

# Joint Representation Ethics Lessons From Ga. Electors Case

By **Hilary Gerzhoy and Grace Wynn** (April 25, 2023)

On April 18, Fulton County District Attorney Fanny Willis filed a motion to disqualify Kimberly Bourroughs Debrow from her representation of 10 of the individuals accused of attempting to subvert the 2020 presidential election in Georgia by claiming to be legitimate electors for Republican nominee Donald Trump, who had lost the state.[1]



Hilary Gerzhoy

The motion seeks to disqualify Debrow from her representation of all her elector clients, claiming a nonconsentable conflict of interest because some of Debrow's clients have allegedly begun accusing each other of crimes.

The DA's motion has important implications for the outcome of the Georgia electors case, one of a number of inquiries into alleged election malfeasance by former President Trump and his associates. But it also has broader implications for lawyers in all joint representations, where the potential for conflicts abounds.



Grace Wynn

This article explains the circumstances giving rise to the DA's motion, analyzes the critical Rules of Professional Conduct that govern these type of conflicts and provides practical guidance for identifying and avoiding conflicts in joint or related representations.

## The Criminal Case Against the Georgia Electors

On Dec. 14, 2020, 16 individuals selected by the Trump presidential campaign met at the Georgia state capitol and signed a certificate claiming that Donald Trump had won the electoral college in the state.[2] These electors sought to cast electoral votes for Trump following his infamous request that Brad Raffensperger, Georgia's secretary of state, "find" him enough votes to reverse the outcome in Georgia's 2020 presidential election.[3]

In February 2021, Fulton County's DA launched a criminal investigation into Trump's actions. In January 2023, a Georgia-impaneled special purpose grand jury issued its final report recommending indictments for several individuals for crimes related to election fraud.[4]

To bring charges, the DA will present her case to a traditional grand jury, which can recommend criminal charges, including solicitation of election fraud, racketeering and conspiracy.

From the beginning of the representation, the DA has accused Debrow, the lawyer representing 10 of the electors, of a conflict of interest.

The first allegation stemmed from Debrow's representation of David Shafer, chairman of the Georgia Republican Party, concurrently with 10 other electors. The DA alleged — and the Fulton County Superior Court judge agreed — that Shafer was differently situated from the other 10 electors, having played an arguably more culpable role.

In November 2022, the judge ruled that Shafer's role in "establishing and convening the

slate of alternate electors, his communications with other key players in the District Attorney's investigation, and his role in other post-election efforts to call into question the validity of the official vote count in Georgia" rendered it "impractical and arguably unethical" for him to share a lawyer with the other electors.[5]

The representation was severed — Shafer would be represented by attorney Holly Pierson, and Debrow would continue to represent the other 10 electors.

To add to the already conflict-fraught representation, in the DA's motion to disqualify on April 18, Willis alleged that Debrow and Pierson had failed to advise their clients about a potential immunity offer from the government.

In July 2022, the court ordered that Debrow and Pierson talk to their clients about the potential for immunity. According to the DA, Debrow and Pierson reported back that none of their clients were interested in seeking immunity. But two weeks ago, the DA alleged that this month she sat down with a number of the electors who stated that they had never been told of the potential for immunity.[6]

And then came the finger pointing among the remaining 10 electors. According to the DA, "some of the electors stated that another elector represented by Ms. Debrow committed acts that are violations of Georgia law and that they were not [a] party to these additional acts." [7] In other words, some electors have alleged criminal conduct by at least one of their joint defense group comrades.

If the evidence supports these allegations, does the DA have a legitimate basis for seeking to disqualify Debrow from her continued joint representation of the electors?

### **The Ever-Present Conflict Risk**

The American Bar Association Model Rule 1.7 prohibits a lawyer from representing two or more clients that would constitute a concurrent conflict of interest.

A concurrent conflict arises if either (1) representation of one client will be "directly adverse" to another client; or (2) if "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." [8]

A lawyer can nonetheless proceed with a representation conflicted in this manner so long as (1) the lawyer reasonably believes she will be able to provide competent and diligent representation to each affected client; (2) the representation is not prevented by law; (3) the representation does not require the lawyer to assert a claim by one client against another client in the same proceeding; and (4) each client gives informed consent, confirmed in writing. [9]

An initially conflict-free joint representation can turn into a conflict-ridden one. Lawyers are accordingly obligated to consider whether there is a significant risk that a conflict will develop in the future. [10] Such a risk exists when there is a "likelihood that a difference in interests will eventuate" and, in the event it does, "it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." [11]

## **The Nonconsentable or Noncurable Conflict**

Each of the 10 electors who are accused of serving as false electors signed an informed consent to continued joint representation, ostensibly waiving the conflicts inherent in Debrow's joint representation.[12] But not all conflicts are waivable.

For example, as soon as the first client seeks to assert a claim against another, the matter becomes a nonconsentable conflict. No amount of waivers, however informed, can cure direct adversity where one client is asserting claims against another client.[13] Nor can informed consent cure a conflict that precludes a lawyer from providing diligent representation to both clients.

It is hard to conceive how a lawyer could diligently represent two clients, one of whom accuses the other of a crime. As the comments to ABA Model Rule 1.7 state, "if the relationship between the [commonly represented] parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by the common representation is not very good." [14]

Even if the electors' finger pointing does not amount to a nonconsentable conflict, informed consent in these instances can be practically impossible to obtain. "Informed consent" is a defined term and requires that a lawyer communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." [15] But when one client tells a lawyer to keep secrets from another commonly represented client, the lawyer is at an impasse.

As a general matter, a lawyer cannot "reveal information relating to the representation of a client" absent an applicable exception.[16] As between commonly represented clients, the prevailing wisdom is that a lawyer should inform each commonly represented client that no information can be held inviolate from the other.[17]

But not all lawyers give that advice while seeking to obtain informed consent, and not all clients follow that advice if given. Imagine you represent Bob and Joe as part of a joint defense.

Bob tells you, "Joe committed robbery last year, but don't tell him I told you that." You have but one choice: withdrawal. Why?

Because to get Joe's consent to continue the representation — necessary pursuant to ABA Rule 1.7 — would require you betray your loyalty obligation to Bob. Failure to tell Joe what Bob told you would be a violation of your ABA Rule 1.4 duty of communication to Joe. The clients are adverse and informed consent is impossible to obtain, so you must withdraw.

## **When a Conflict Arises, Is Withdrawal as to All Clients Necessary?**

In her motion to disqualify Debrow from her representation of all 10 remaining electors, the DA argued that the

potentially incriminating information ... gained by Debrow concerning each of her 10 clients in the course of her simultaneous representation is undoubtedly vast. The serious potential that any of that information might be used to the disadvantage of a former client, should Debrow be allowed to continue in her representation of even just one of the 10, must be a matter of grave concern for the Court.[18]

The reference to a former client very likely alludes to Debrow's former representation of Shafer. Put simply, if Debrow's remaining clients have incriminating information about her former client that could advantage them, Debrow has a conflict.

The accuracy of that allegation remains to be seen. But what is always true is that a lawyer's duty to provide diligent and zealous representation to current clients cannot supersede her obligations to former clients.

ABA Model Rule 1.9 prohibits a lawyer from using information relating to a prior representation to the detriment of her former client absent informed consent.[19] To the extent that Debrow has incriminating information about her former client Shafer, she is handicapped in her ability to use it in defense of her remaining 10 clients.[20] And that would make her representation untenable.

### **Takeaways**

The Fulton County DA's attempt to disqualify Debrow from her representation of the 10 remaining electors is likely part of a strategic play to secure plea bargains and cooperation agreements that would implicate more senior figures in the plot. But it also has critical implications for the lawyers in less high-profile joint representations.

Attorneys should exercise caution when representing multiple clients related to the same conduct. Particular diligence is required when representing multiple criminal defendant clients. While conflicts will not always arise, the more related the clients and the closer the factual similarity between their cases, the greater the odds.

As a practical matter, if you choose to represent multiple clients in a related matter, you should seek written informed consent regarding the representation, regardless of whether you perceive a conflict at the outset of the representation. It is easier to do so as a general practice than to risk having to address why you failed to foresee a conflict.

When the conflict becomes nonconsentable, withdrawal is the answer, often from all related representations. For this reason, it is essential to learn as much as feasible about the underlying facts before agreeing to take on a common representation, gain consent at the outset of the representation and remain vigilant for conflicts which may arise during the representation.

Paradoxically, when it comes to conflicts, sometimes the only way to zealously represent the client's interests is to withdraw.

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*Hilary Gerzhoy is a partner and Grace Wynn is an associate at HWG LLP.*

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[1] Mot. to Quash and Disqualify, In re Special Purpose Grand Jury, Case No. 2022-EX-000024 (Super. Ct. Fulton Cnty. Ga. July 19, 2022), available at <https://www.documentcloud.org/documents/22089602-motion-to-quash-subpoena>.

[2] Certificate of the Votes of the 2020 Electors from Georgia, National Archives and Records Administration, Office of the Federal Register (Dec. 14, 2020), available at <https://s3.documentcloud.org/documents/20493986/nara-records-regarding-invalid-electors-slates-nara-21-0174-a.pdf>. Each of the electors "signed a certificate declaring falsely that then-President Trump had won the 2023 presidential election and declaring themselves the state's 'duly elected and qualified' electors even though Joe Biden had won the state and a slate of Democratic electors was certified." Kate Brumback, Georgia electors may face charges in election probe, Associated Press News (July 19, 2022), <https://apnews.com/article/2022-midterm-elections-biden-georgia-presidential-donald-trump-5f8bf7a11225f75b44309806ce5c5412>.

[3] Amy Gardner, 'I just want to find 11,780 votes,' The Washington Post (January 3, 2021), available at [https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555\\_story.html?itid=lk\\_inline\\_manual\\_18&itid=lk\\_inline\\_manual\\_27&itid=lk\\_inline\\_manual\\_29&itid=lk\\_inline\\_manual\\_33&itid=lk\\_inline\\_manual\\_30&itid=lk\\_inline\\_manual\\_31](https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html?itid=lk_inline_manual_18&itid=lk_inline_manual_27&itid=lk_inline_manual_29&itid=lk_inline_manual_33&itid=lk_inline_manual_30&itid=lk_inline_manual_31) b.

[4] See *In re Special Purpose Grand Jury*, Case No. 2022-EX-000024 (Super. Ct. Fulton Cnty. Ga.). While the special grand jury's report is confidential, the panel's forewoman has stated that the grand jury recommended indictment of several individuals. See Matthew Brown, 5 takeaways from the Georgia grand jury forewoman's comments on Trump probe (February 22, 2023) available at [https://www.washingtonpost.com/politics/2023/02/22/georgia-grand-jury-forewoman-emily-kohrs/?itid=lk\\_inline\\_manual\\_27](https://www.washingtonpost.com/politics/2023/02/22/georgia-grand-jury-forewoman-emily-kohrs/?itid=lk_inline_manual_27).

[5] Order on Mot. to Disqualify at 5, *In re Special Purpose Grand Jury*, Case No. 2022-EX-000024 (Super. Ct. Fulton Cnty. Ga. Nov. 30, 2022), available at <https://www.law360.com/articles/1553841/attachments/0>. The court stated in an email to all parties that the arrangement was reached based on the "impracticability and ethical mess of simultaneously representing eleven clients who, despite their lawyers' protestations to the contrary, were differently situated." Liz Dye, Fulton DA Moves To Disqualify Attorney For Fake Electors, Offering Glimpse Into Investigation, Above the Law (Apr. 19, 2023), <https://abovethelaw.com/2023/04/fulton-da-moves-to-disqualify-attorney-for-fake-electors-offering-glimpse-into-investigation/>.

[6] If true, it amounts to much more than a conflict of interest—it is a fundamental breach of a lawyer's duty to her client not to relay offers of immunity. Model Rules of Pro. Conduct r. 1.4 cmt. 2 (Am. Bar Ass'n 2023) ("[A] lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance[.]").

[7] Mot. to Disqualify at 4, *In re Special Purpose Grand Jury*, Case No. 2022-EX-000024 (Super. Ct. Fulton Cnty. Ga. Apr. 18, 2023), available at <https://www.fultonclerk.org/DocumentCenter/View/1905/SPGJ-MOTION-TO-DISQUALIFY-ATTY-KIMBERLY-BOUROUGHS-DEBROW> ("Mot. to Disqualify").

[8] Model Rules of Pro. Conduct r. 1.7(a) (Am. Bar Ass'n 2023).

[9] *Id.* at r. 1.7(b). Abstaining from conflicted relationships is of particular importance because "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." *Id.* at r. 1.7 cmt. 1.

[10] Id. at r. 1.7 cmt. 8.

[11] Id.

[12] Mot. to Disqualify at 8.

[13] While "direct adversity" is often used when one client is directly suing another, it also applies when "a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit." Model Rules of Pro. Conduct r. 1.7 cmt. 6 (Am. Bar Ass'n 2023).

[14] Id. at cmt. 29.

[15] Model Rules of Pro. Conduct r. 1.0(e) (Am. Bar Ass'n 2023).

[16] Model Rules of Pro. Conduct r. 1.6 (Am. Bar Ass'n 2023).

[17] See Model Rules of Pro. Conduct r. 1.7 cmt. 31 (Am. Bar Ass'n 2023).

[18] Mot. to Disqualify at 8.

[19] Model Rules of Pro. Conduct r. 1.9 (Am. Bar Ass'n 2023).

[20] Whether an advanced waiver to such a conflict would be deemed effective depends upon the language of the waiver and circumstances surrounding the waiver. See Model Rules of Pro. Conduct r. 1.7 cmt. 22 ("The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails....In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).")