

HCAPS – THE DEFENSE OF EMPLOYED PHYSICIANS

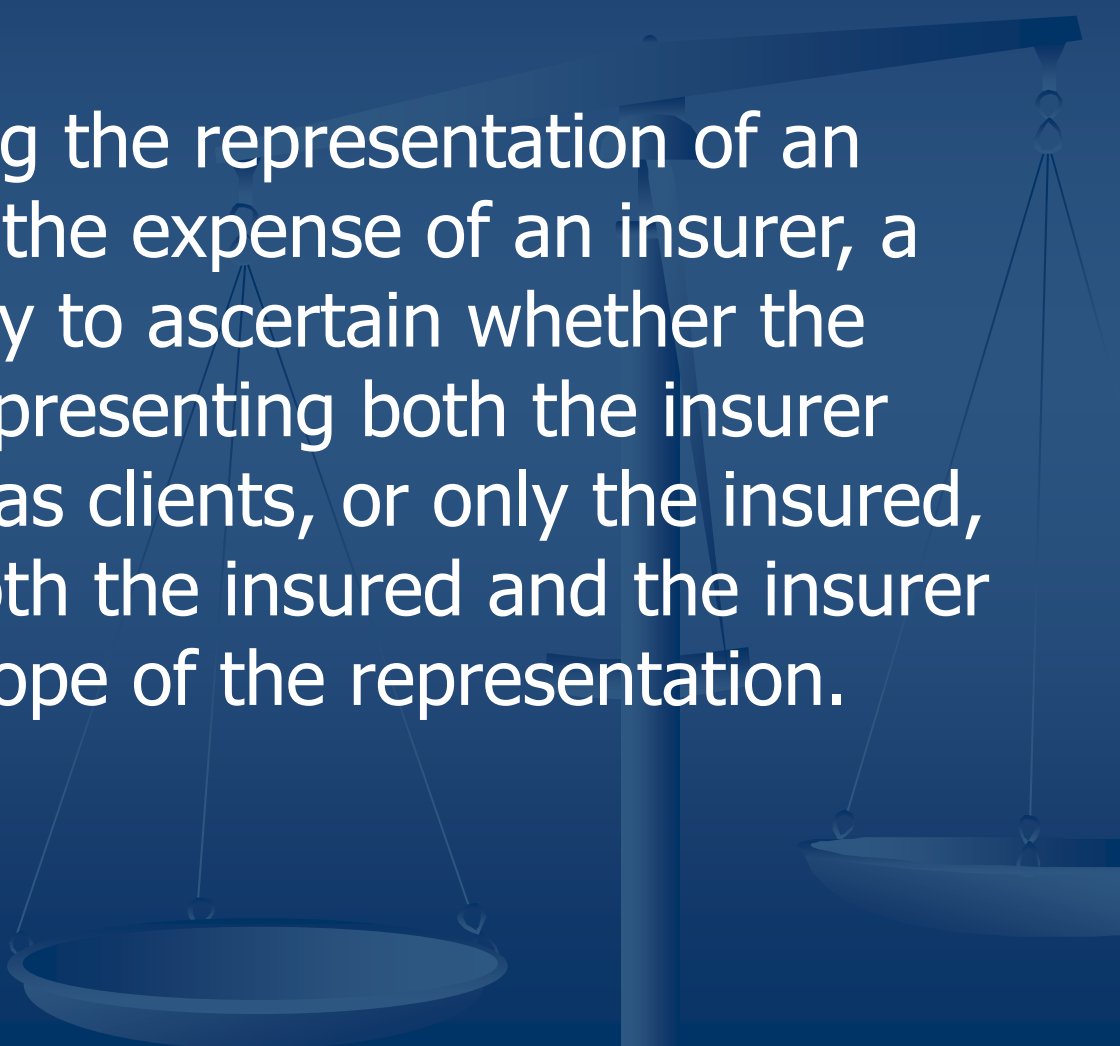
Presented by:

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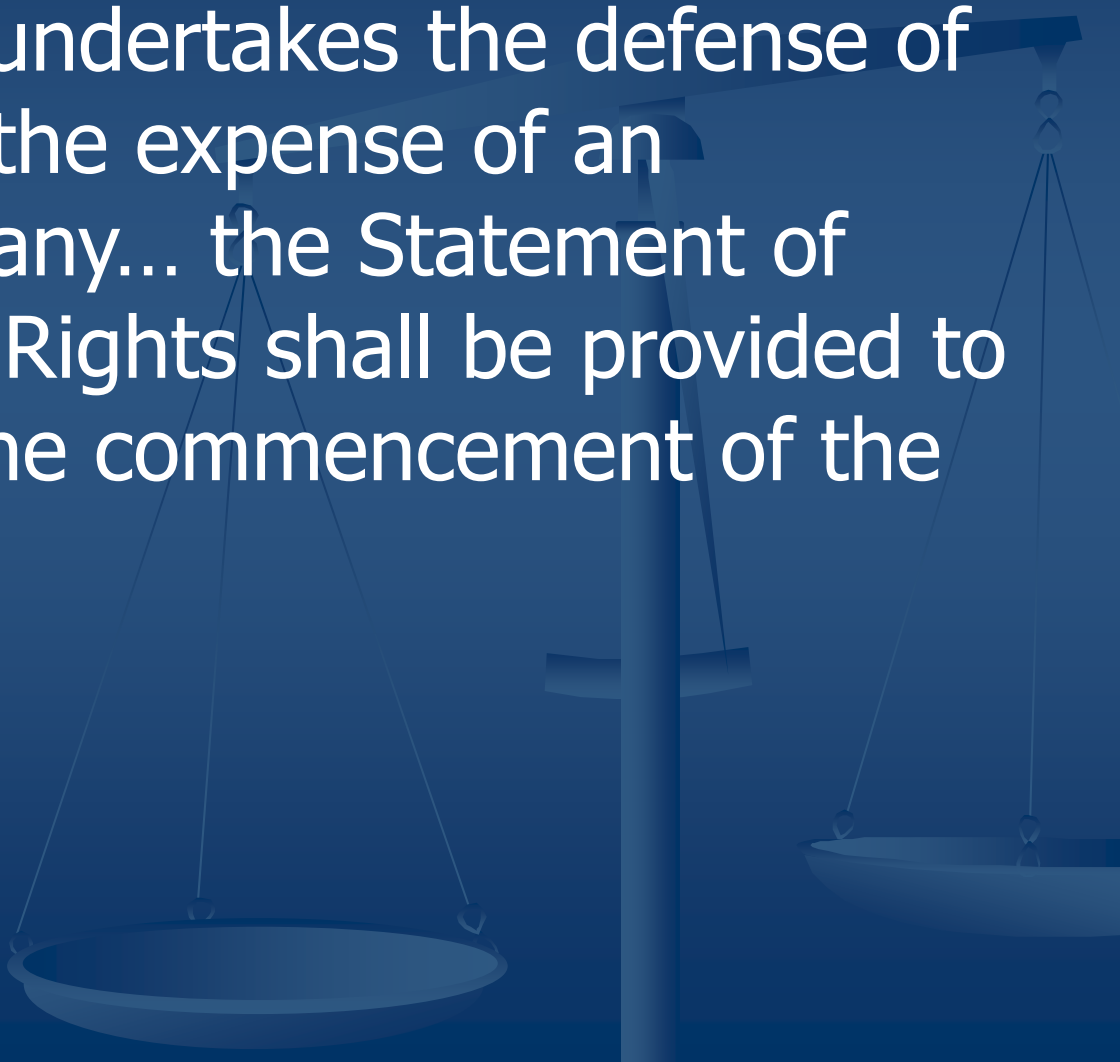
Representation of Insureds

Upon undertaking the representation of an insured client at the expense of an insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation.



Statement of Insured Client's Rights

When a lawyer undertakes the defense of an insured... at the expense of an insurance company... the Statement of Insured Client's Rights shall be provided to the insured at the commencement of the representation.



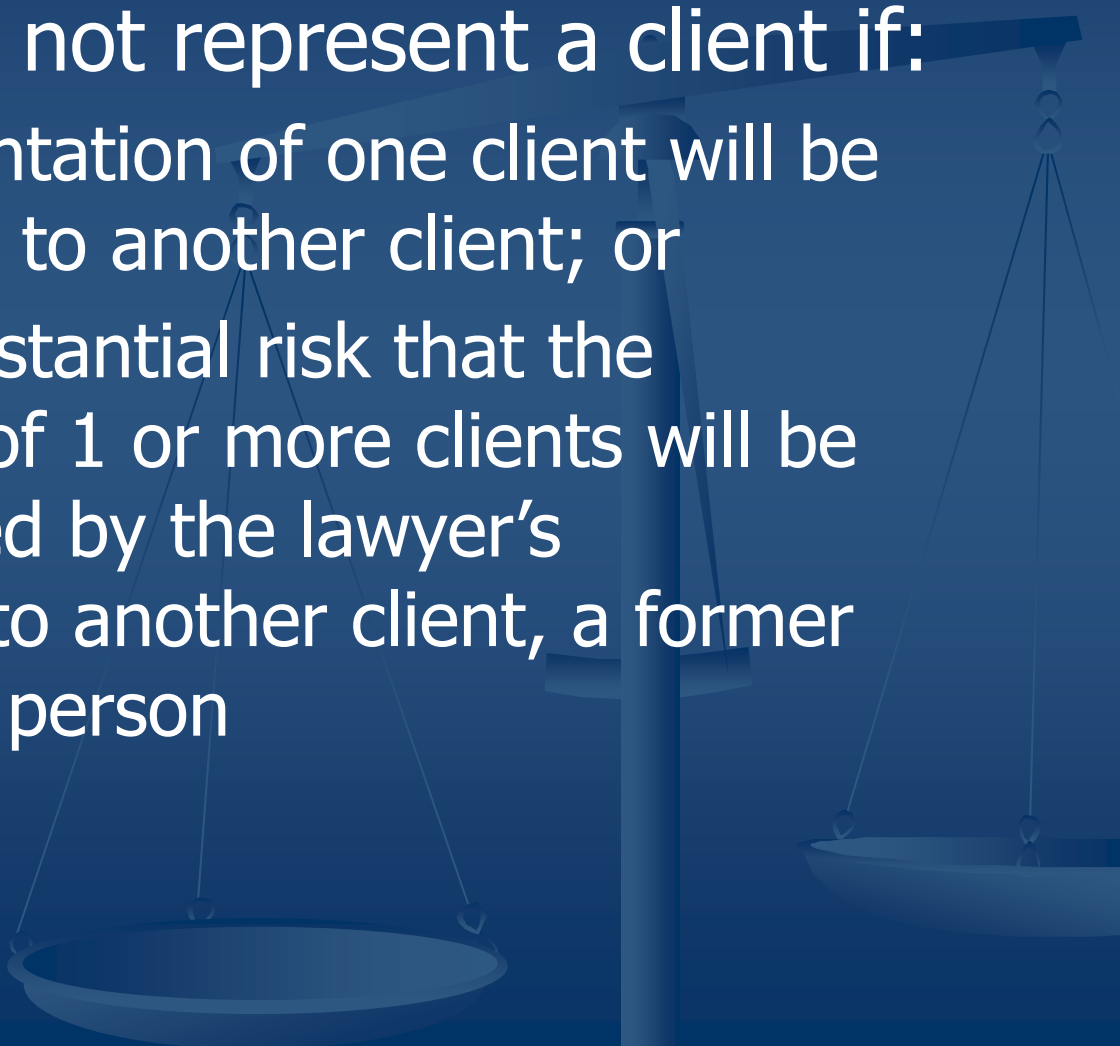
Florida's Statement of Insured Client's Rights

- Addresses:
 - Lawyer qualifications
 - Fees and Costs
 - Control of the Defense (policy controls)
 - Litigation Guidelines
 - Confidentiality
 - Conflicts of Interest
 - Settlement
 - Risks of Excess Judgment
 - Personal Counsel



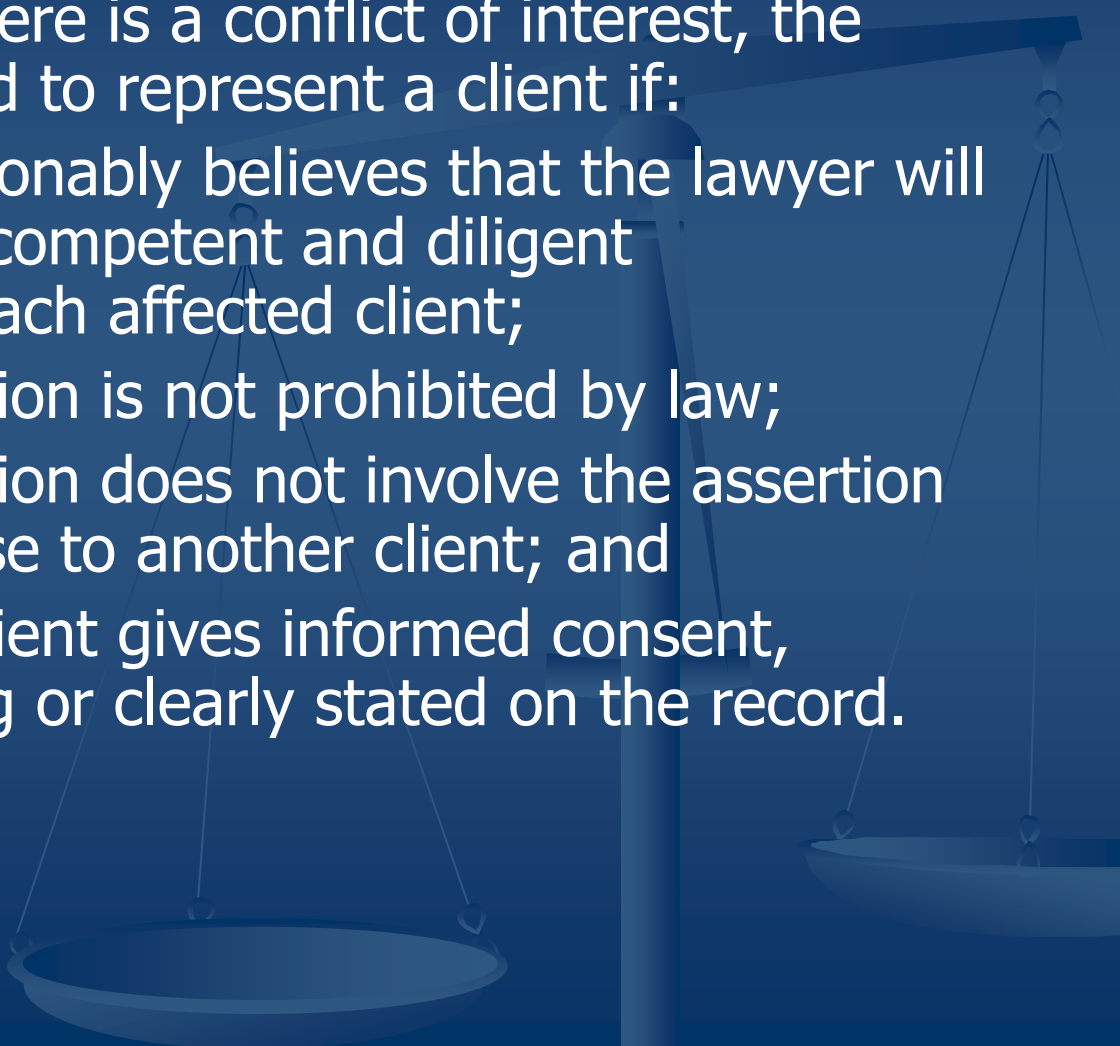
Conflict of Interest

A lawyer shall not represent a client if:

1. The representation of one client will be directly adverse to another client; or
 2. There is substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person
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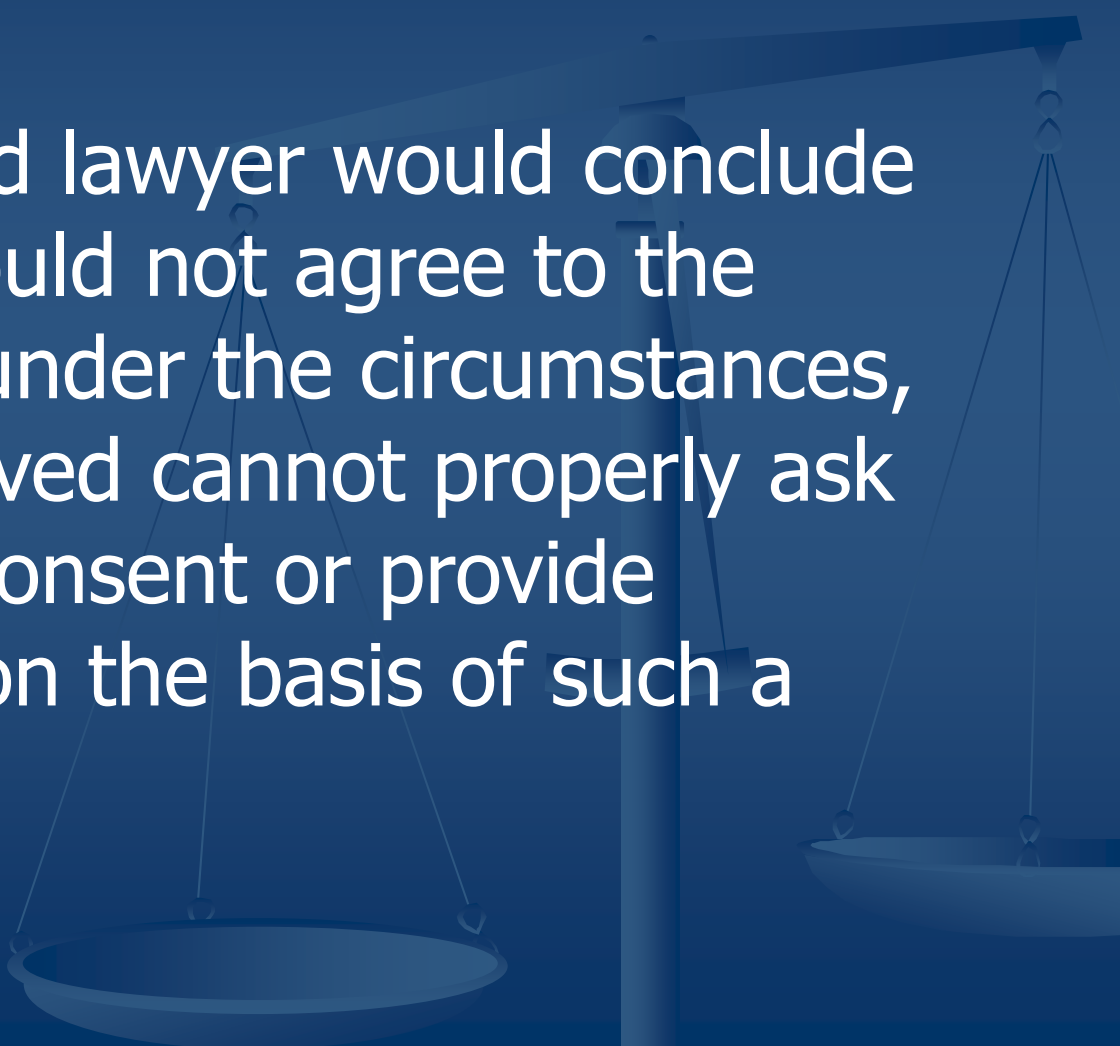
Conflict Waivers

However, even if there is a conflict of interest, the lawyer may proceed to 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 position adverse to another client; and
 4. Each affected client gives informed consent, confirmed in writing or clearly stated on the record.
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Reasonable Lawyer Standard

If a disinterested lawyer would conclude that a client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for the client's consent or provide representation on the basis of such a consent.



Common Conflicts

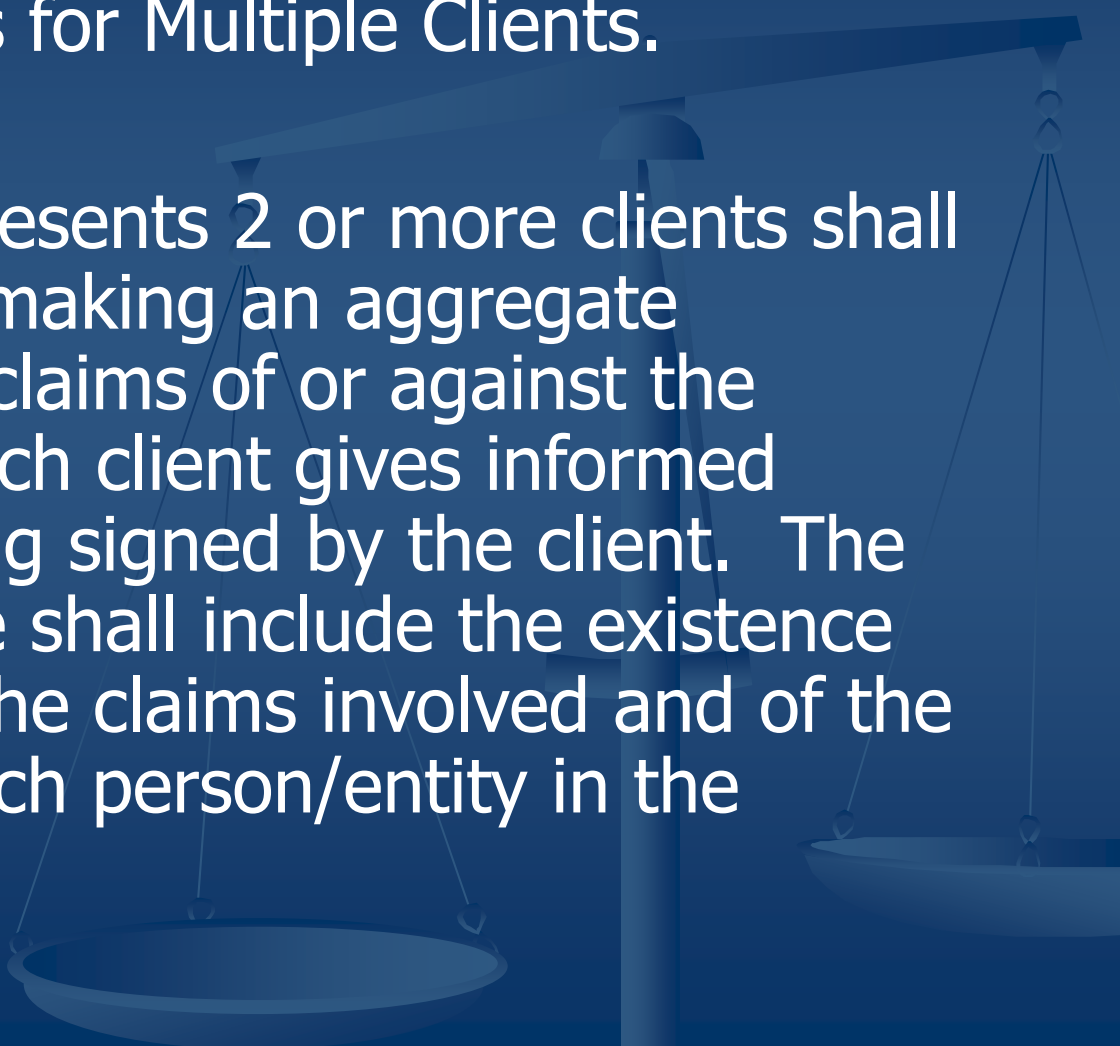


- **Temporal Sequence**
 - Arises when there are claims of separate acts of negligence against separate defendants in temporal sequence, i.e., some period of time between the acts of negligence alleged against each defendant.
- **Finger Pointing**
 - Arises when there are valid or at least arguable grounds for any one defendant to assert that a co-defendant is responsible for the injuries.
- **Professional Loyalties**
 - Usually arises with regard to coverage or settlement issues. Differences in willingness to make or accept an offer of settlement are among the primary risks of common representation of multiple clients by a single lawyer.

Settlements

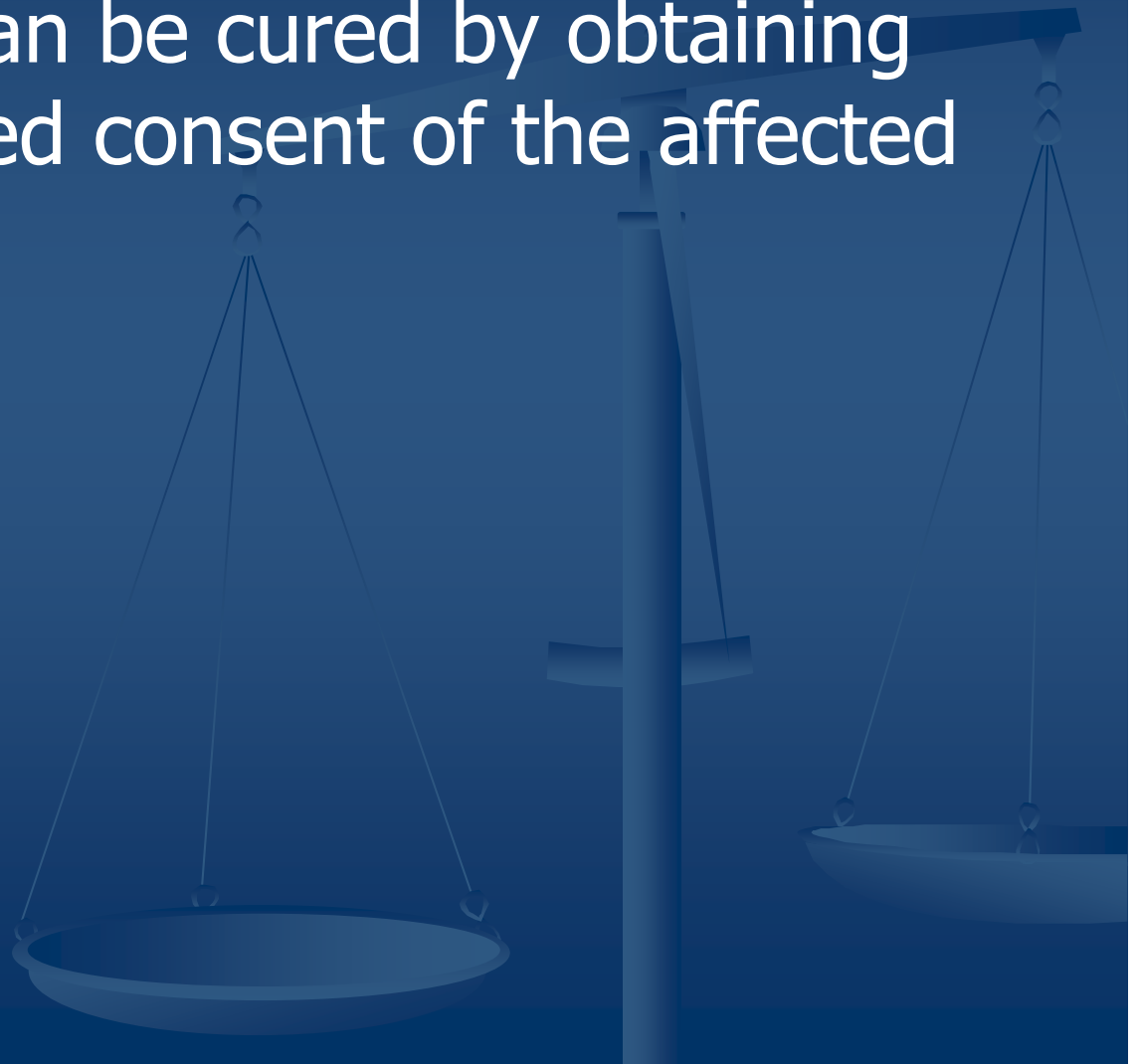
Settlement of Claims for Multiple Clients.

A lawyer who represents 2 or more clients shall not participate in making an aggregate settlement of the claims of or against the clients... unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person/entity in the settlement.

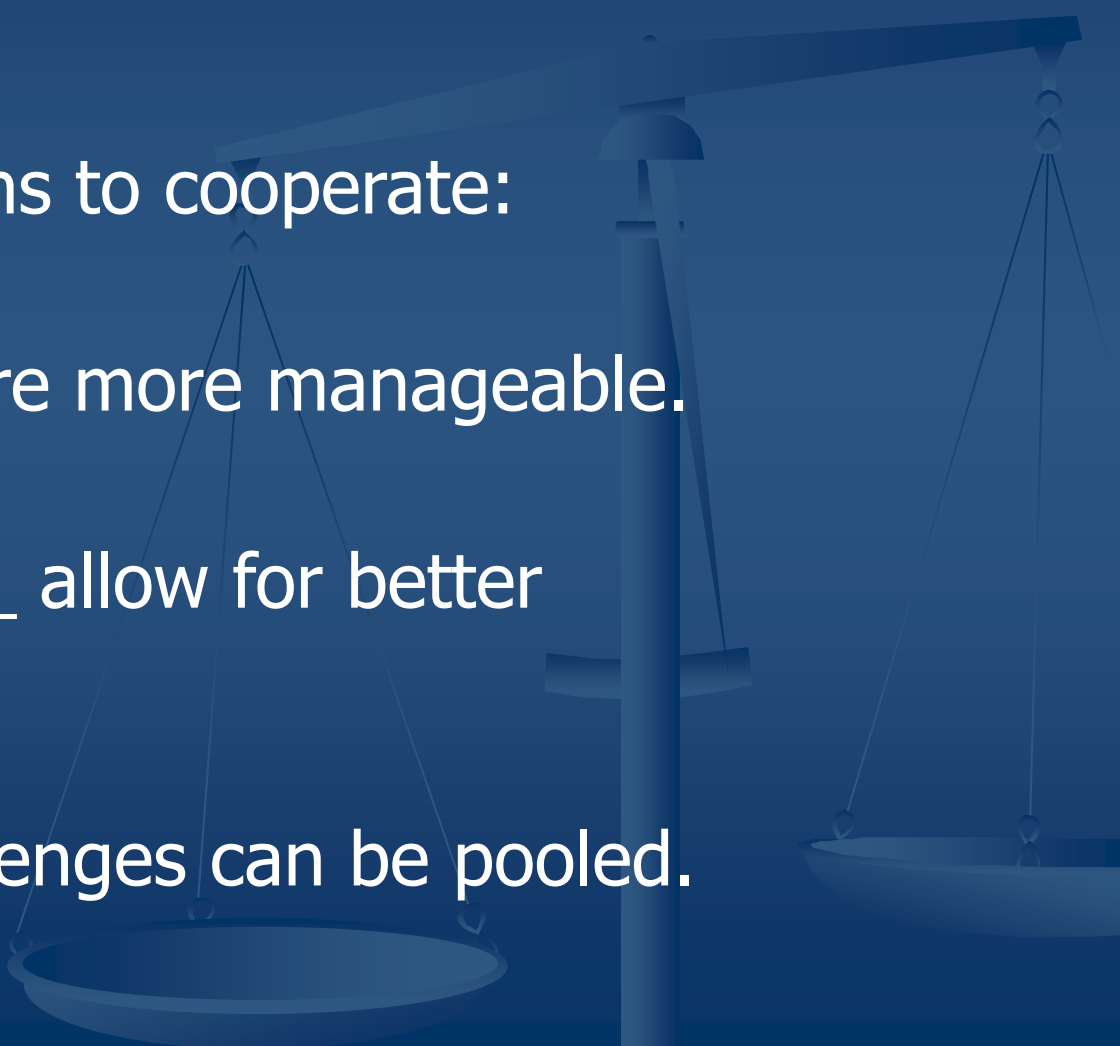


Informed Consent

- Most conflicts can be cured by obtaining the fully informed consent of the affected clients.

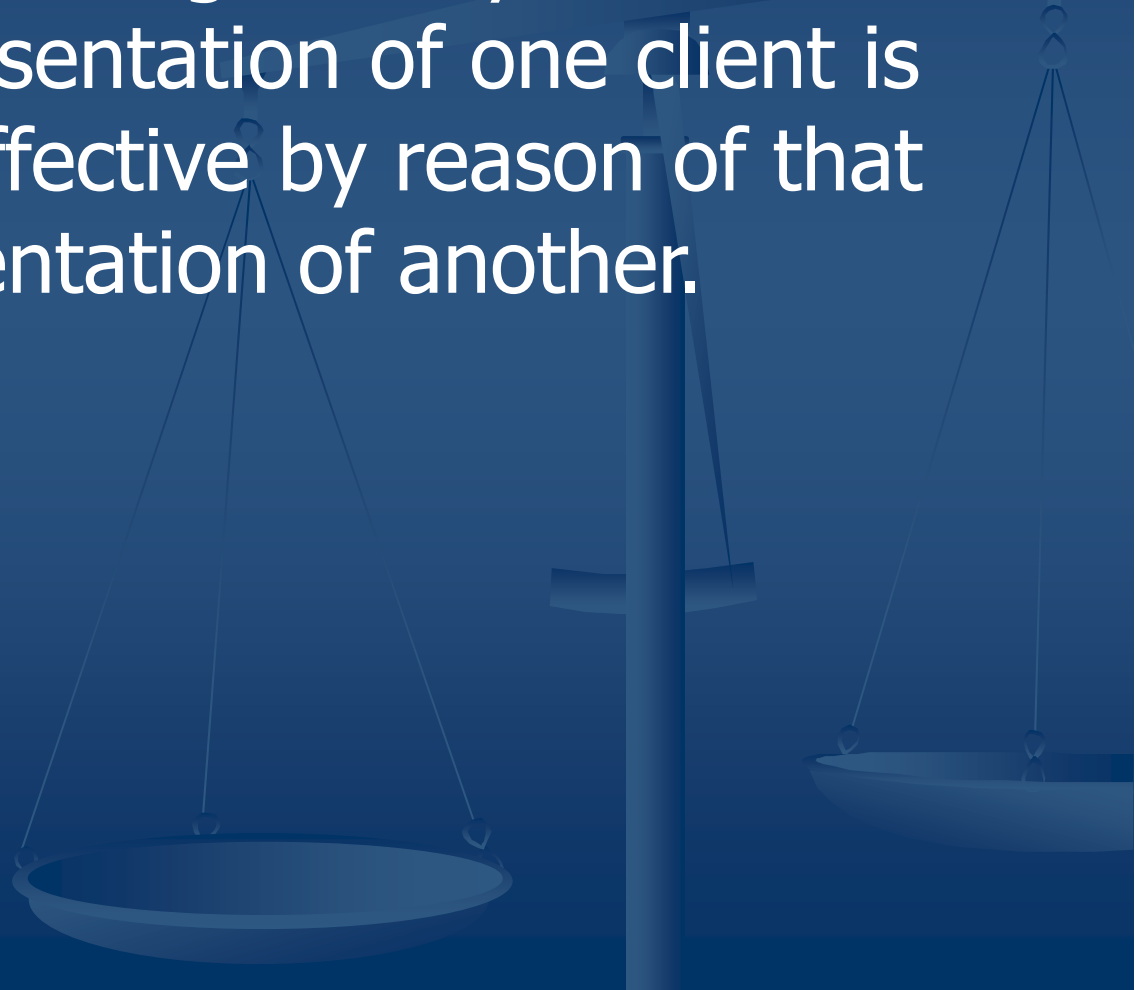


“A common defense often gives strength against a common attack”
– J. Felix Frankfurter

- Three good reasons to cooperate:
 - 1) Costs and fees are more manageable.
 - 2) Access to _____ allow for better assessment.
 - 3) Peremptory challenges can be pooled.
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Conflict of Interest

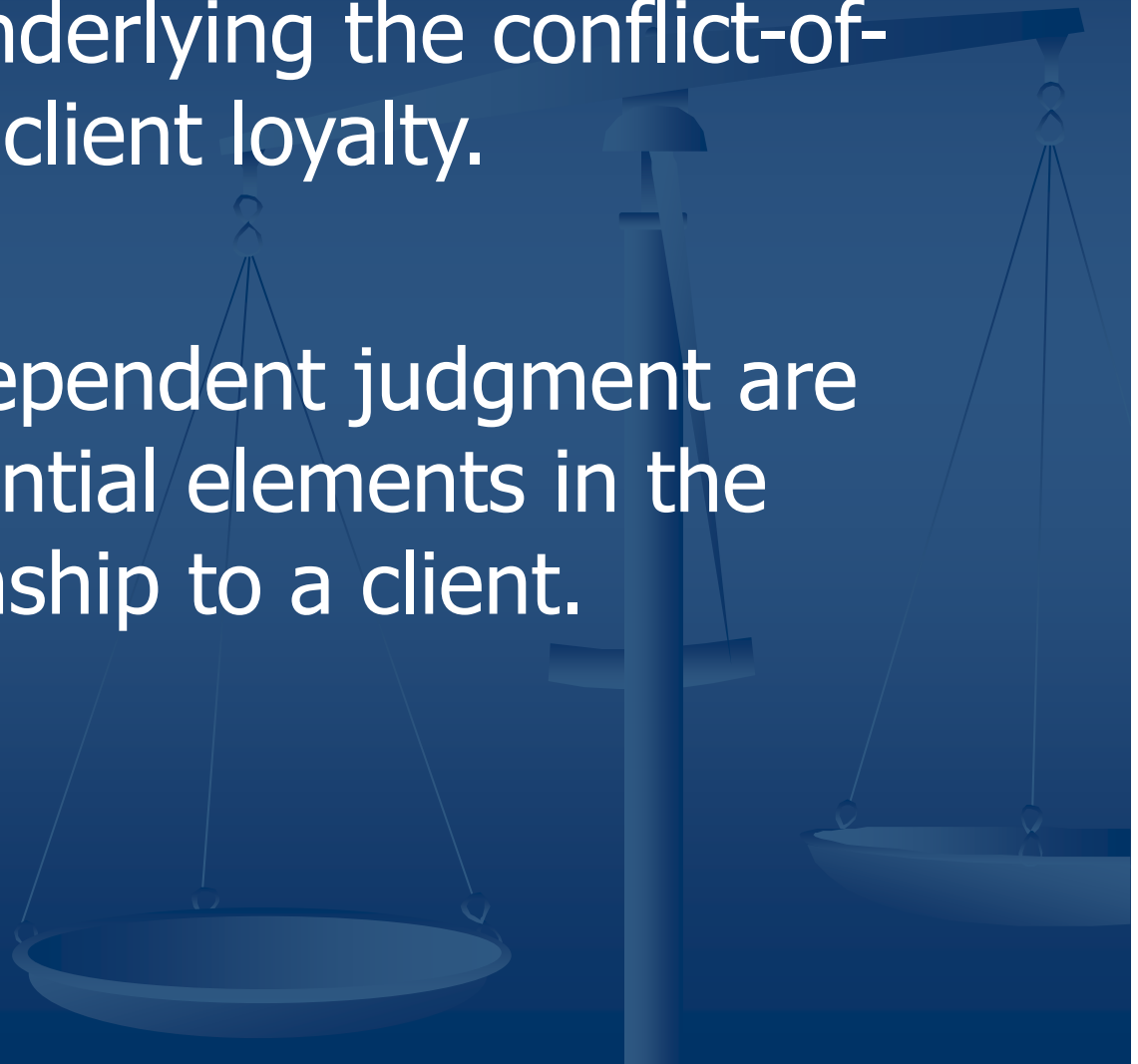
A conflict of interest generally arises when a lawyer's representation of one client is rendered less effective by reason of that lawyer's representation of another.



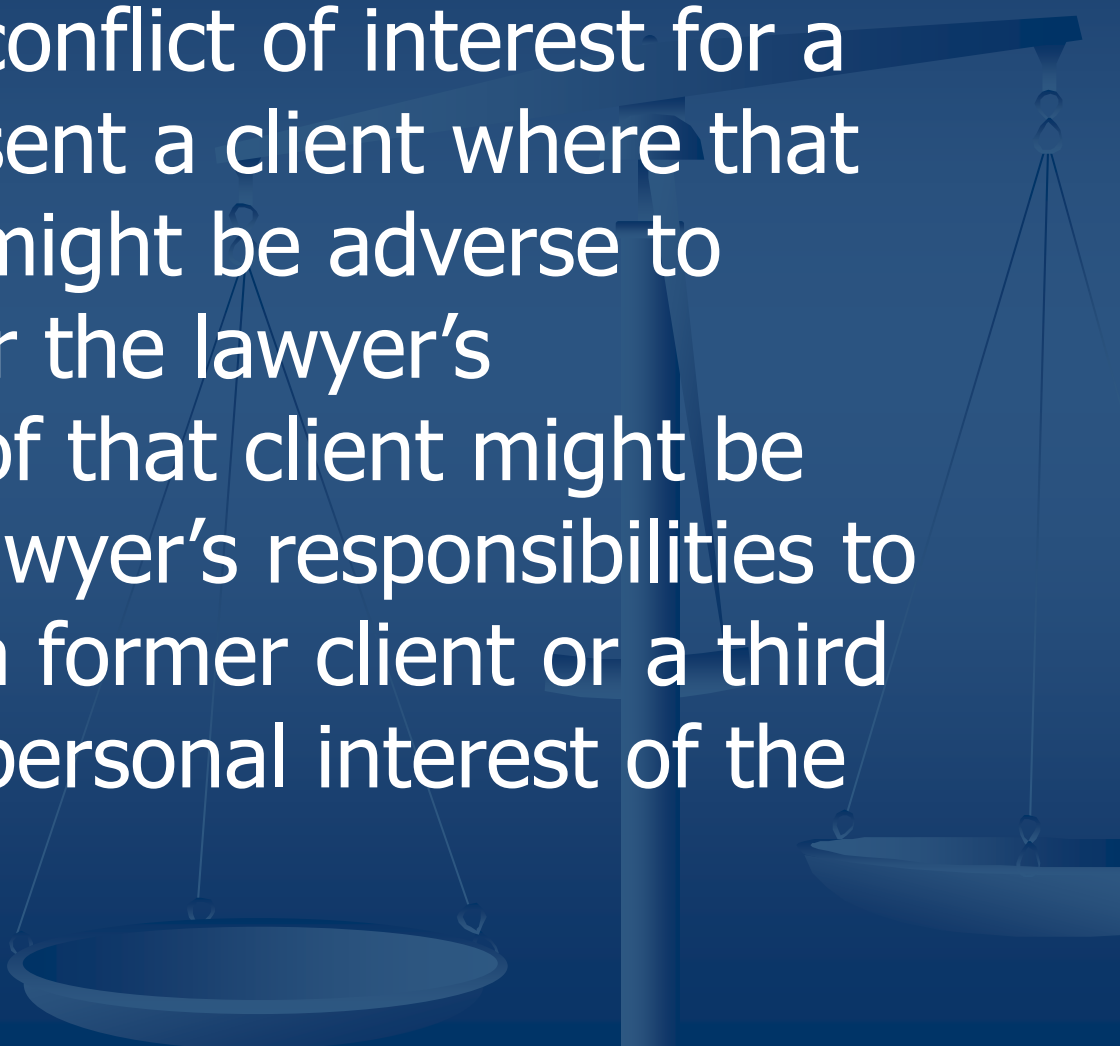
Basis for the Rules

The rationale underlying the conflict-of-interest rules is client loyalty.

Loyalty and independent judgment are considered essential elements in the lawyer's relationship to a client.

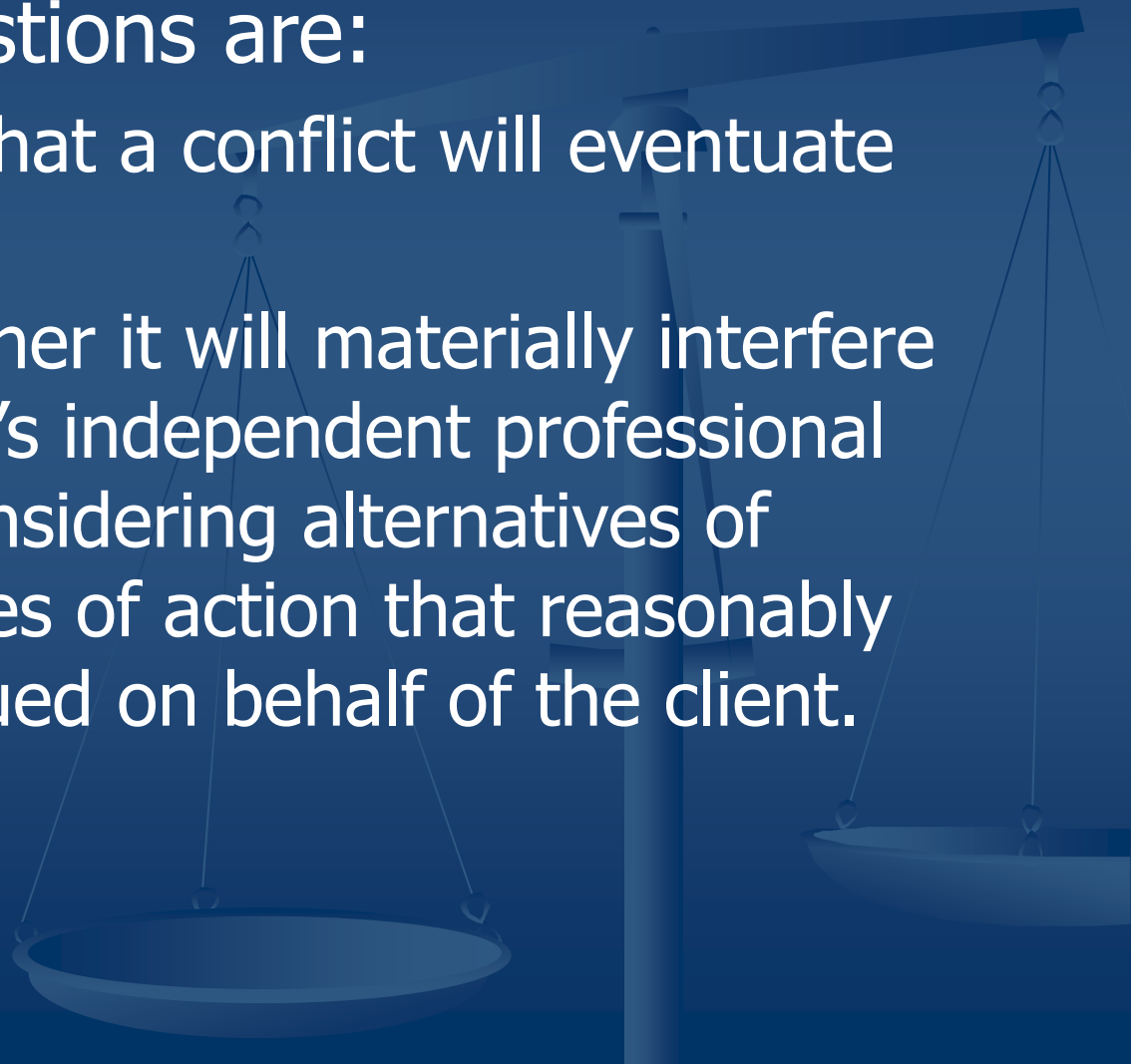


Rule 4-1.7 (continued)

- It is deemed a conflict of interest for a lawyer to represent a client where that representation might be adverse to another client or the lawyer's representation of that client might be limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
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Comment to Rule

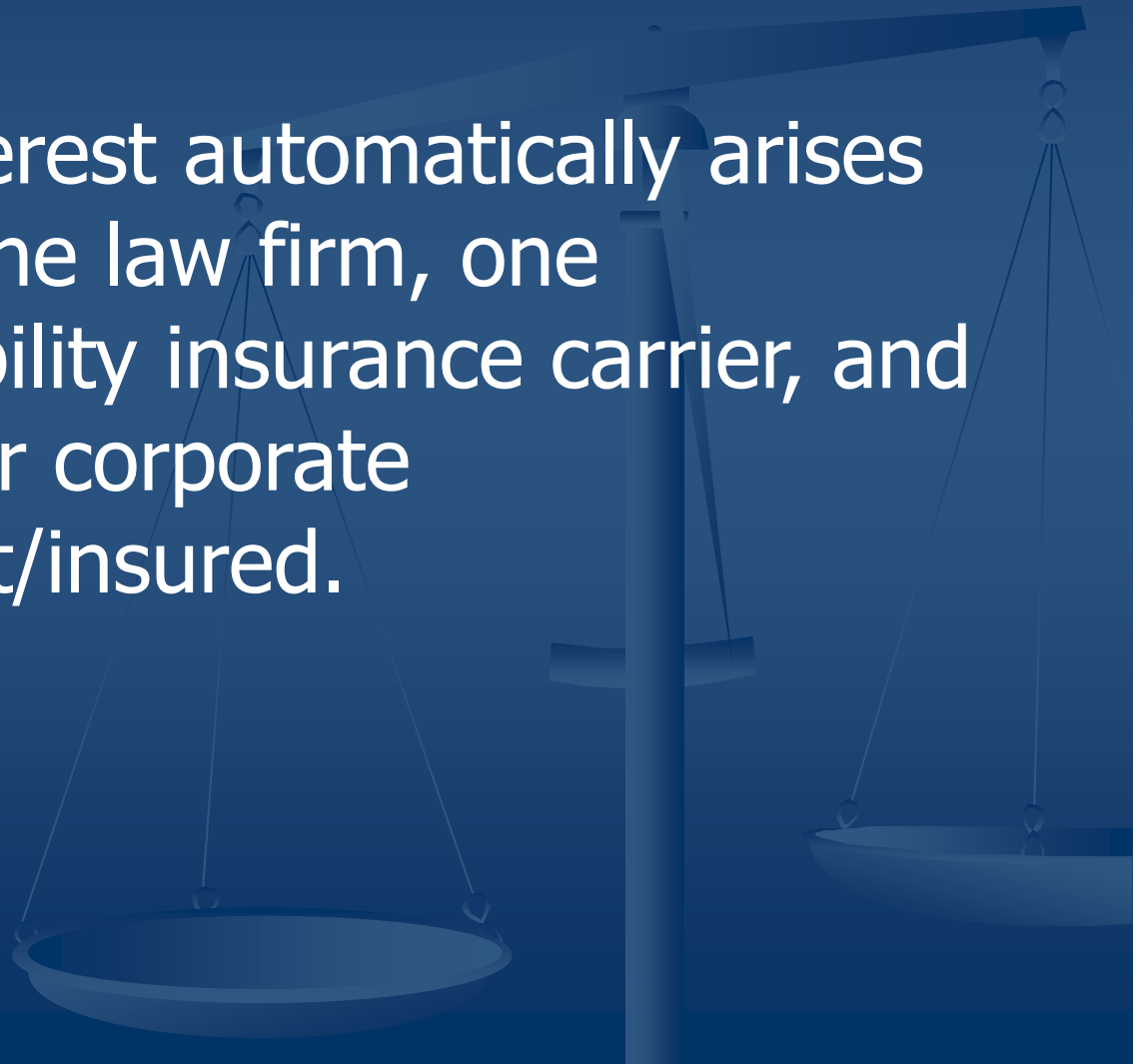
- The critical questions are:
 - The likelihood that a conflict will eventuate and,
 - If it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives of foreclose courses of action that reasonably should be pursued on behalf of the client.



Insurer Representation

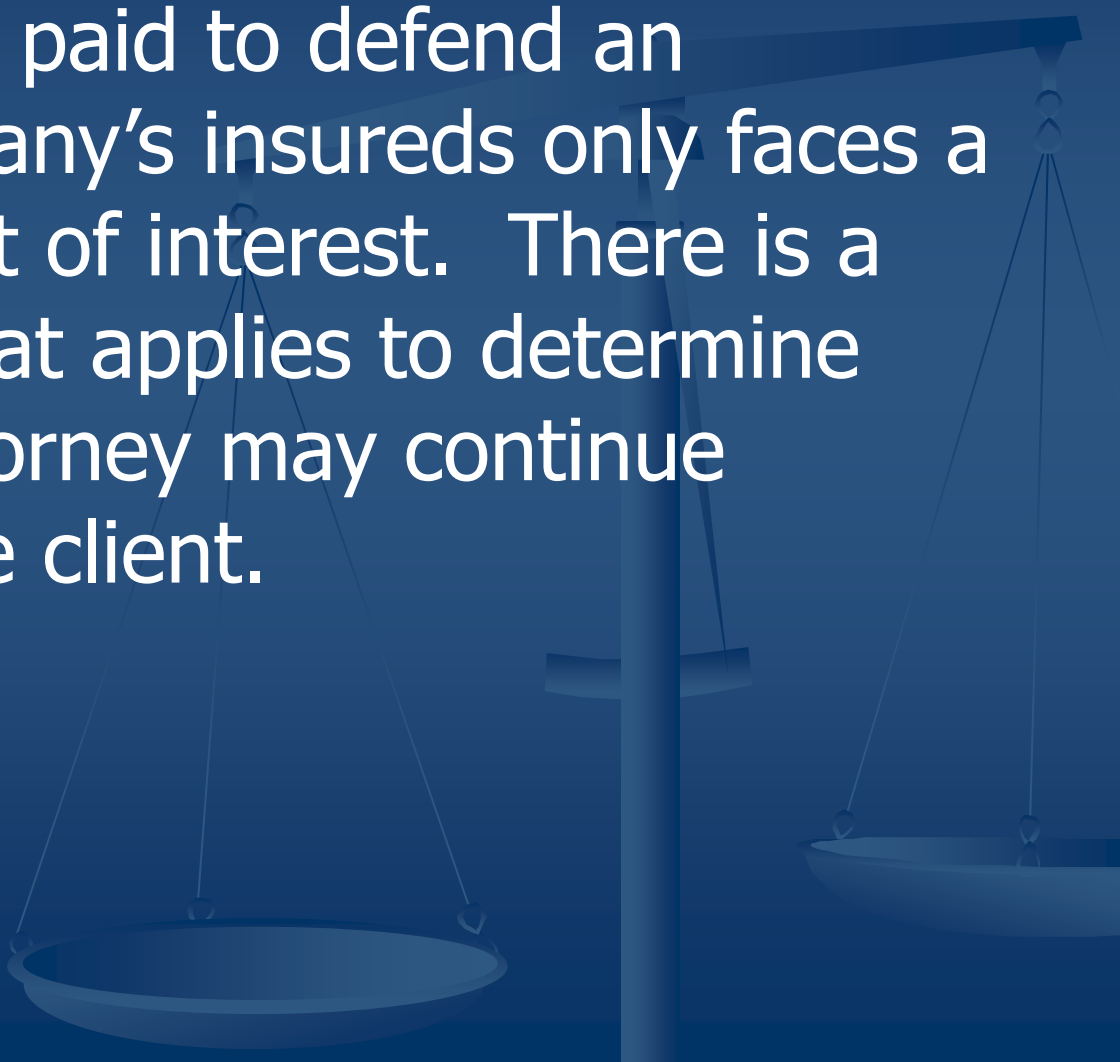
- Scenario 1

A conflict of interest automatically arises when there is one law firm, one professional liability insurance carrier, and one individual or corporate defendant/client/insured.

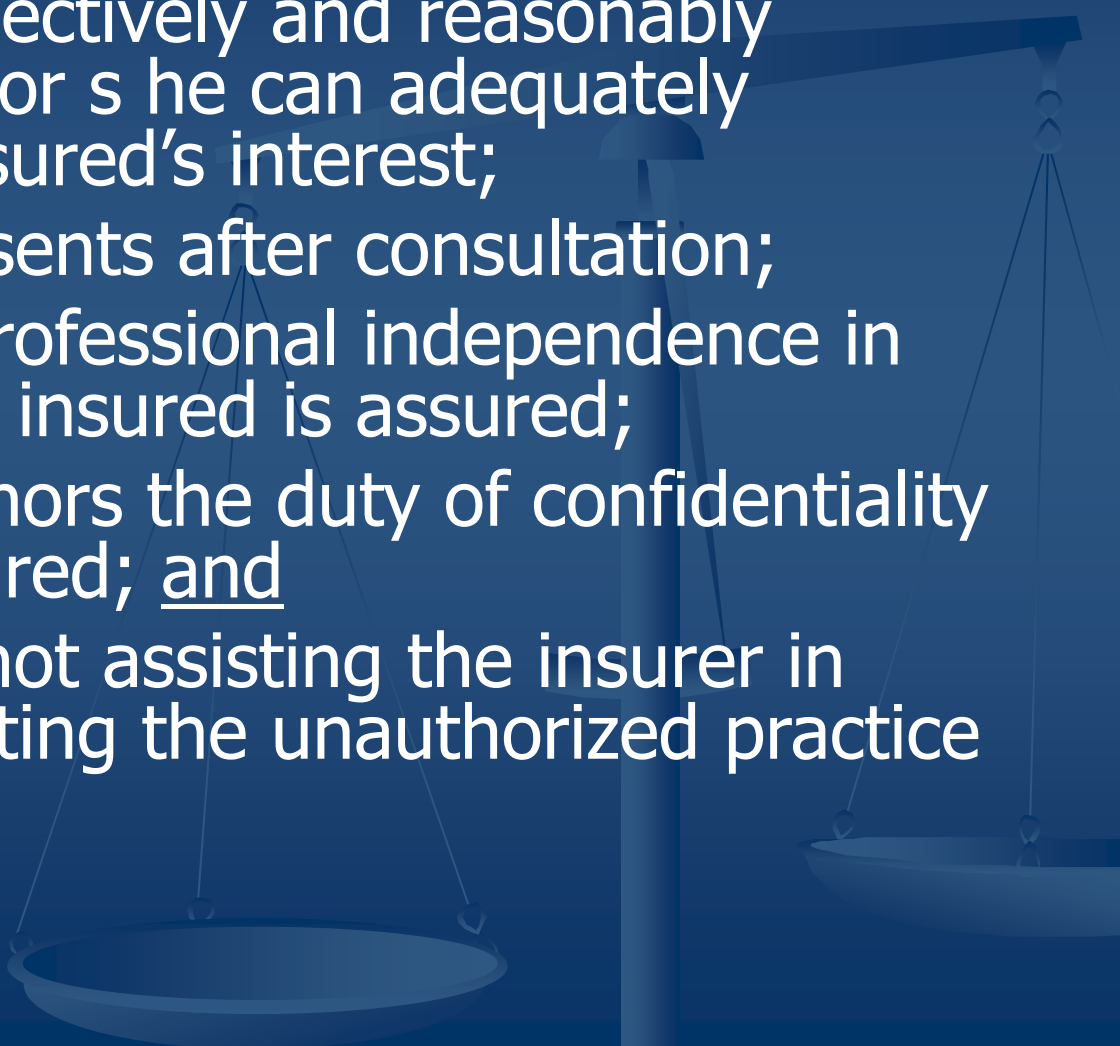


Insurer Involvement

Outside counsel paid to defend an insurance company's insureds only faces a potential conflict of interest. There is a five-step test that applies to determine whether the attorney may continue representing the client.



5 Step Test

1. The attorney objectively and reasonably believes that he or she can adequately represent the insured's interest;
 2. The insured consents after consultation;
 3. The attorney's professional independence in representing the insured is assured;
 4. The attorney honors the duty of confidentiality owed to the insured; and
 5. The attorney is not assisting the insurer in conduct constituting the unauthorized practice of law.
- 

Duty to Insured

A lawyer can be paid from a source other than the client (i.e., an insurer) if the client is informed of the fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client (the insured).

An attorney who has been hired by an insurance company to represent an insured owes his or her primary duty to the insured.

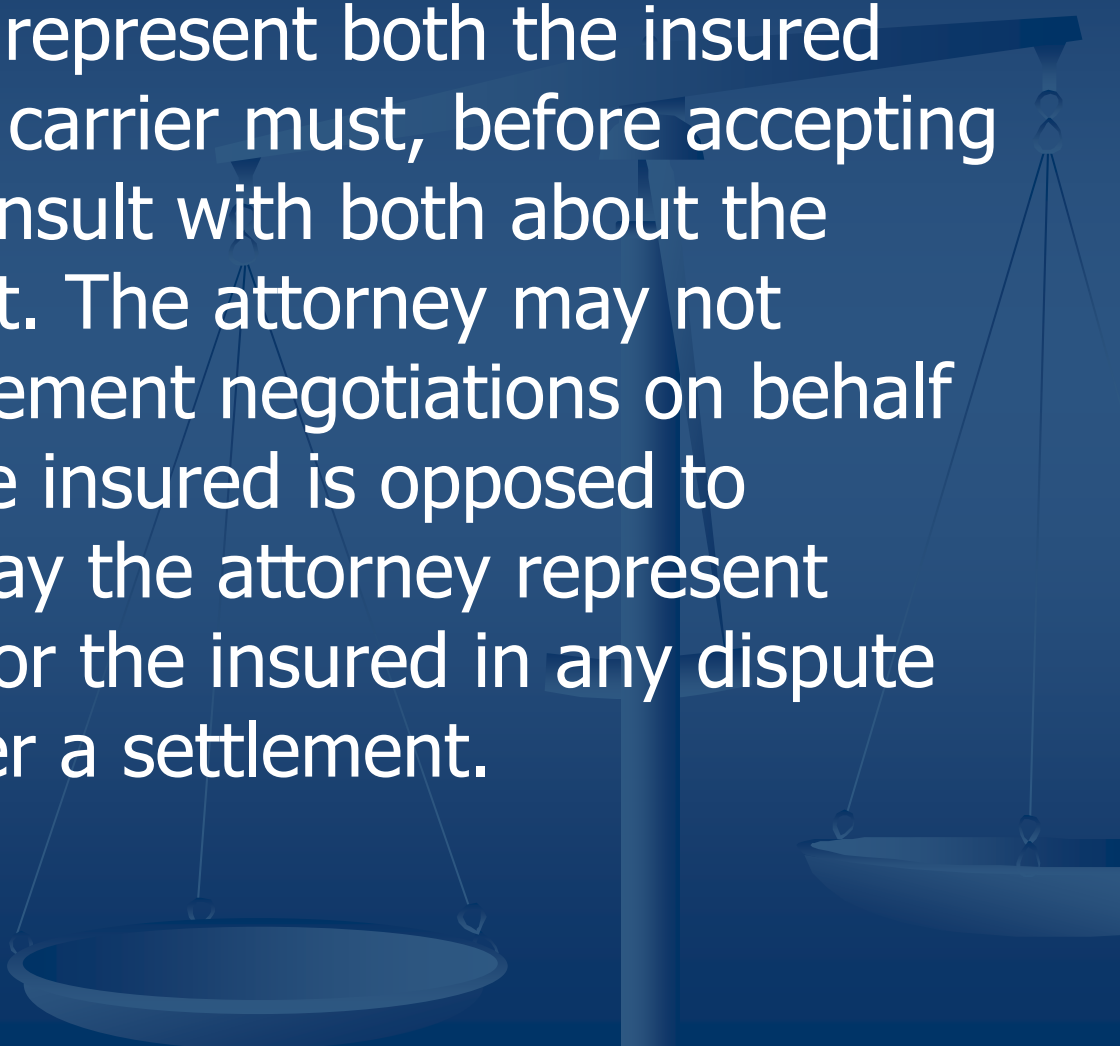
Conflict of Interest



- A lawyer shall not use information to the disadvantage of a client.
- A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - The client gives informed consent;
 - There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - Confidential information relating to representation of a client remains protected.

Settlements

A lawyer asked to represent both the insured and the insurance carrier must, before accepting representation, consult with both about the issue of settlement. The attorney may not participate in settlement negotiations on behalf of the carrier if the insured is opposed to settlement; nor may the attorney represent either the insurer or the insured in any dispute between them over a settlement.



Client Consent

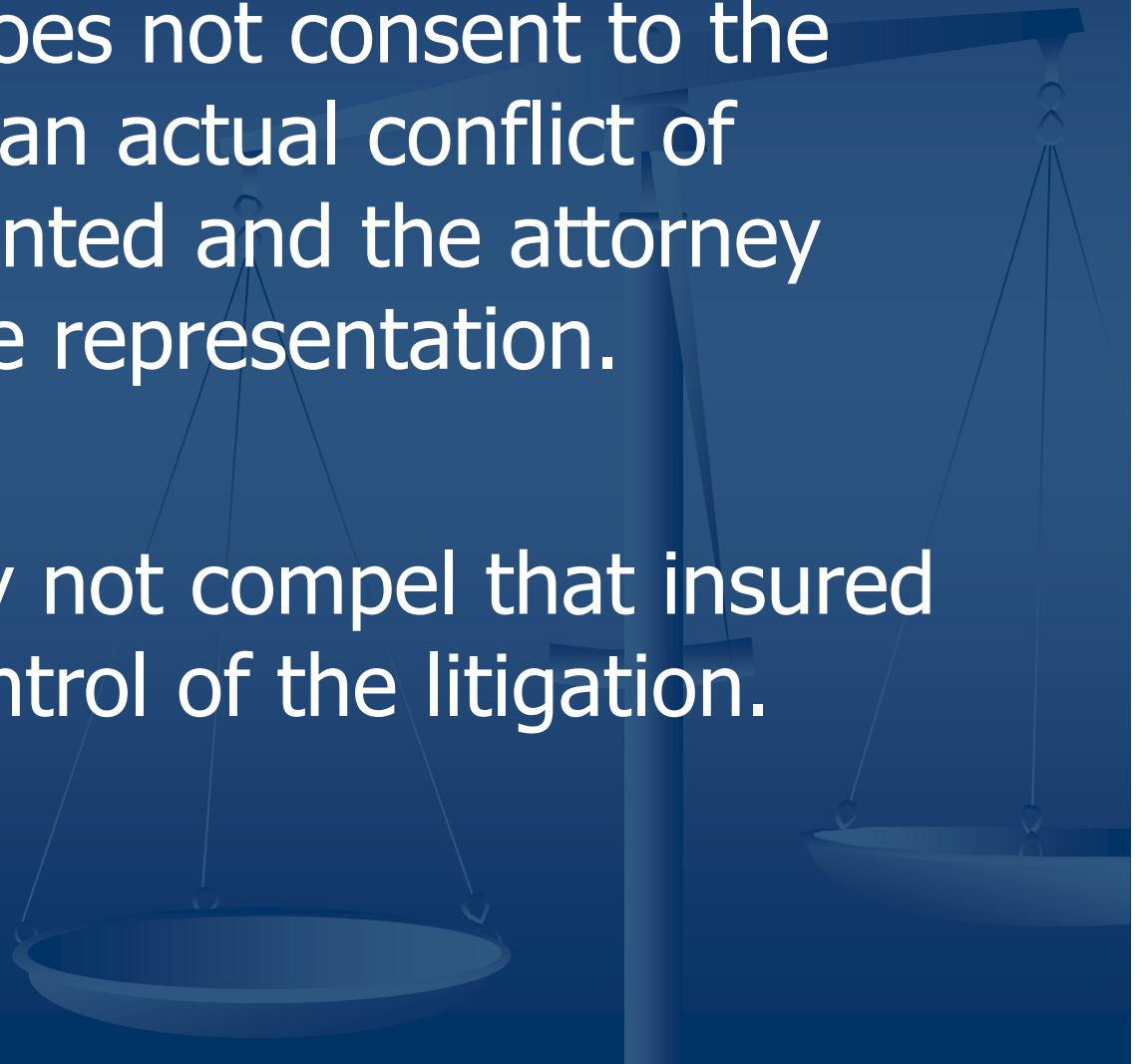
A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client unless:

1. the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and
2. each client consents after consultation.

Client Consent

If the insured does not consent to the representation, an actual conflict of interest is presented and the attorney must decline the representation.

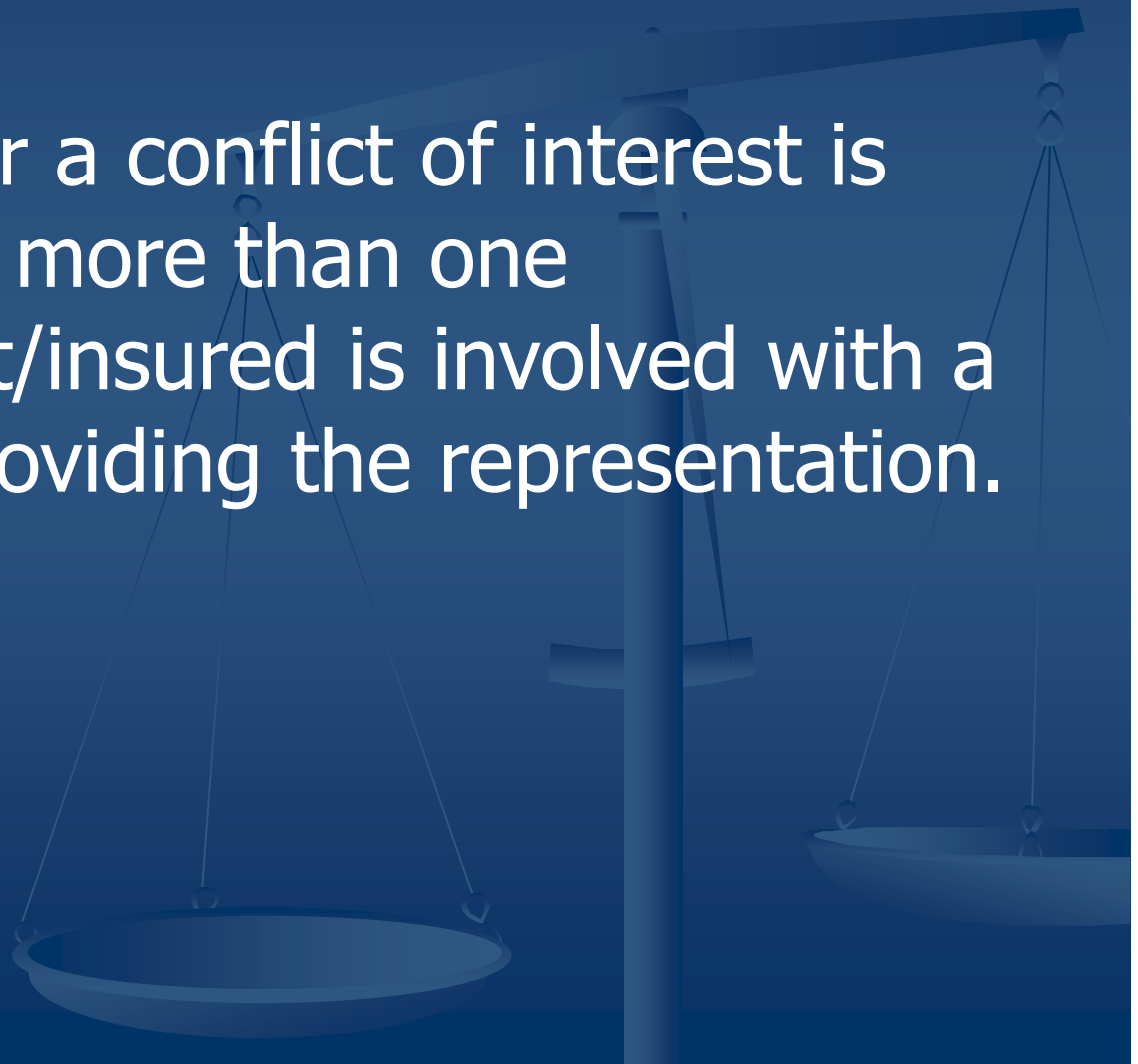
The insurer may not compel that insured to surrender control of the litigation.



Dual Representation

- Scenario 2

The potential for a conflict of interest is increased when more than one defendant/client/insured is involved with a single lawyer providing the representation.



Joint Representation

In some cases, it is appropriate for multiple defendants to be represented by one attorney.

Per Justice Frankfurter: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."

Glasser v. U.S., 315 U.S. 60 (1942)(dissenting opinion)

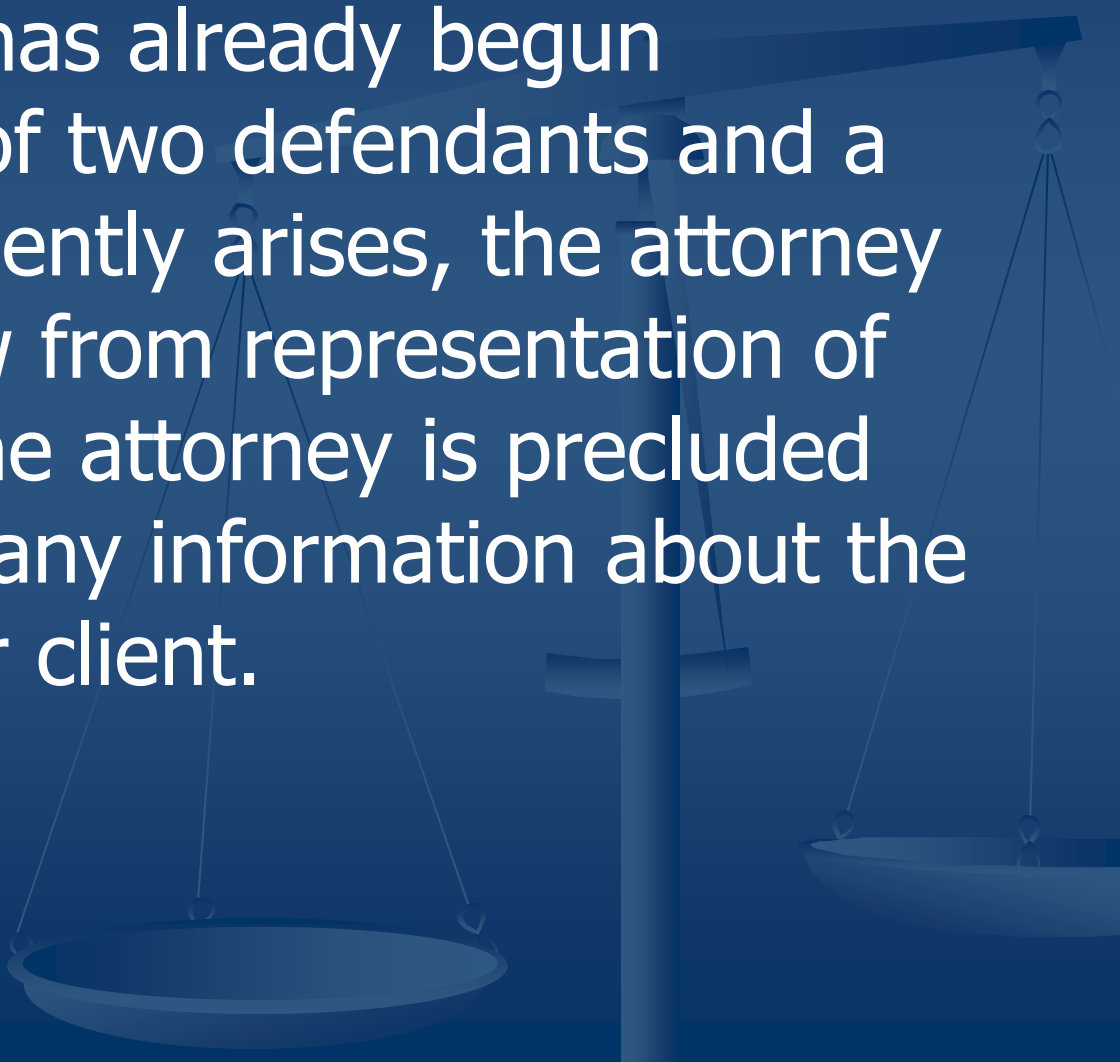
Consultation and Consent

Again, counsel is required to consult with all potential clients and obtain their consent for the joint representation (must get waiver or consent from each client).

There is always the potential for conflict in such a situation, but when the conflict is clearly possible, or even probable, from the outset of the representation of multiple named defendants, the rule of thumb is that the representation of the second defendant should be declined from the outset.

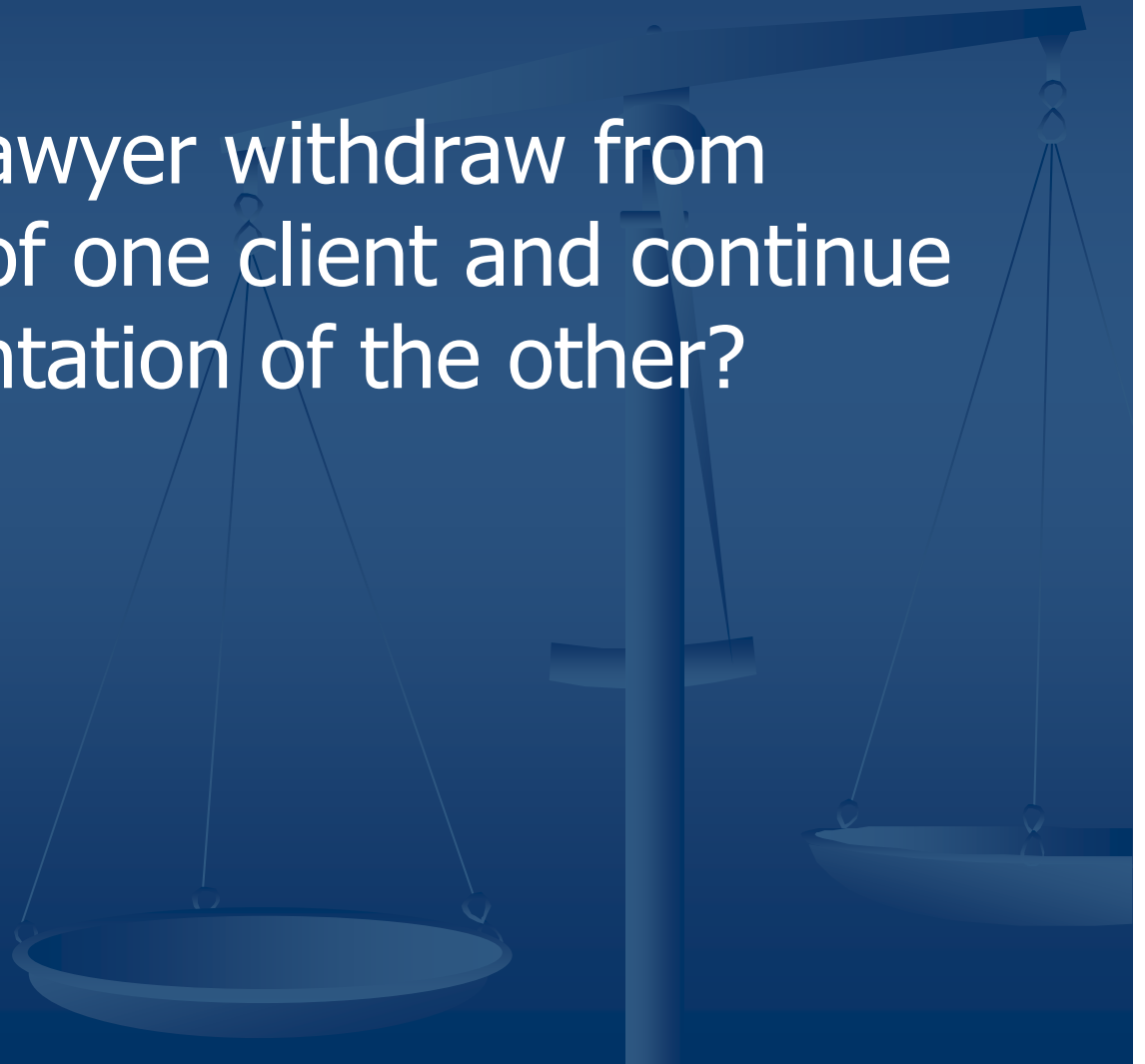
When Conflict Arises

If the attorney has already begun representation of two defendants and a conflict subsequently arises, the attorney should withdraw from representation of both clients. The attorney is precluded from disclosing any information about the conflict to either client.



Query

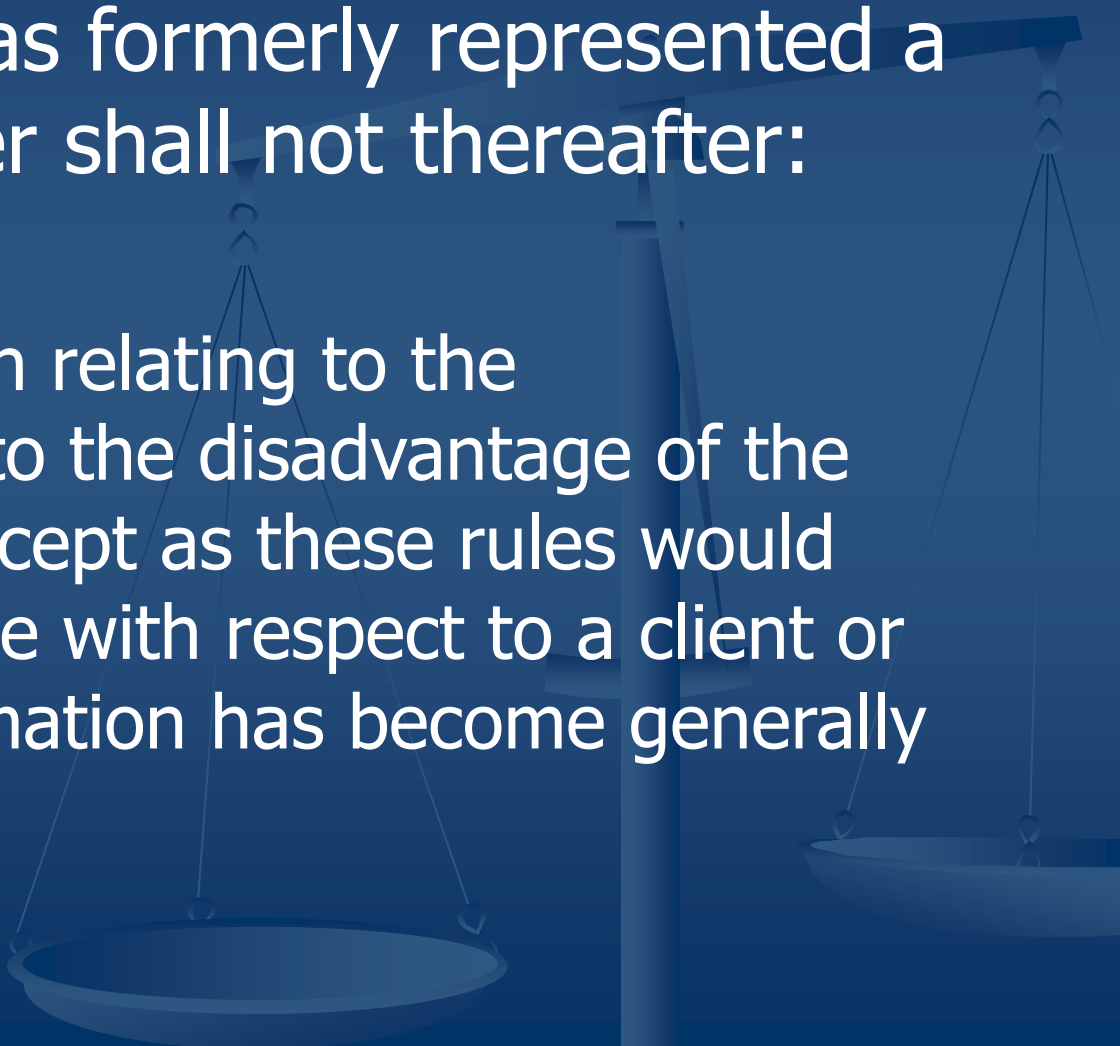
When can the lawyer withdraw from representation of one client and continue his/her representation of the other?



Rule 4-1.9 Conflict of Interest; Former Client

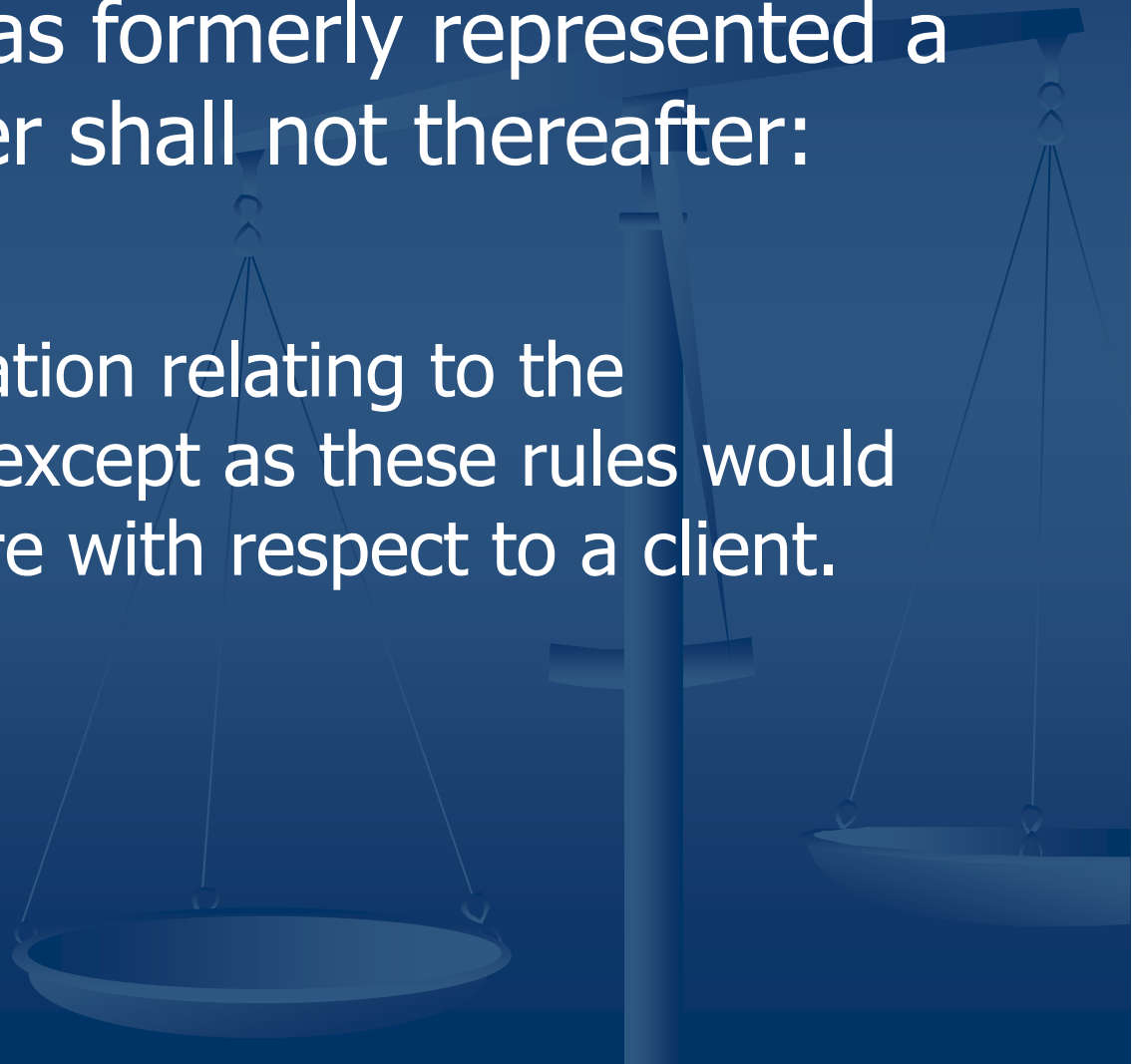
- A lawyer who has formerly represented a client in a matter shall not thereafter:
 1. Represent another person/entity in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;

Rule 4-1.9 (continued)

- A lawyer who has formerly represented a client in a matter shall not thereafter:
 2. Use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or
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Rule 4-1.9 (continued)

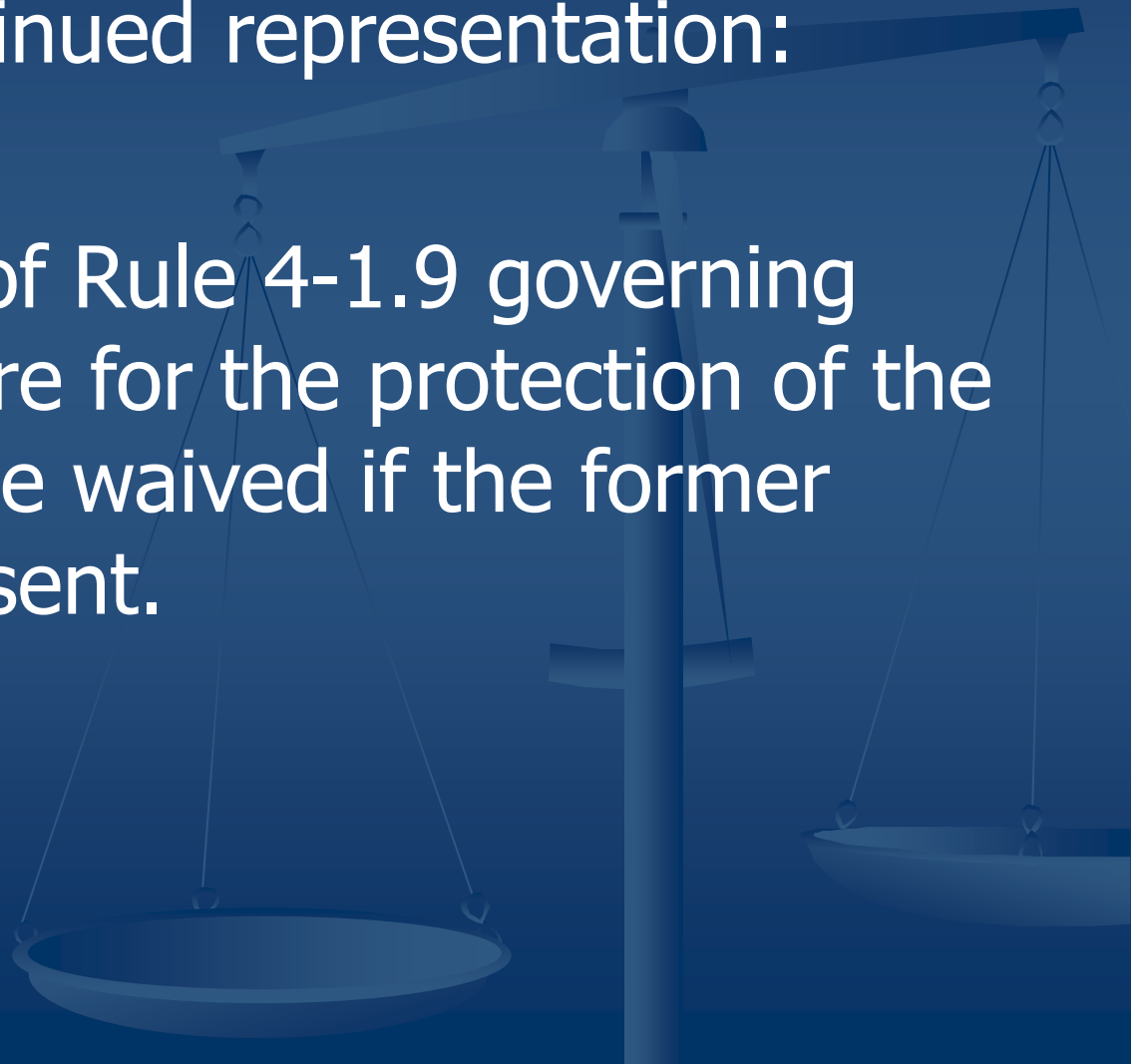
- A lawyer who has formerly represented a client in a matter shall not thereafter:
 3. Reveal information relating to the representation except as these rules would permit or require with respect to a client.



Client Waiver

- The key to continued representation:

The provisions of Rule 4-1.9 governing former clients are for the protection of the client and can be waived if the former client gives consent.



DUAL REPRESENTATION

Questions or requests for copies of the Statement of Insured Client's Rights and/or letter to clients regarding dual representation can be sent to:

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