



# “JUST SAY NO”

Conflicts of interest in representing clients: current, past and prospective

BY MICHAEL F. YOSHIBA, ESQ.

When I moved from a Deputy State attorney to a private practice firm, I didn't then appreciate the challenges that lay ahead in representing existing, past and prospective clients. A colleague gave me some truly sage advice when evaluating whether to represent new clients in the face of actual and prospective conflicts of interest, sometimes the best action is to “Just Say No.” One important caveat — this article is only meant to highlight some of the most common considerations when evaluating past, existing and new attorney-client relationships and is not a substitute for a full evaluation of each attorney-client relationship.

## New Clients

It is inevitable that an attorney and firm representing a variety of clients over time will raise the question of whether a conflict of interest exists between clients. The categories of clients can be separated into three baskets: existing, past and prospective clients.

Existing clients are those where an attorney is actively representing a person or entity. Communications between the attorney and client are strictly confidential, with few exceptions. It is of utmost importance in the legal system that a client be able to know that all statements, strategy and thoughts, both positive and negative, will not be shared and used to negatively impact their case or legal matter. Conversations and writings between attorney and client are protected so that the attorney can zealously advocate for the client.



### Joint Representation — Multiple Parties in the Same Lawsuit

Based upon an initial investigation, attorneys can determine that we do not believe there are any conflicts of interest which would preclude us from undertaking joint representation of co-defendants. When one law firm represents co-defendants in a legal matter, a possibility always exists that the interest of the co-defendants, although unified in the beginning, can later conflict. If we become aware of any facts in the future which suggest there is a possible conflict, we must immediately advise these clients of these new circumstances so they can determine if joint representation is still in their best interest. Likewise, if we become aware of any facts or circumstances which are an actual conflict between the co-defendants, we must notify them all, apprise them of the situational change and withdraw from representation, if necessary.

For example, we could discover facts during the course of litigation and decide to assert that some or all of the co-defendants were not acting in the harmony or engaged in the alleged misconduct or wrongdoing. One co-defendant may then take the position that it cannot be jointly represented by the same legal counsel. A conflict also could arise in the event one client asserts claims against another client whom we jointly represent. In such circumstances, the interests of the co-defendants would actually conflict and they could no longer be simultaneously represented by the same legal counsel.

An important aspect of joint representation is the attorney-client privilege. Communications between an attorney and client are confidential and not subject to disclosure to third parties. When an attorney represents multiple clients in the same matter, there is no privilege of confidentiality between the clients. Thus, any information received from each party concerning the legal matter cannot be treated as confidential and privileged from disclosure to the individual co-defendants, although it will be protected from disclosure to any third party.

Depending on the circumstances, a conflict which arises in the future may require the attorneys to cease representation of all the parties in conflict, or we may withdraw from representing only one such party and continue representing others. In the event of a future conflict between co-defendants where we seek to represent one party only, we would request the consent of all affected clients before moving forward.

### Prospective New Client — Adverse to Past or Existing clients?

There is another common situation that arises where an attorney recognizes a preexisting conflict involving current or past clients in separate matters. Attorneys can determine that an existing or potential conflict would not affect their ability to represent both clients. The potential conflict may concern litigation strategies or legal arguments concerning interpretation of law. In this case, written disclosure and sometimes consent and waivers from the parties with potential adverse interests are required. A written conflict waiver and disclosure details the reasons the attorney believes that concurrent representations won't pose a risk of inconsistent or harmful advice to the parties.

As attorneys, we are governed by specific rules relating to our representation of clients when present or potential conflicts of interest exist. Rules 3-310 (B), (C) and (E) of the Rules of Professional Conduct of the State Bar of California. The State Bar notes that Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Finally, although the State Bar does not discourage attorneys from representing clients in these complex situations, as my wise colleague once told me, when in doubt concerning conflicts of interest situations sometimes the best answer to a request for representation is to "Just Say No." 🙅

*Post script: the phrase "Just Say No" will be familiar to some old enough to remember. Its origins can be traced back to a national movement started by the U.S. government in an effort to combat an epidemic rise in illicit drug use during the late 1970s through the 1980s. An anti-drug initiative described as a "War on Drugs." When President Ronald Reagan took office in 1981, he pledged a crackdown on substance abuse and began what he described as the War on Drugs. President Reagan's wife, First Lady Nancy Reagan, sought to encourage children to reject experimenting with or using drugs by simply saying the word "no," and coined a public service messaging campaign dubbed "Just Say No."*



Michael Yoshiba is a shareholder in the Eminent Domain and Litigation Departments of the Los Angeles law firm, Richards, Watson & Gershon.