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Conflicts Part 3: Eliminating Conflicts in the First Place

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This month we conclude our three-part series on conflicts. In the first, we looked at why conflicts matter. In the second, we examined the key ingredients for a conflict waiver. This month, we'll talk about how to structure a representation to eliminate conflicts in the first place.

We've discussed in past columns why defining the scope of a representation at the outset is important—including confirming who your client will be and what you will be responsible for. But, there is another potentially significant reason to define the scope of a representation: you may be able to eliminate potential conflicts before they ever appear on the horizon.

DR 5-105 defines multiple current client conflicts here in Oregon and a relatively recent Oregon State Bar ethics opinion—2000-158—walks through the steps in analyzing whether a multiple current client conflict exists. (They are available on the OSB's web site at www.osbar.org.) Both begin with the touchstone that there has to be *adversity* in the legal positions of multiple clients for there to be a conflict. Eliminate the adversity (or the potential for adversity in the matter the lawyer is handling) and the potential conflicts will likely be eliminated, too. Adversity can be eliminated by structuring the representation at

the outset to handle only those aspects of a matter where the positions of multiple clients are in concert.

Although this technique can be used in some instances to eliminate multiple client conflicts in different matters, it is most commonly employed in situations where a single lawyer is handling a single matter jointly for multiple clients. Two examples from my other practice areas illustrate how this works in the joint representation context.

In products liability cases, it is common for dealers to tender the defense of a case to the manufacturer and for both to want to use the same lawyer to defend them. But, what about the possibility of "liability shifting" defenses or outright cross-claims between the manufacturer and the dealer for modifications of the product by the dealer which would create a conflict for the defense lawyer? If the manufacturer has accepted the tender without reservation, then it has effectively eliminated that defense from the case and, as a result, the defense lawyer has no conflict. Similarly, if the manufacturer and the dealer have agreed (without the defense lawyer acting as a broker between them) to reserve any claims and other liability-shifting issues between them to a later proceeding with other counsel, then, again, the lawyer has no conflict in defending them in the primary action against the plaintiff.

In condemnation cases, it is also common for multiple interest holders in a property to use the same lawyer. Under Oregon law, condemnation trials are

bifurcated by statute—the first phase is to a jury with the sole focus being the overall value of the property interests involved and the second phase is to the court for dividing the overall total among the various interest holders. If there is a preexisting agreement between the property owner and, for example, tenants on how condemnation proceeds are to be divided, then they have effectively eliminated that issue from the case and, as a result, a single lawyer has no conflict. Similarly, if the various interest holders agree (again without the lawyer acting as a broker between them) to arbitrate their respective claims to the overall "pot" in a separate proceeding with other counsel, then, again, the single lawyer has no conflict in representing them jointly in the primary action against the public agency.

Structuring or limiting representations won't eliminate all conflicts and can have other practical constraints if the resulting scope is too narrow to represent the clients effectively. In many situations, however, it can be a very useful tool for managing conflicts.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon

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