charged with criminal offenses arising out of the same set of facts?<sup>1</sup>

**CONCLUSION:** ARPC 1.7(a) prohibits a lawyer from representing multiple parties when doing so creates a concurrent conflict of interest. Representation of multiple parties in the same criminal matter is a classic example of a concurrent conflict of interest because there is always a significant risk that the representation of one client will be limited by the lawyer's responsibilities to the other client.

However, ARPC 1.7(b) allows in certain, rare situations for concurrent representation when the precise requirements of the rule are met. Specifically, the lawyer must reasonably believe competent and diligent representation can be provided and all the affected clients give informed consent, confirmed in writing.

Because of the significant consequences often attendant to a criminal conviction and a criminal defendant's Constitutional right to effective representation of counsel under the Sixth Amendment to the United States Constitution and Article 1, Section 11 of the Alaska Constitution, the requirements for obtaining informed consent to multiple representation are particularly stringent when multiple clients are charged with crimes arising out of the same set of facts. Accordingly, lawyers should ordinarily avoid concurrent representation of criminal defendants in a case when informed consent of the clients becomes necessary.

The Committee has been presented with two sets of facts relating to the ethical considerations in representing multiple clients who have been charged with criminal offenses arising out of the same set of facts.

1. Defendant A and Defendant B have been charged with theft of the same vehicle, which belongs to Defendant A's employer. Both defendants originally told the police that Defendant A was the only person who drove the vehicle. They now maintain that no crime was committed because, although both of them drove the vehicle, Defendant A had permission to use the vehicle

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<sup>1</sup> This opinion deals only with the situation in which multiple clients have been charged with crimes. It does not deal with matters in the investigative stages of criminal matters in which no charges have yet been filed.

and he gave Defendant B permission to drive the vehicle as well. The Committee concludes that concurrent representation of Defendants A and B is impermissible because a lawyer could not reasonably believe that competent representation could be provided to each client given the multiple ways their interests could diverge.

2. Two commercial fishers were charged with fishing in closed waters and falsely identifying where they caught the fish. Each has a permit for one of the species of fish they caught; one of the defendants is the boat owner and the other is a crewman. Here, the Committee concludes that concurrent representation of the fishers is likely prohibited, again because of the number of ways their interests could diverge; however in a very narrow set of circumstances concurrent representation could be possible with informed written consent of both clients.

**RULES:** ARPC 1.7(a), (b) and (c); 9.1(g) and (c); 1.1; and 3.2

**ANALYSIS:**

ARPC 1.7(a) prohibits a lawyer from representing multiple parties when there is a concurrent conflict of interest among them.<sup>2</sup> In criminal cases the prohibition against concurrent representation is particularly important: "The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."<sup>3</sup>

Issues that may be unique to concurrent representation in criminal matters, or at least more consequential than in civil matters, might include:

- A. the defendants may be charged with disparate degrees of criminal activity;
- B. one client may be offered a favorable plea agreement that may require testimony against the other;
- C. a defense strategy that favors one client may preclude a theory that is more favorable to the other;
- D. the defendants or their witnesses may testify unfavorably to each other;

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<sup>2</sup> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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

<sup>3</sup> Comment to ARPC 1.7.

- E. counsel's arguments suggesting a minor role for one client may highlight a larger role for the other;
- F. a legal argument for one client may be harmful to the other;
- G. sentencing arguments may emphasize relative culpability to the detriment of one of the clients.

Additionally, questions of timing may play a role: one defendant may wish a speedy trial, while another may find delay better serves his or her interests. The allocation of funds and time between defendants may also create readily apparent conflict issues.

Nevertheless, ARPC 1.7(b) allows for concurrent representations in rare cases when certain requirements are met, including whether the lawyer reasonably believes competent and diligent representation can be provided and the affected clients all give informed consent, confirmed in writing.<sup>4</sup> The terms "informed consent" and "confirmed in writing" are defined in ARPC 9.1 (g)<sup>5</sup> and (c).<sup>6</sup>

**When is a concurrent representation conflict not waivable in a criminal matter?**

ARPC 1.7(b) allows a lawyer to represent multiple parties with concurrent conflicts only when "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." The Comment provides guidance on this issue:

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<sup>4</sup> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (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 claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

<sup>5</sup> ARPC 9.1(g) provides: "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has adequately explained the material risks of, and the reasonably available alternatives to, the proposed course of conduct.

<sup>6</sup> ARPC 9.1(c) provides: "Confirmed in writing", when used in reference to the informed consent of a person, denotes informed consent that is given in writing by that person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent". If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

The ABA Standards for Criminal Justice (2015) supply additional guidance for assessing conflicts in criminal matters. Standard 4-1.7(d) states that, except to secure counsel for certain preliminary matters, "defense counsel (or multiple counsel associated in practice) should not undertake to represent more than one client in the same criminal case."

Nonetheless, the Standards allow for concurrent representation in certain very limited circumstances. Standard 4-1.7(d) provides that concurrent representation should be accepted only when it is clear either that no conflict is likely to develop at any stage of the matter or that concurrent representation will be advantageous to each client and foreseeable conflicts will be waived.

Thus, while in the vast majority of cases concurrent representation is impermissible, it is possible for a lawyer to undertake such representation in rare circumstances depending on the balance between the potential advantages and the myriad disadvantages according to the facts presented in a particular case. The advantages of multiple representation may include the financial (shared attorney's fees and other costs) and the strategic ("[a] common defense often gives strength against a common attack"<sup>7</sup>). Nonetheless, ARPC Rule 1.7(a) and its Commentary, and the ABA Standards, make clear that it is only in the truly exceptional case that a lawyer can reasonably conclude that the advantages of multiple representation outweigh the disadvantages to such a degree that a lawyer can provide competent and diligent representation to each client.

In making the decision whether to undertake concurrent representation, the lawyer should also consider whether such an arrangement might evolve into a conflict under ARPC 1.7(a)(2) in which a lawyer's personal interests in collecting fees might conflict with a client's right to separate representation. Specifically, Alaska law requires a lawyer to forego any fees earned after a conflict of interest becomes clear.<sup>8</sup>

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<sup>7</sup> *Holloway v. Arkansas*, 435 U.S. 475, 482-83 (1978).

<sup>8</sup> See *Jacobus, P.C. v Kalenka*, 464 P. 3d 1231, 1240 (Alaska 2020) (Lawyer not entitled to any fee, including under a "reasonable value" test, after a conflict of interest becomes clear.)

In sum, in the vast majority of cases, concurrent representation should be declined.

**What are a lawyer's duties to the client in those cases in which the client wishes to waive the conflict?**

In the rare case in which a lawyer reasonably concludes competent and diligent representation can be provided to multiple clients, ARCP 1.7(b) requires the lawyer to obtain the informed consent in writing of all affected clients.<sup>9</sup> The Comment to ARCP 1.7 requires that the information provided to obtain informed consent for concurrent representation "must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."

Thus, at a minimum, the lawyer must explain that: one joint client cannot be favored over another; relevant information must be shared among all joint clients; and such information, whatever the source, may be used by one joint client against the other if adversity develops between them later (in other words, the attorney-client privilege will not protect information shared with the lawyer of a joint client from use by the other joint client at some time in the pending case, or in any other proceeding); a client who has given consent to joint representation may revoke it at any time for any reason; and if the interests of any concurrent client diverges from another concurrent client later, or a concurrent client chooses for any reason to withdraw from the representation, the lawyer (and the lawyer's firm) will have to withdraw from representing all of the clients in the matter and other counsel will have to be obtained.<sup>10</sup>

Further, the lawyer must explain that the lawyer's duty to make reasonable efforts to expedite litigation<sup>11</sup> and to act with reasonable diligence in determining whether a conflict exists<sup>12</sup> requires the lawyer to bring the conflict

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<sup>9</sup> See notes 4, 5 and 6 *supra*.

<sup>10</sup> It may be possible to deal with this by a prospective waiver, but this requires yet more detailed consultation. See ABA Formal Ethics Op. 05-436 (2005) (stating that a lawyer may obtain advance waiver from client allowing lawyer to represent unidentified future clients with interests potentially adverse to existing client's interests; waiver more apt to be enforceable if client is "experienced user of legal services" or independently represented in connection with the waiver). The Committee takes no position on that issue in this Opinion.

<sup>11</sup> ARCP 3.2 provides: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

<sup>12</sup> ARCP 1.7(c) provides: "A lawyer shall act with reasonable diligence in determining whether a conflict of interest . . . exists."

to the court's attention at the earliest opportunity if the issue has not been raised by the court or opposing counsel. The lawyer must also explain that the court may not accept a waiver and may require separate counsel despite a defendant's wishes.<sup>13</sup>

Turning to the facts referred, in the first scenario - the car theft charges - the Committee concludes that a lawyer could not reasonably believe a concurrent conflict does not exist, nor could the lawyer reasonably conclude the conflict could be waived. The interests of each of the defendants are obviously potentially divergent. The clients have told the police that only one defendant drove the car. That is clearly inculpatory as to one defendant and exculpatory as to the other. If the new defense - permission of the owner, with both defendants having driven the car - falters, the lawyer's ability to shift defenses for the non-driver would be impaired by his duty of loyalty to the alleged driver. That alone should be enough to prevent the lawyer from any reasonable belief in the viability of a concurrent representation. The significant ways in which their interests diverge outweighs any advantage that could be achieved by concurrent representation.

The second scenario - the commercial fishers - supports an analysis similar to the first: that joint representation is prohibited because the differing roles and status of the defendants may well create a situation in which one defendant would seek to minimize that client's ability to control the actions of the vessel, or differing backgrounds could be used by one defendant to emphasize that client's lack of culpable knowledge.

However, it is conceivable that in a very narrow set of circumstances the advantages to each client may outweigh the disadvantages and the lawyer may be able to reasonably conclude both clients will receive competent and diligent representation. Important considerations could include, for instance, whether both clients wish to mount a common defense, whether the costs of separate representation would be beyond the means of one or both defendants (when court-appointed counsel is not an option), whether the best available defense to the charges is the same for both defendants and whether the relative culpability of the defendants is similar. In this situation, it may be possible for the lawyer to represent both individuals, but only with strict adherence to the informed consent provisions under ARPC 1.7(b).

When the lawyer has concluded that concurrent representation is possible, ARPC 1.7(b) requires the lawyer obtain the informed consent of each client, which requires the lawyer to analyze the available facts and explain

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<sup>13</sup> See *Wheat v United States*, 486 U.S. 153 (1988) (recognizing the ability of the trial court to refuse a waiver of separate counsel where there was a potential for a conflict); *Daniels v. State*, 17 P.3d 75 (Alaska App. 2001).

risks of concurrent representation and alternative arrangements each client could make for separate representation. In this case the issues that may require specific detailed explanation might include: 1) the defendants' charges could be amended to reflect disparate degrees of criminal activity; 2) one client may be offered a favorable plea agreement that may require testimony against the other; 3) as the facts are revealed in discovery, a defense strategy that favors one client (such as reliance on the Fifth Amendment right not to testify) may preclude a theory that is more favorable to the other (offering the client's testimony on one or more issues); 4) the defendants or their witnesses may testify unfavorably to each other; 5) counsel's arguments suggesting a minor role for one client may highlight a larger role for the other; 6) a legal argument for one client may be harmful to the other; 7) sentencing arguments may emphasize relative culpability to the detriment of one of the clients; 8) the possibility of delay may affect the clients differently; and 9) the lawyer's time expenditures for costs may not be equally allocated between the clients' particular issues, depending on the lawyer's judgment of the importance of the issues.

It should be noted that when a single lawyer (or a law firm) appears in a criminal case on behalf of two or more defendants, the court is obligated to make an independent inquiry to ensure both defendants are prepared to make knowing and intelligent waivers of their Sixth Amendment rights to competent (conflict-free) counsel. In *Moreau v. State*,<sup>14</sup> the Alaska Supreme Court adopted a procedure to ensure that criminal defendants are aware of the pitfalls of joint representation. In *Hutchings v. State*,<sup>15</sup> the Alaska Court of Appeals elaborated on the duties of the trial judge:

The [*Moreau*] court declared that trial judges should “address each defendant personally and forthrightly advise [them] of the potential dangers of [being represented] by counsel with a conflict of interest. [Defendants] must be at liberty to question the court as to the nature and consequences of [their choice of] representation.... [Generally], the court should seek to elicit a narrative response from each defendant that [they have] been advised of [their] right to effective representation, that [they] understand [ ] the details of [their] attorney's possible conflict of interest and the potential perils of such a conflict, that [they have] discussed the matter with [their] attorney or ... with outside counsel, and that [they] voluntarily waive[] [their right to separate counsel].”<sup>16</sup>

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<sup>14</sup> 588 P.2d 275, 284 (Alaska 1978).

<sup>15</sup> 53 P.3d 1132 (Alaska App. 2002).

<sup>16</sup> *Id.* at 1134-35 (quoting *Moreau*, 588 P.2d at 284 n.27). See also Rule 44(c), Federal Rules of Criminal Procedure:

In consulting with and advising clients on the issue of waiver, competent representation under ARPC 1.1<sup>17</sup> would include preparing both clients to respond to the court's inquiries regarding waiver of their Sixth Amendment rights to conflict-free counsel.

Approved by the Alaska Bar Association Ethics Committee on April 1, 2021.

Adopted by the Board of Governors on May 7, 2021.

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The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

<sup>17</sup> ARPC 1.1(a) provides: "(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."