



# Party bus

## Considerations when representing multiple plaintiffs in the same case



Cooper

BY MILES B. COOPER

The lawyer sat with the potential client. “So, the cab just slammed on its brakes on the freeway on-ramp for no reason?”

“Yes. We went flying when our shuttle bus crashed into the back of it. Say, several of my co-workers on that shuttle were also hurt. Can they retain you too? They heard I was meeting with you and were interested.”

### Conflicting interests

Representing multiple parties works, so long as there is no actual conflict of interest. A potential conflict of interest always lurks in the background, however. For this column, we’ll be using an injured party and a spouse with a loss of consortium claim as an example. Imagine the couple arrives to the intake meeting and, during the meeting, the non-injured spouse states they are divorcing and that the injured party is abusive. That’s an actual conflict. Representing both won’t end well. One of the parties should be sent to another lawyer.

Imagine a different scenario. The lovely couple arrives and gets along well. That’s a potential but not actual conflict (potential because things might change in the future). Joint representation works. A year into the case, the non-injured spouse tells the lawyer that the spouse plans to divorce the injured party and the injured party is abusive. Now there’s an actual conflict, and joint representation no longer works.

Potential conflicts – present in every joint representation – require written waivers with details about the upsides and downsides of joint representation. Some lawyers include this in the retainer agreement. Others have it as a separate document, used only in multiple plaintiff cases. Either method works so long as the clients’ ink is on it.

### Confidentially speaking

Another consideration in joint representation is confidentiality. Confidentiality duties don’t change, but Client A tells the lawyer something and the lawyer can maintain confidentiality with Client A without the risk of having to tell Client B what Client A said. For example, Client A tells the lawyer that Client A has an underlying health issue that Client A does not want shared. Fine. The complexity arises if Client A and Client B later end up in their own conflict, say a divorce, that draws in the lawyer. Client A wants to use information that came up during a joint meeting between Client A, Client B, and the lawyer. Client

B claims attorney-client privilege. In this multiple party representation, attorney-client privilege would not apply and Client B’s attempt to keep the information contained would fail.

### Collective bargaining

With these underlying complexities in joint representation, why do it? Joint representation typically advantages the clients. Chief among the advantages are economics. The investigation costs tend to be the same whether there’s one client or five. Same with liability experts like accident reconstructionists. But one should address the cost division at the beginning of the case. Are the clients agreeable to sharing joint costs in proportion to their share of the total recovery or do they simply want to split them equally, as in 50/50 for two clients? The former tends to be more equitable. The latter advantages the client who has a more valuable case. Either work, so long as the clients agree. Note that specifying the cost allocation in the written conflict waiver helps prevent problems when the case resolves.

The costs also pose an added accounting challenge. The police report? Joint cost. Client A’s orthopedic records? A cost specific to Client A. Different lawyers handle this in different ways. One is to open a separate matter for each client as well as a master matter for the joint costs. Another is to lump everything into one matter and then break it out at the end. The latter can be time-consuming, particularly when figuring out whose records are whose.

### Control freak

Multiple plaintiffs benefit from joint deposition preparation sessions. This helps on many levels, efficiency being one. But more important is consistency between witnesses. The lawyer who represents everyone in a matter has the opportunity to have everyone discuss the incident and the outcome. Say that during depo prep Client A states that before the incident, Client A did everything around the house and now can no longer do anything. Client B stares at Client A like Client A just said the moon is made of cheese and explains Client A did *nothing* around the house pre-incident. If the lawyer is representing both clients and gets the opportunity to probe this issue during the preparation, it will go better for the case. Perhaps the household services claim in that case should be avoided. If there’s no opportunity to jointly discuss the issue, there’s a good chance that competing facts will emerge at deposition. Never a good thing.

### Outro

Back to our lawyer. A couple weeks later, the lawyer met with the other injured co-workers. The lawyer detailed joint



representation's pros and cons. After questions were answered, the co-workers decided to work together in the case – and agreed to joint representation.

*Miles B. Cooper is a partner at Emison Hullverson LLP. He represents people with personal injury and wrongful death cases.*

*In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).*