fucile & reising | LLP

November 2015 *Multnomah Lawyer Ethics Focus*

Common Problems with Common Representation

By Mark J. Fucile
Fucile & Reising LLP

Common or "joint" representation is a frequent occurrence for many lawyers in a wide variety of practice areas. On the plaintiffs' side in litigation, for example, a single lawyer or firm may take on several clients who have been injured in the same automobile accident. On the defense side, a single lawyer or firm may represent both a national manufacturer and a local seller in a product liability case. Common representation is generally permitted as long as the respective positions of the jointly represented clients are—and remain—aligned. At the same time, if a multiple client conflict between jointly represented clients develops—under RPC 1.7, the multiple client conflict rule—the result can be significant because, as Comment 29 to the corresponding ABA Model Rule notes, the lawyer or firm may be required to withdraw altogether. Over the past two years, the Oregon Supreme Court has addressed common representation conflicts twice—with one case focusing on the early stages and the other addressing the later stages. In his column, we'll look at both.

Before we do, however, three qualifiers are in order. *First*, Oregon lawyers have long had a duty of reasonable care to evaluate potential conflicts throughout the course of a representation (*see, e.g., In re Johnson*, 300 Or 52, 61, 707 P2d 573 (1985)). Therefore, even if there are no conflicts at the outset of a joint representation, the lawyer needs to continue to monitor for potential

conflicts as the case proceeds. *Second*, if a conflict develops between jointly represented clients during the course of a case, it is ordinarily not waiveable because it is occurring in the same matter (*see, e.g., In re Barber*, 322 Or 194, 199-200, 904 P2d 620 (1995)). As noted, therefore, the lawyer may need to withdraw altogether. Third, although potential conflicts are a key facet when evaluating the viability of common representation, the implications of joint privilege should also be explained to the clients concerned (*see, e.g., U.S. v. Gonzalez*, 669 F3d 974, 982 (9th Cir 2012)). Jointly represented clients, for example, should understand that the lawyer generally cannot keep their individual confidences on matters of common application.

Early Stages

In re Ellis/Rosenbaum, 356 Or 691, 344 P3d 425 (2015), involved two very experienced business litigators who represented multiple officers and employees of a local high tech company during the early phases of an SEC investigation. At that point, the SEC was conducting individual interviews, the positions of the interviewees were aligned and it was in their shared interest to learn what direction the SEC was taking in the interviews. Later, when the SEC (and a separate criminal investigation) began focusing on specific individuals, the lawyers transitioned out of the joint representation. The Bar, however, charged

the lawyers with having multiple client conflicts among their jointly represented clients. The Supreme Court disagreed.

In doing so, the Supreme Court underscored two important points. First, it reaffirmed long-standing Oregon law (principally *In re Samuels/Weiner*, 296 Or 224, 674 P2d 1166 (1983)) emphasizing that whether a conflict exists is evaluated at the time of the representation involved—not whether there is a theoretical possibility that a conflict may develop later depending on speculative future events (356 Or at 713). Second, the Supreme Court defined what it means for interests to be "adverse." The Supreme Court looked to the ordinary dictionary meaning of the term, noting it means "opposing," "hostile," "antagonistic" or "inconsistent" (*Id*.). By taking that practical approach, the Supreme Court provided a common sense test for lawyers to gauge whether or not commonly represented clients' positions are aligned.

Later Stages

In re Gatti, 356 Or 32, 333 P3d 994 (2014), involved a very experienced personal injury lawyer who had represented 15 clients in clergy abuse claims that resolved against the principal defendant at a court-supervised mediation. Although the evidence was uniform that the lawyer had done a stellar job for his clients, one later complained that he hadn't gotten a good enough deal and filed

a bar complaint against the lawyer. The Bar argued that the lawyer had developed a conflict when the mediator had been able to extract substantially more from the settling defendant than the sum total of the clients' individual settlement authority and the lawyer divided the surplus among the clients using an agreed formula. The Supreme Court concluded that suggesting a formula might benefit one client over another and, therefore, constituted a conflict.

Under the particular facts, the Supreme Court did not reach the issue of whether the clients on their own might agree on an allocation method. OSB Formal Ethics Opinion 2005-158 (at 434), however, suggests that approach and that a lawyer can assist the clients with the logistics and information after they have independently chosen a process among themselves.

Summing Up

Common representation can provide real benefits to clients ranging from cost savings to leveraging the knowledge a single lawyer or firm can bring to a case. At the same time, lawyers need to be sensitive to potential conflicts both when undertaking a common representation and along the way.

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 State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA NWLawyer (formerly Bar News) and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.