Legal Ethics Issues in the Representation of Multiple Parties: Issues Affecting Plaintiffs’ Lawyers

by

Debra S. Katz
Katz, Marshall & Banks, LLP
Washington, D.C.
I. Introduction

This chapter surveys several hot topics in the intersection between employment law and the ethical requirements and obligations of attorneys in multiple representation contexts. We have reviewed a representative sampling of cases and professional responsibility opinions from various jurisdictions that reflect the spectrum of permissible and impermissible conduct. The ABA Model Rules of Professional Conduct (1983, as amended through 2002) have been used as the baseline, although a minority of jurisdictions, including New York, still use the older ABA Model Code of Professional Responsibility (1969), and California has its own combination of statutes and judicial rules governing attorney conduct. It must be emphasized that even if two jurisdictions have adopted the same version of a provision of the Model Rules (or the Model Code), the interpretation of that provision by the courts and committees on professional conduct may significantly differ between the two jurisdictions.

Useful links to bar associations, rules of conduct, ethics opinions and related resources, at the state level, include:

ABA Center for Professional Responsibility <http://www.abanet.org/cpr/>
Georgetown Law Library <http://www.ll.georgetown.edu/topics/legal_ethics.cfm>
Internet Legal Services <http://www.legalethics.com/>  
Legal Information Institute <http://www.law.cornell.edu/ethics/>

1 Debra S. Katz is a partner with Katz, Marshall & Banks, LLP, a plaintiffs’ employment and civil rights law firm based in Washington, D.C. The firm specializes in the representation of plaintiffs in employment law, civil rights and civil liberties matters, and whistleblower matters. Alan R. Kabat of the Bernabei Law Firm assisted with the research and earlier draft of these materials.

© Copyright 2006, Debra S. Katz, Katz, Marshall & Banks, LLP,
II. Representation of Multiple Plaintiffs

The ABA Model Rules, as for most other ethics standards, permit multiple representation of non-adverse clients, provided that there is suitable informed consent in advance. The ABA Model Rules further require that the lawyer reasonably believe that multiple representation will not adversely affect the lawyer’s ability to adequately represent each client. The issues that typically arise in multiple representation situations are: (1) the potential existence of conflicts in the joint representation, how to minimize them, and obtain informed consent; (2) the nature of informed consent needed; (3) issues arising from the joint settlement of plaintiffs’ claims; and (4) the attorney’s obligations if conflicts arise subsequent to obtaining informed consent to the multiple representation. The analogous ethical conflicts that may arise in employment discrimination class actions are not discussed here, but have been recently summarized by Mersol. See G.V. Mersol, “Ethical Issues in Class Action Employment Litigation,” 20 Labor Lawyer 55 (2004).

A. Conflict of Interest and Disqualification.

Rule 1.7 of the ABA Model Rules governs conflicts of interest. Rule 1.7 was completely rewritten in 2002, and currently provides that:

(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.

(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.
ABA Model Rule 1.7 (2002).²

Rule 1.7(a) governs cases in which the representation of one client is directly adverse to the representation of another and arises infrequently in the multiple representation of employment discrimination plaintiffs. Rule 1.7(b) encompasses the multiple representation context: situations in which a lawyer’s representation “may be materially limited by the lawyer’s responsibilities to another client, a former client to a third person, or by a personal interest of the lawyer.” In such situations a lawyer can only represent the client if the lawyer “reasonably believes” the representation will not be affected, the representation is not prohibited by law, there are no client conflicts, and each client gives informed consent in writing. Comment 8 to Rule 1.7 provides that the critical inquiry in determining whether multiple representation is appropriate is the likelihood that a conflict will arise.

A client may consent to joint representation notwithstanding a conflict, but the lawyer should not seek consent when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances. For example, a conflict may arise from a substantial discrepancy in the prospective clients’ testimony, incompatibility in their positions in relation to an opposing party, or the fact that there are substantially different outcomes for the claims or liabilities in question. See Rule 1.7 cmt. 23.

The Rhode Island Bar addressed the issue of representation of multiple plaintiffs in Opinion No. 93-15 (Mar. 31, 1993). This opinion is based upon a scenario in which an attorney represented two plaintiffs who were separately suing a single defendant. Both plaintiffs sustained injuries and or damages that potentially exceeded 50% of the defendant’s insurance policy limit. The concern was that if one case settled first, the second plaintiff’s right to a full

² Formerly, this Rule provided that:

(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 after consultation.

(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 after consultation. 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.
settlement might be prejudiced. The panel concluded that Rule 1.7 applied and mandated withdrawal from representing one client.

The New York State Bar Association Committee on Professional Ethics addressed a similar question in Opinion No. 639 (Dec. 7, 1992). At issue was whether a lawyer may represent two plaintiffs injured in the same fire in separate suits against a defendant, when there is likely to be insufficient assets available to satisfy fully all of the parties’ claims. Neither client caused or contributed to the fire or the other’s respective injuries. Although the inquiry concerned the attorney’s ethical obligations in accepting potentially adverse multiple representations under a rule patterned on the Model Code DR 5-105, the Code and Model Rules are substantially similar and the outcome would likely be similar under Rule 1.7.

New York’s DR 5-105(A) prohibits a lawyer from accepting a case which is likely to involve representation of “differing interests,” including conflicting, inconsistent, diverse and other interests that will adversely affect the judgment or loyalty of an attorney to a client. While this is accepted to include issues arising from the varying stages of litigation, it is broadly interpreted to also encompass inconsistent and other interests that will adversely affect the attorney-client relationship. DR 5-105© permits an attorney to represent both clients where the attorney can adequately represent both clients and after proper consent has been obtained from each client after full disclosure of the possible effect of such representation on the exercise of the lawyer’s independent professional judgment on behalf of each.3

The Committee concluded that the interests of the two clients would be inconsistent, and hence “differing interests” within the meaning of DR 5-105, if the available assets are likely to be insufficient to satisfy the judgments that realistically might be obtained by the clients in the aggregate. In reaching this result, the Committee relied on Alabama Opinion 82-591 (Mar. 17, 1982) (a lawyer may not represent all plaintiffs in an automobile accident case where the assets are not sufficient for the full satisfaction of all potential claims and a recovery by one claimant would reduce the assets available for the satisfaction of the other claims); Colorado Opinion 58 (Mar. 21, 1981) (lawyer may represent more than one client involved in the same water rights litigation, unless the claims or rights of one client could impair the rights or claims of another client); and Matter of Guardianship of Lauderdale, 15 Wash. App. 321, 549 P.2d 42 (1976) (regarding apportionment of a settlement of a wrongful death action, an attorney may not act as guardian ad litem for several minors whose interests are not substantially the same where he must recommend a larger settlement for one to the potential detriment of another).

3 See also New York Ethical Consideration EC 5-1, which provides that the professional judgment of a lawyer should be exercised solely for the benefit of the client, free of compromising influences and loyalties. The interests of other clients should not be permitted to dilute a lawyer’s loyalty to another client. EC 5-15 cautions that all doubts should be resolved against multiple representation of clients having potentially differing interests; further, that there are few situations in which the lawyer would be justified in representing in litigation multiple clients with potentially differing interests.
The New York Committee further concluded that once the attorney determined that insufficient assets likely would be available to pay aggregate judgments, the attorney must decline the representation or determine whether consent may be obtained. Multiple representation is proper under DR 5-105© only if it is obvious that the lawyer can adequately represent both clients and each consents after full disclosure. The Committee noted that the “obviousness” condition may be met if both claims can be pursued zealously by the same lawyer (and the respective interests are not divergent except as to the lack of sufficient assets for satisfaction), with the a priori agreement that the plaintiffs will divide the available assets in proportion to their respective judgments or in accordance with an agreement regarding the allocation of recoveries.

The District of Columbia Bar took a slightly different approach in Opinion No. 248 (June 21, 1994), which addressed the case of an attorney who wanted to represent plaintiffs who were unsuccessful candidates for the same position and both claimed that their non-selection was discriminatory. The attorney asserted that to establish liability he need only prove that each plaintiff was better qualified than the person selected.

The D.C. Ethics Committee noted that pursuant to D.C. Rule 1.7, a lawyer might be able to represent multiple clients in the liability phase of a case, but agree to represent only one of the clients in the damages phase. The Ethics Committee also noted that while bifurcated proceedings had been common in employment discrimination cases in the past, passage of the Civil Rights Act of 1991 permitting jury trials and compensatory damages (42 U.S.C. § 1981a), created the prospect that one side or the other may benefit from, and be entitled to insist upon, a unified trial of all issues, covering both liability and damages.

While the D.C. Ethics Committee was “not prepared to say that Rule 1.7 precludes such representation,” it did set forth various scenarios suggesting that such multiple representation situations are rife with problems. The Bar posited a situation where even if an agreement were reached that counsel would represent both plaintiffs with respect to proving liability only, relief issues could arise at any stage of the litigation in the context of settlement discussions. For example, the defendant employer might argue that since there was only one position that both plaintiffs claim they each should have received, only one of the plaintiffs could have been selected for the position. Thus, only one plaintiff would be entitled to reinstatement, backpay and damages. The Committee reasoned that a lawyer could not represent both plaintiffs under circumstances where it might be in the interest of each plaintiff to demonstrate that he or she, and not his or her co-plaintiff, was better qualified and should have been selected for the position. The lawyer would then be in a position of having to take “adverse positions” for the two clients in the same matter.

Comment 4 to D.C. Rule 1.7 states that an attorney may be able to represent clients when their interests are not adverse (i.e., in the liability phase), and then represent just one of them in the damages phase even if the other client, represented by separate counsel, might have an adverse position as to that phase of the case.
The D.C. Ethics Committee noted that as an alternative, the lawyer and clients could agree in advance to limit the objectives of the representation to establishing liability, as permitted by Rule 1.2(c). The Committee expressed doubts as to whether a client, if adequately informed about the possible constraints on a lawyer’s representation, would consent to such joint representation or would agree to limit the scope of the representation in such a way that a lawyer could reasonably conclude that he or she would be able to satisfy his or her duty of zealous representation. Despite all of these misgivings, the Committee declined to adopt a per se rule banning such joint representation. The Committee made clear, however, that a lawyer can proceed with such representation only if the lawyer concludes that zealous representation is possible and obtains fully informed consent.

Another problem can arise when a defendant files a counterclaim against one of the plaintiffs. In such situations, the plaintiffs generally can consent to continued representation. In Hamilton v. Merrill Lynch, 645 F. Supp. 60 (E.D. Mich. 1986), the defendants moved to disqualify an attorney representing multiple plaintiffs in a securities action. One of the defendants filed a counterclaim against one of the plaintiffs alleging that this plaintiff was the person responsible for all of the other plaintiffs’ losses. The defendants argued that this plaintiff’s interests were adverse to the interests of the other plaintiffs. The court held that the plaintiffs’ counsel could adequately represent the interests of the plaintiffs so long as they all agreed that it was the defendants who engaged in the fraud that caused their injuries. The court also noted that disqualification is not required when a defendant files a counterclaim stating that one plaintiff is solely responsible for the losses to the other plaintiffs, so long as all of the plaintiffs have consented to joint representation after full disclosure of the possible effects of multiple representation and after obtaining the advice of independent counsel. Id. at 61-62.

In Gustafson v. City of Seattle, 87 Wash. App. 298, 941 P.2d 701 (1997), the plaintiffs, a married couple, were involved in an automobile accident where the other driver counter-claimed that the husband was contributorily negligent. Citing Washington Rule 1.7(a), the court held that in such cases, an attorney must get the informed consent of each client prior to representing them jointly, unless it reasonably appears that the other party is solely liable. However, the court stressed that passengers and drivers have potentially conflicting interests whenever they are involved in a collision and that a claim against the driver is reasonably foreseeable. Therefore, consent from both the husband and wife after full disclosure of the material facts was required as it was reasonable to anticipate that a counterclaim would be filed charging the driver with contributory negligence. Gustafson, 941 P.2d at 704.

**B. Judging Informed Consent**

---

5 Rule 1.2(c) provides: “A lawyer may limit the objectives of the representation if the client consents after consultation.”
In order to satisfy the consent requirement in a case with potential conflicts of interest, lawyers should, at a minimum, explain to their clients: (1) the ways in which their interests could come into conflict; (2) the possible hampering of their respective claims if they were to agree not to take conflicting positions; (3) the possible increased cost and disruption if it were necessary for either or both clients to retain new counsel later, and (4) the implications concerning compensation if a contingent fee is contemplated. See, e.g., D.C. Bar Opinion No. 248, supra. Informed consent has been found where a client studied a consent form for 20 minutes prior to signing it and the consent form included an explanation of the potential conflicts and legal rights of the parties involved. See Zador Corp. v. Kwan, 31 Cal. App. 4th 1285, 1301, 37 Cal. Rptr. 2d 754 (1995). The court stressed that attorneys are not required to disclose every possible consequence of a conflict in order for consent to be valid so long as the clients understand the general issues involved with their joint representation. Id.

Attorneys must be very careful to inform all clients fully of the potential conflicts of interest as a court may disqualify counsel if the plaintiffs are not sufficiently aware of the potential problems with joint representation. In one case involving forty plaintiffs suing over the death of a relative, a magistrate judge found a conflict of interest between the heir and non-heir plaintiffs and ordered the plaintiff law firm to fully disclose possible future conflicts to all plaintiffs. See Figueroa-Olmo v. Westinghouse Elec. Corp., 616 F. Supp. 1445 (D.P.R. 1985). The law firm proceeded to obtain statements from the plaintiffs saying that the conflicts were explained to them and after "amply discussing the matter" consented to representation. Id. The generalized language, along with plaintiff counsel's refusal to acknowledge the severity of the potential conflict, prompted the district judge to reject the statements and order an individual questioning of each plaintiff before proceeding with the case. Id.

The District of Columbia Bar has endorsed the “joint statement of facts test” to evaluate whether consent is informed. This test, which consists of the following, provides considerable protection to the plaintiffs:

(1) The co-parties agree to a single comprehensive statement of facts describing the occurrence.
(2) The attorney reviews the statement of facts from the perspective of each of the parties and determines that it does not support a claim by one against another.
(3) The attorney determines that no additional facts are known by each party which might give rise to an independent basis of liability against the other or against themselves by the other.
(4) The attorney advises each party as to the possible theories of recovery which each may be foregoing through this joint representation based on the disclosed facts.
(5) Each party agrees to forego any claim or defense against the other based on the facts known by each at the time.
(6) Each party agrees that the attorney is free to disclose to the other party, at the attorney’s discretion, all facts obtained by the attorney.
(7) The attorney outlines potential pitfalls in multiple representation and advises each party of the opportunity to seek the opinion of independent counsel as to the advisability of the proposed multiple representation; and, each either consults separate counsel or advises that no separate consideration is desired.

(8) Each party acknowledges that the facts not mentioned now but later discovered may reveal differing interests, which, if they do not compromise these differences, may require the attorney to withdraw from the representation of both without injuring either.

(9) Each party agrees that the attorney may represent both in the litigation.


Note that some courts may order disqualification even when each party consents to the joint representation, despite the conflict. For example, in Caprioty v. Bell, Civ. A. No. 89-8609, 1991 WL 22134, 1991 U.S. Dist. LEXIS 1930 (E.D. Pa. Feb. 19, 1991), the court ordered disqualification of the plaintiffs’ attorney where one plaintiff was potentially liable to the other plaintiff under an indemnity agreement. The plaintiffs were, respectively, an administratrix of an estate and an insurance company from which the administratrix had obtained bonds. After the estate failed to pay taxes, the state named the administratrix personally liable for the debt. The insurance company, as guarantor for the administratrix, paid the full value of the bonds toward the back taxes. The two plaintiffs then joined together to sue the estate's attorney for malpractice related to his handling of the estate taxes. The court held that, even though the two plaintiffs were at that time united in interest, because the insurance company could potentially seek indemnity from the administratrix under their contract, there was an irreconcilable conflict of interest. The potential conflicts included the fact that the administratrix would have a greater interest in choosing a trial over settling so that, if the full value of the bonds were awarded to the insurance company at trial, the indemnification claim against her would be foreclosed. The court found that consent was not possible under these circumstances.

A similar conclusion was reached in D.C. Bar Opinion No. 131 (Nov. 15, 1983). The D.C. Ethics Committee concluded that a firm representing a plaintiff class in a discrimination action against a federal agency could not also represent an employee-grievant at that agency in an unrelated administrative action to remove certain performance evaluations in the employee’s file, including some prepared by a supervisor who was a class member in the other action. In determining that such representation constituted a non-waivable conflict, the Committee concluded that success in representing the employee would amount to a successful attack on the

See, e.g., Ruth v. Crane, 392 F. Supp. 724 (E.D. Pa. 1975), aff’d, 564 F.2d 90 (3rd Cir. 1977) (table) (lawyers should advise the client to obtain independent advice regarding consent to simultaneous representation).
supervisor/class member’s judgment, and that such a ruling could be used to deny the supervisor relief in the class action.

Courts will require some degree of probability of conflict to mandate disqualification. See, e.g., Shaffer v. Farm Fresh, Inc., 966 F.2d 142 (4th Cir. 1992), where the Fourth Circuit reversed the judgment of the district court disqualifying counsel for the employees. In this case, a law firm represented both employees of Farm Fresh as well as the Union that had been conducting an extensive organizing campaign to become the exclusive bargaining representative of Farm Fresh Employees. The law firm brought a class action law suit against Farm Fresh under FLSA on behalf of Farm Fresh employees. Farm Fresh sought to disqualify counsel on the ground that a potential conflict might develop (e.g., the Union might object to a quick, confidential settlement because it would not further its organizing objectives.)

The Fourth Circuit held that while Virginia’s Disciplinary Rule 5-105(B) prohibits multiple representation by an attorney if his or her independent judgment on behalf of a client is or is likely to be adversely affected by representation of another client, the argument in favor of disqualification was “too attenuated a basis upon which to disqualify counsel.”

1. Joint Representation: Confidentiality v. Duty to Keep Client Informed

In 2000, the D.C. Bar issued an opinion addressing the issue of “Joint Representation: Confidentiality of Information,” D.C. Bar Opinion 296 (Feb. 15, 2000). The D.C. Bar specified that when a lawyer undertakes representation of two clients in the same matter, the lawyer “should address in advance and, where possible, in writing, the impact of joint representation on the lawyer’s duty to maintain client confidences and to keep each client reasonably informed.” The lawyer should “obtain each client’s informed consent to the arrangement.”

a. The mere fact of joint representation, without more, “does not provide a basis for implied authorization to disclose one client’s confidences to another.” Id.

b. Where express consent to share client confidences has not been obtained and one client shares in confidence relevant information that the lawyer should report to the non-disclosing client, in order to keep that client reasonably informed, the lawyer should: “[s]eek consent of the disclosing client to share the information or ask that client to disclose the information directly to the other client.” Id.

c. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal. Id.

In a 2005 D.C. Bar Opinion “Joint Representation: Confidentiality of Information Revisited,” D.C. Bar Opinion 327 (March 2005), the D.C. Bar now concluded that where one client has given consent to the disclosure of confidential information by the lawyer to another client, “the lawyer must do so if the information is relevant or material to the lawyer’s representation of the other client.” The Bar reasoned that “[b]ecause the disclosing client
previously has waived confidentiality, there is nothing to weigh against either the nondisclosing client or the lawyer’s obligation to keep that client reasonably informed.”

2. Where Disclosed Confidence Involves Fraud or Criminal Activity.

In the D.C. Bar’s 2000 Opinion on “Joint Representation: Confidentiality of Information,” D.C. Bar Opinion 296 (Feb. 15, 2000), it made clear that where the disclosed confidence involves fraud or criminal activity that may detrimentally affect others involved in the representation in the future, the lawyer may retract or disaffirm documents that were premised on the fraud.

C. Ethical Issues Posed By Settlement With Multiple Plaintiffs

Settlement raises a number of difficult issues when representing multiple plaintiffs. Rule 1.8 (g) provides that: “A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.” See Rule 1.8. Under Model Rule 1.2(a), a lawyer must abide by a client’s decisions concerning the objectives of representation and whether to accept an offer of settlement.

Settlement issues can create a variety of conflicts between co-plaintiffs. It is frequently the case that a defendant will not wish to settle a case piecemeal, and will condition settlement on attainment of a global resolution between the parties. If some, but not all, of the co-plaintiffs wish to settle the matter, a conflict will develop between the co-plaintiffs. In employment discrimination cases, where emotions tend to run high, a plaintiff who sees her role as vindicating larger interests than her own may wish to take her case to trial to have a public airing of the issues. Her co-plaintiff(s) might not share this public interest goal, and may instead wish to settle the case.

Another common conflict occurs between plaintiffs when apportioning or distributing settlement monies. Although Rule 1.8 prohibits attorneys from making an aggregate settlement of the claims without consent of the clients, defense counsel often present settlement offers in that manner. While it is not considered unethical for a defendant to make such "blanket" settlement offers, the plaintiffs' attorney is potentially confronted with a conflict of interest. If the co-plaintiffs do not consent to the lawyer’s participation in aggregate settlement discussions, co-plaintiffs often find themselves bidding against one another to secure the largest share of the settlement monies that the defendant has offered or would be prepared to pay. Co-plaintiffs may also differ on the type of relief that they would be prepared to accept, creating yet other types of conflict. For example, a defendant might be willing to pay a large sum of money for the plaintiffs to forego reinstatement or the right to reapply for a position with the company. This

---

might be acceptable to one plaintiff who has secured alternate employment in the interim, but not
to his co-plaintiff who has been unemployed since his termination.

The Standing Committee on Professional and Judicial Ethics of the State Bar of Michigan
addressed the issue of acceptance of a court-ordered mediation award by some clients and its
rejection by others in Opinion No. RI-134 (May 28, 1992). A mediation determination of $7,500
was made, to be divided equally among three plaintiffs - $2,500 to each. Under court rules, the
mediation award was deemed rejected unless all the clients accepted it. Applying the Model
Rules, the Committee determined that an attorney must withdraw from the representation of all
clients unless they all consented to the attorney’s continued representation. The rejection of a
mediation award by one client is directly adverse to the interests of the other clients who wish to
accept the award, therefore triggering Michigan Rule 1.7(a). An attorney may not represent a
client where the representation of that client is directly adverse to another unless the attorney
reasonably believes the representation will not adversely affect the relationship with the other
client, and each client consents. Where two or more clients accept the terms of the mediation
award and one objects, Michigan Rule 1.7(b) applies, since this situation materially limits the
attorney’s responsibilities to the client who rejects the award.

The Committee, however, noted that if the mediation award is rejected, and the matter
goes to trial, the lawyer may continue to handle the joint representation because the conflict
arose with respect to decisions about settlement, and not because of any factual dispute, differing
legal argument or benefit or detriment to a client in pursuing the representation, as long as the
clients waive the conflict. The Committee also found that paying individual mediation fees in
order to receive separate mediation awards for each client would not relieve the conflict
question. The Committee reasoned that the conflict arose because the lawyer had undertaken
duties to each client that were in conflict if the clients made differing decisions regarding
acceptance of the award, not because the mediation award was presented in the aggregate.

Attorneys may wish to head-off potential conflicts by encouraging plaintiffs at the
commencement of the representation to agree to an approach for deciding whether to settle, and
how to divide settlement monies. For example, plaintiff’s counsel in Allegretti-Freeman v.
drew up an agreement which conditioned settlement of any individual plaintiff’s case, upon
majority approval by the other plaintiffs. Defendants sought the disqualification of the law firm,
arguing that this agreement violated public policy by placing an improper restriction on the
ability of any individual plaintiff to settle, and therefore created an impermissible conflict of
interest.

The court held that the agreement did not violate public policy. It reasoned, that where
several plaintiffs agree to pool their resources for litigation purposes, “we cannot say that it is
improper for them to require as part of that agreement that their cases be handled in a uniform
matter.” The court also rejected the defendants’ argument that multiple representation of the
parties posed an impermissible conflict of interest justifying the firm’s disqualification.
The court noted that “[i]n this case it is not difficult to envisage a scenario wherein [the attorney’s] loyalty to the multiple plaintiffs would become divided should certain plaintiffs desire to accept a settlement offer notwithstanding the majority’s lack of consent.” Id. at 861. The attorney could not represent the interests of the plaintiffs who decided to breach the agreement conditioning settlement on majority approval, and plaintiffs who decided not to accept the settlement. However, the court then stated that such a scenario had not arisen, and seemed unlikely to arise. Because of the hardship that disqualification would pose in the form of delay and increased costs, the court declined to disqualify the attorney, despite the fact that the situation might create the appearance of impropriety. The court further concluded that the interests of a client in retaining an attorney of his/her choice and preference should prevail against the general rule that the appearance of impropriety should be avoided.

Although plaintiffs may agree to impose additional settlement conditions on one another, as they did in Allegretti-Freeman, plaintiffs may not enter into an agreement that waives their rights under Rule 1.8. Specifically, plaintiffs may not contract around the requirement that all plaintiffs consent to an aggregate settlement. An arrangement that allowed a majority of plaintiffs to govern settlement decisions was found to violate basic ethical proscriptions and was not enforceable. See Hayes v. Eagle-Picher Ind., Inc, 513 F.2d 892 (10th Cir. 1975). After two out of the eighteen plaintiffs challenged the settlement accepted by the majority, the court found that the arrangement violates the “basic tenets of the attorney-client relationship in that it delegates to the attorney powers which allow him to act not only contrary to the wishes of his client, but to act in a manner disloyal to his client and his client's interests.” Id. at 894-95; see also M.A. Stratton, “Hit Hard, not Low,” Trial, Sept. 2003, at 60, 62-63.

D. **Withdrawal**

If all conflicts cannot be resolved, the lawyer cannot continue to represent all parties. Under Rule 1.16(a), the lawyer must withdraw from a representation if he or she determines that the representation will result in violation of the rules of professional conduct or other law. Whether or not the lawyer can continue to represent one former co-plaintiff after withdrawing from representing the other is governed by Rule 1.9, which deals with conflicts of interest between current and former clients. Rule 1.9 (1995 version) states that:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interest are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9© that is material to the matter; unless the former client consents after consultation.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation of the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

The 2002 version has some changes: <http://www.abanet.org/cpr/e2k-rule19.html>, primarily to add that the consent must be in writing.

A lawyer is not permitted to simply withdraw from representing one client while continuing to represent the other client. Consent of the former client must be obtained; otherwise, the attorney is required to withdraw from representing both clients. The rule is designed to preclude even the possibility that a client's confidences will be later used against him and it protects the client's rightful expectation of continued loyalty from the attorney. See In re Corn Deriv. Antitrust Litig., 748 F.2d 157, 162 (3d Cir. 1984).

It is possible, in certain circumstances, for an attorney to obtain a prospective waiver of future conflicts from the clients that he or she represents, thus allowing the attorney to continue with his or her representation of one co-plaintiff should he or she have to withdraw from the representation of one or more of the remaining co-plaintiffs. The waiver must meet all the requirements of contemporaneous conflicts of interest, and must be of sufficient clarity so that the client’s consent can be reasonably viewed as having been fully informed when given. See ABA Formal Ethics Op. 372 (1993). For example, the Los Angeles Bar Association held that an attorney may obtain a prospective waiver from an employee represented by the same counsel as the company which permits the attorney to withdraw from representing the employee and continue represent the employer. Ethics Opinion No. 471, L.A. County Bar Association (1993). See also Zador Corp. v. Kwan, 31 Cal. App. 4th 1285, 37 Cal. Rptr. 2d 754 (1995) (fully informed prospective waiver upheld when former client challenged its legitimacy after hiring new counsel).

1. **Advance Waiver Less Likely to Be Valid if Circumstances Considered by Client Are not Specific and/or if Client is Unsophisticated.**

   In D.C. Bar Opinion 309, on “Advance Waivers of Conflicts of Interest,” the Bar held:

   Advance waivers of conflicts of interest are not prohibited by the Rules of Professional Conduct. Such waivers, however, must comply with the overarching requirement of informed consent. This means that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid.

   But see In re: Congoleum Corp., 426 F.3d 675 (3d Cir. 2005). There the court invalidated prospective waivers, finding that ineffective waivers from the claimants it
represented in a complex bankruptcy proceeding violated the Rules of Professional Conduct. The court stated:
“[a]lthough concurrent conflicts may be waived by clients under the New Jersey and ABA Rules of Professional Conduct, the effect of a waiver, particularly a prospective waiver, depends upon whether the clients have given truly informed consent. Given the complexities of the bankruptcy proceeding and the ‘many hats’ worn by Gilbert throughout the pre- and post-petition process, we cannot conclude that the purported waivers Gilbert received from Weitz ‘on behalf of’ the individual clients constituted informed, prospective consent. . . .”

“We conclude that Gilbert did not receive effective waivers from the claimants it represented and, therefore, acted in violation of the Rules of Professional Conduct.”

2. Advance Waiver Given by Client Having Independent Counsel is Presumptively Valid.

An advance waiver given by a client having independent counsel (in-house or outside) who is available to review such a provision is presumptively valid, however, even if general in character. D.C. Bar Opinion 309 (Sept. 20, 2001). However, where the two matters are “substantially related to one another,” an advance waiver of conflicts will not be valid “[r]egardless of whether reviewed by independent counsel.”

E. SUCCESSIVE REPRESENTATION

The problem implicated by successive representation is the potential for the use of confidences gained from a former client to the detriment of that client. A related problem is the failure to use information favorable to the present client in order to protect the confidentiality of the former client.

Disciplinary Rule 5-105(D) of the Virginia Code of Responsibility states that a “lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of the person is adverse in any material respect to the interest of the former client...” This test was articulated in the seminal case T.C. Theatre Corp. V. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953), and has been adopted by most of the Circuit Courts of Appeal which have addressed the question of attorney disqualification in the successive representation context. See Tessier v. Plastic Surgery Specialists, Inc., 731 F. Supp. 724 (E.D. Va. 1990); Rogers v. Pittston, 800 F. Supp. 350 (W.D. Va. 1992) (“It is well settled that once an attorney-client relationship has been established, an irrebuttable presumption arises that confidential information was conveyed to the attorney in the prior matter.”)
III. Dual Representation of Corporate and Individual Defendants

The issue of whether in-house or outside counsel can represent both a defendant employer and its managerial or supervisory employees who are also individual defendants, which frequently occurs in other legal contexts (e.g., white collar defense and securities derivatives litigation), has become increasingly important in employment discrimination litigation.

The problem is that the defendant employer and the alleged harassers or discriminators may not share common legal interests: each may attempt to shift the blame to the other. The Supreme Court’s Ellerth and Faragher decisions held that the employer could be vicariously liable when its managers or supervisors caused the hostile work environment. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (“An employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee.”); accord Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (quoting Ellerth).

Under Ellerth and Faragher, there is an affirmative defense to vicarious liability in the absence of a tangible employment action, where the employer proves “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Id. The first element of the affirmative defense, which looks to the steps that the employer took “to prevent and correct promptly” the supervisor’s conduct, itself may create a conflict of interests between the employer and the supervisor regarding these preventative and corrective steps. The affirmative defense to liability is not available “when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 808 (quoting Ellerth).

The Supreme Court’s Kolstad decision established a defense for the employer to liability for punitive damages under Title VII. Kolstad v. American Dental Ass’n, 527 U.S. 526, 545 (1999) (“we agree that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer’s good-faith efforts to comply with Title VII”) (internal quotation marks omitted). Thus, this defense can create an incentive for both employer and the individual defendants to shift the blame to each other: (1) the employer will argue that it had implemented adequate programs or policies to prevent discrimination and harassment in the workplace, and that it was the individual defendant who was acting “contrary” to its good-faith efforts; (2) while the individual defendant will argue either that he never received any such training, or that his actions were in fact in compliance with corporate policies, orders, or custom.
Since Section 1981 (42 U.S.C. § 1981) and Section 1983 (42 U.S.C. § 1983) claims, along with those under some state and local anti-discrimination statutes, allow for individual liability, these two defenses can create an incentive for individual defendants to shift the blame and resulting liability for damages to their employer, and vice versa. In these circumstances, the employer and its managers or supervisors may well have adverse legal interests which could preclude joint or dual representation.

ABA Model Rule 1.13, “Organization as Client,” applies to joint or dual representation. Rule 1.13, in relevant part, states that:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

“Constituents” of an organization are its “officers, directors, employees and shareholders.” See Comment 1 to Rule 1.13. Comment 7 to Rule 1.13, “Clarifying the Lawyer’s Role,” states that:

There are times when the organization’s interest may be or become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent, whose interest he finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.8

Large employers typically have insurance policies (e.g., Officers and Directors policies), which may fully indemnify its managers and supervisors for their liability in employment discrimination cases. In such circumstances, counsel may argue that there will be no conflict of interest between the employer and the individual defendants, since any damages will come out of a single pot, the insurance policy.

8 The 2002 revisions to Model Rule 1.13 are minor and do not affect the excerpts quoted herein. See Model Rule 1.13 (2002), http://www.abanet.org/cpr/e2k-rule113.html>.
However, if the employer’s internal investigation or the discovery process should reveal that the individual defendants were engaged in other illegal conduct, there may be a conflict in that the individual defendant may have had confidential communications with the in-house or outside counsel, which could create a conflict when the company desires to use that information to bring a claim against the individual defendant, whether through a cross-claim or a separate action. In such circumstances, the “joint defense privilege,” whereby the employer and its supervisor(s) agreed to share legal resources in defending the initial action, may cause a conflict of interest when the defendants later part ways and sue each other, since the attorneys for the employer will have received confidential information from the supervisor, which it could then use to the supervisor’s detriment in the subsequent actions. See, e.g., Felix v. Balkin, 49 F. Supp. 2d 260, 267-72 (S.D.N.Y. 1999) (disqualifying employer’s counsel from continued representation of employer when a supervisor, named as a respondent in an employee’s sexual harassment charge, subsequently brought her own harassment charge against the employer); see generally Ageloff v. Noranda, Inc., 936 F. Supp. 72, 76-77 (D.R.I. 1996) (defining scope of joint defense privilege). 9

In Dunton, a Section 1983 action brought by a police officer who alleged that two other officers (the Pfeiffers) had assaulted him after a party, and caused him to be arrested for sexual assault, the issue was whether the county’s attorney could represent both the police department and the two individual defendants. Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984) (“Dunton I”), modified 748 F.2d 69 (2d Cir. 1984) (“Dunton II”). The individual defendants were sued in their personal capacity for punitive damages; therefore, the County advised the Pfeiffers to obtain their own private counsel. Dunton I, 729 F.2d at 906. Although the County, in its initial Answer “included an affirmative defense that Robert Pfeiffer was acting in good faith pursuant to his official duties and responsibilities,” the County then took a different tack at trial, when its attorney, during both opening and closing remarks to the jury, argued that Mr. Pfeiffer was acting as a husband, and not as a police officer. Id. The claims against the County were all dismissed, leaving only the Section 1983 claim and the state law battery claim against Mr. Pfeiffer and the state law malicious prosecution claim against Ms. Pfeiffer, and the jury found for plaintiff on both state law claims, awarding compensatory and punitive damages. Id.

Mr. Pfeiffer argued that there was a conflict of interest in the dual representation by the county attorney, since the attorney should have argued to the jury that he [Pfeiffer] was acting in good faith within the scope of his employment; his failure to so argue thus “undermined the good faith immunity defense.” Id. at 907. The Second Circuit recognized that the county attorney’s

9 The New York State Bar Association Committee on Professional Ethics discussed the situation arising from the representation of multiple defendants, where the defendants may have “differing interests,” particularly relating to potential indemnification claims. See N.Y. Ethics Op. 778 (Aug. 30, 2004), online at: <http://www.nysba.org>. The Committee held that joint representation could only occur “if the lawyer determines a disinterested lawyer would believe the lawyer can competently represent the interests of each defendant, the defendant with the indemnification claim waives the right to assert it as a cross-claim, and both defendants otherwise consent after full disclosure.” 9
argument to the jury “was a good defense for the county . . . . However, it was not in the best interest of Pfeiffer, who was ultimately found liable in his individual capacity.” Id. The Second Circuit held that this was prejudicial error, since “[if] Pfeiffer’s first trial had been fair, he might have escaped liability altogether. The county had agreed to indemnify Pfeiffer for compensatory damages. If the jury found that Pfeiffer was acting in good faith as a police officer, it might not have awarded punitive damages.” Id. at 909. Thus, the Second Circuit vacated the judgment against Mr. Pfeiffer and remanded the state law claims. Dunton II, 748 F.2d at 71.

IV. Settlement Issues: Restriction on Attorneys’ Ability to Practice Law

An important ethical issue that can arise during settlement negotiations occurs when a settlement agreement precludes an attorney from using information acquired in one case in future litigation involving other clients or otherwise restricts an attorney’s ability to practice law. Given that cases are more likely to be settled than go to trial, it is imperative that employment litigators be aware of these and other pitfalls that may occur in settlement. See generally American Bar Ass’n, Section of Litigation, Ethical Guidelines for Settlement Negotiations (2002).

For example, a plaintiff’s counsel may have several pending or prospective cases against the same employer. The plaintiff’s counsel may want to use information learned or obtained during discovery in the first case to help litigate other cases. Even if the plaintiff’s counsel is willing to keep such information confidential, i.e., by not releasing it to the public and by filing court documents containing that information under seal, defendant’s counsel may object to any future use of that information by the plaintiff’s counsel.

In 2000, the ABA issued a formal ethical opinion, holding that while a settlement agreement could restrict an attorney from releasing information, a settlement agreement could not prohibit an attorney from making any use of that information, as that would be an improper restraint on an attorney’s right to practice. See ABA Formal Opinion 00-417, “Settlement Terms Limiting a Lawyer’s Use of Information” (April 7, 2000). The ABA concluded that:

Although a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except in limited circumstances. An agreement not to use information learned during the representation effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b).

Id.; see also “ABA Opinion Says Lawyers May Restrict Release, But Not Use, of Secret Information,” 68 U.S.L.W. 2757 (June 20, 2000).
The New York State Bar Association similarly held that, under Disciplinary Rule 2-108(B), a New York attorney could not be prohibited, through a settlement agreement, from representing other clients in future cases against that client’s employer. See N.Y. State Bar Ass’n, Committee on Professional Ethics, Opinion 730, “Settlement Agreements; Restrictive Covenants” (July 27, 2000), available online at: <http://www.nysba.org/>; see also “Lawyers May Not Promise in Settlement to Keep Mum About Facts that Aren’t Secret,” 69 U.S.L.W. 2102 (Aug. 22, 2002). This opinion noted that although such agreements may be enforceable, see Feldman v. Minars, 230 A.D. 356, 658 N.Y.S.2d 614 (1997), they were prohibited under Rule 2-108(B).


The D.C. Court of Appeals upheld the one-year suspension of an attorney who entered into a secret settlement agreement with the defendant in a products liability class action. In re Hager, 812 A.2d 904 (D.C. 2002). Here, the settlement agreement would, inter alia, prohibit the attorney representing current or future clients with claims against the defendant, and preclude the current clients from obtaining the attorney’s work product or the names of potential class members, which effectively foreclosed the clients from continuing with their claims. Id. at 917-18. The court found that the attorney’s conduct violated D.C. Rules 1.2(a) (a lawyer must abide by the client’s decision whether to accept a settlement offer) and 5.6(b) (prohibiting a lawyer from entering into a settlement agreement that restricted the lawyer’s right to practice).

The Virginia Bar, in 2004, discussed the circumstances in which a settlement agreement’s restriction on a plaintiff’s lawyer’s ability to file future lawsuits against the employer was an impermissible restriction on the attorney’s ability to practice law. There, the settlement agreement provisions were so broad that even departing attorneys could not sue the employer in their new law firm. See Va. Bar. Legal Ethics Op. 1788 (Feb. 17, 2004). See http://www.vacle.org/opinions/1788.htm).

The Committee concluded as follows:

“Whether an agreement between an attorney and a settling defendant broadly restricts the right to practice law in violation of DR 2-106(B), is a “fact-intensive question and cannot be answered in an all-encompassing fashion.” Va. Legal Ethics Op. 1715 (1986). Factors to be considered include the nature, scope and geographical location of the attorneys’ practice, the composition of the surrounding legal community and the significance of the defendants’ role in the community. Id. Also of importance is whether the attorney has represented similarly situated plaintiffs against the defendant in the past and whether the attorney has an expectancy of representing plaintiffs against the defendant in the future. Id. In addition, whether the restriction is “broad” is to be analyzed in terms of its impact on the practice of each individual attorney and not the law firm as a whole.
In 1985, this Committee held that a settlement agreement which contained a provision preventing a plaintiff’s attorney from thereafter accepting cases or prosecuting similar claims against the same defendant was improper under DR 2-106(B), the predecessor to Rule 5.6(b). Va. Legal Ethics Op. 649 (1985). In contrast, LEO 1715, supra, the Committee found that the proposed agreement in that case did not violate DR 2-106(B). However, the facts in that opinion are dissimilar to those in the hypothetical now being presented to the Committee. In LEO 1715, plaintiffs’ attorney settled an employment discrimination suit on behalf of a former employee against the former employer. Plaintiffs’ attorneys, because of their intensive discovery of defendant’s employment records, were in a unique position to provide valuable advice to the employer regarding its employment practices. As part of the settlement agreement the plaintiffs’ lawyers were hired for a fee by the defendant employer to provide advice regarding its employment practices. As a result the plaintiffs’ lawyers were conflicted out of future cases against the defendant employer.

In upholding the agreement, the Committee in LEO 1715 remarked that it promoted the public good by assisting the defendant employer in its effort to bring its employment practices in compliance with the spirit of employment-related laws and by helping to promote good employment practices. In addition, the plaintiff’s lawyers in that hypothetical did not represent any other client adverse to the employer and had no expectation of such representation in the future. More importantly, unlike the settlement agreement in LEO 649 and the Agreement now before this Committee, the agreement in LEO 1715 did not include a provision that the plaintiffs’ lawyers would be prevented from prosecuting similar claims against the defendant employer in the future. Thus, the Committee believed that the agreement under consideration in that opinion did not violate the important public policy favoring clients’ unrestricted choice of legal representation. See Committee Commentary to Virginia Rule 5.6.

The Committee observed that “[t]he common thread in the settlement agreements uniformly disapproved by other ethics panels was an explicit provision that prohibited representation of future clients against the same defendant.” ABA/BNA Lawyers’ Manual on Professional Conduct 51:1209-51:1212 (1995). It opined that, because the settlement agreement did not directly restrict plaintiff’s attorneys from subsequent representation adverse to the defendant employer and because the employers’ employment of plaintiffs’ attorneys was not a ruse to circumvent DR 2-106(B), the Disciplinary Rule was not implicated.

In the hypothetical presented, the Agreement with X Corporation specifically prohibits the individually signing attorneys from filing or causing to be filed any action on behalf of any plaintiff at any future time for any asbestos-related cause of action on any theory other than workers’ compensation. The Committee acknowledges other bar opinions holding that agreements similar in nature to the Agreement in the hypothetical have been deemed improper restrictions on the lawyers’ right to practice law. However, most of those opinions applied rules which on their face appear to prohibit any restriction on a
lawyer’s right to practice law. Virginia’s rule is unique and requires that the settlement agreement “broadly restrict a lawyer’s right to practice law.”

The Committee declined to reach a conclusion about whether the Agreement imposed a broad restriction on the right to practice law, noting that the facts in the hypothetical are complex and would require the Committee to make actual findings to determine whether the Agreement at issue creates a broad restriction of the plaintiffs’ lawyers’ right to practice law. “Some of the factual matters include, for example: the length of time the parties have operated under the agreement; the numbers of cases settled or resolved in the past; the number of cases likely to develop in the future where clients would have a direct action against Corporation X; the ability of clients to find other lawyers of equivalent expertise and experience in handling these cases; the nature and scope of the practices of the lawyers who are parties to the Agreement; the geographical location of those lawyers and the significance of the defendant Corporation X in the local community.”

The Committee did find, however, that the provision requiring every future associate or partner to execute a copy of the agreement to be a violation of DR 2-106(A), as well as Va. Rule 5.6(a), which prohibits a lawyer from entering into a partnership or employment agreement restricting his right to practice law after termination of the relationship, except as a condition of retirement benefits, because those future associates and partners would be found by the Agreement even after they terminated their relationship with the firms in question.

Some employers have tried to circumvent these ethical proscriptions by including a settlement provision retaining the plaintiff’s counsel to provide legal services for the employer, such as in a monitoring or consulting role with respect to the implementation of the settlement, or providing harassment training.

A recent race discrimination case filed against BellSouth illustrates the serious consequences of such agreements by plaintiffs’ counsel to provide “consulting” services to the employer, where those “consulting” fees have the effect of reducing the plaintiffs’ settlements. See Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1255-60 (11th Cir. 2004); Adams v. BellSouth Telecomm., No. 96-2473, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001); Adams v. BellSouth Telecomm., No. 96-2473, 2000 WL 33941852 (S.D. Fla. Nov. 20, 2000). In the BellSouth litigation, several attorneys, led by Norman Ganz, filed a race discrimination case on behalf of 56 plaintiffs, and threatened to file another lawsuit against BellSouth on behalf of 22 additional plaintiffs. Before the litigation progressed very far, the attorneys reached a global settlement with a total value of $1.6 million for all 72 plaintiffs. However, of that amount, the plaintiffs received only about $300,000, with their counsel receiving the remainder, including $120,000 in a four-year consulting fee, $230,000 in an “engagement” fee, and $51,500 in other expenses. After one plaintiff complained to the court that she was forced to sign a settlement agreement that prohibited her from finding out the total value of the settlement or the amounts that the attorneys would receive, the district court appointed a magistrate judge to conduct an investigation. The court adopted most of the magistrate’s recommendations, including sanctioning Mr. Ganz by requiring him to disgorge $300,000 to the plaintiffs and suspending him
from practicing before the federal court for three years. However, the court declined to impose monetary sanctions on BellSouth’s counsel, even though they had suggested the “consulting fees,” and only imposed a requirement that the defense counsel complete ethics training. Adams, 2001 WL 33941852, at *2-*10. Subsequently, Ganz was disbarred by the Florida Supreme Court, for this and related misconduct, and his co-counsel agreed to disgorge $250,000 to the plaintiffs. Jackson, 372 F.3d at 1258 n.9.

Practitioners who are asked to consider the provision of training to the employer/defendant as part of settlement should carefully review Virginia Legal Ethics Opinion 1715, “Settlement Agreement: Future Conflicts; Restriction of Lawyer’s Practice,” (Feb. 24, 1998). The Opinion considered a hypothetical settlement agreement between an employee and an employer in which, as part of the settlement, the employee’s attorneys agreed to provide a specified number of hours of training about employment law to the employer in exchange for a specified sum of money. The agreement specifically stated that the plaintiff-employee’s interest in the case is not monetary but rather the improvement of employment practices by the employer. It further stated that the employee releases all claims against the employer and will not seek employment with the employer again.

In response to an inquiry into whether the agreement constituted a violation of DR 2-106(B), which prohibits a lawyer from entering into a settlement agreement that “broadly restricts” the lawyer’s right to practice law, the Ethics Committee noted that the agreement contained no express prohibition on the lawyers’ right to practice law and therefore refused to speculate about the employer’s possible attempts to “buy off” the attorneys by conflicting them out of future lawsuits against the employer, particularly in light of the plaintiff’s stated interest in improving the employer’s employment practices. However, because the employer proposed making a payment to the employee’s attorneys for training services, the Committee noted that a full disclosure of the attorney’s financial interest in the settlement and informed consent from the employee would be required to render the agreement ethical as written.

It remains to be seen whether or not these types of arrangements will be recognized as ethical, even if the courts can enforce those provisions. See also G.V. Mersol, “Ethical Issues in Class Action Employment Litigation,” 20 Labor Lawyer 55, 75-76 (2004).

V. CONCLUSION

The foregoing discussion makes clear that, before undertaking multiple representation of clients in employment discrimination suits, it is prudent to memorialize an understanding between the clients about all matters that might cause subsequent conflict. Attorneys must fully disclose the existence of potential conflicts and advise clients of their legal rights, including the right to obtain the advice of outside counsel.
If the clients are adequately informed of the potential conflicts and then consent to joint representation, it is possible for attorneys to preclude future controversy between the plaintiffs. For example, the clients should reach an agreement about division of the available assets in proportion to their respective judgments or in accordance with another appropriate mechanism for the allocation of recoveries. Additionally, the attorney may be able to obtain a prospective waiver of future conflicts that would allow the attorney to continue to represent one party. Such waiver, however, must be given with full written consent after the client has been fully informed of the consequences.

The consolidation of cases, when appropriate, can be advantageous for clients as well as their attorneys, taking into consideration the economies of scale arising from consolidating discovery and trial. Multiple representation can be beneficial for all parties involved, provided that attorneys understand the applicable rules and take the necessary time to consider, address and resolve potential conflicts.

10 For example, the following provision can be included in each of the multiple clients’ retainer agreements:

I agree that if a lump sum settlement is offered to me and my co-plaintiffs that is acceptable to each of us, the lump sum will be apportioned according to the same percentage that our individual economic losses constitutes of the total economic loss we have collectively suffered. I agree to use and abide by the percentages of these losses as calculated by our economic damages expert.