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Unraveling:
When Conflicts Develop in Joint Representations

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Imagine this scenario:

> You are a litigator defending an employment claim against both a company manager and the company. You had recommended that each have separate counsel, but the company did not want to pay for a second lawyer. You went along with that because the company is a good client and because there were no conflicts at the outset—with both the manager and the company asserting that the incident at issue never happened. You are now defending the manager's deposition. The manager just admitted on the record that the offending incident did, in fact, occur. If the company had known that when it happened, its policy and practice would have resulted in the manager's immediate termination. When the manager's unanticipated testimony came spilling out, you recessed the deposition. What now?

Joint representation is common in many practice areas ranging from business formation to litigation. Most of the time, joint representations proceed without event. When conflicts develop mid-matter, however, the unraveling can be very uncomfortable for all concerned. In this column, we'll look at two aspects of that unraveling. First, what happens when conflicts develop? Second, are there steps that lawyers can take up front to address conflicts that may develop later?

When Conflicts Develop

RPC 1.7(a)(1) controls conflicts between current clients and defines them as occurring when "the representation of one client will be directly adverse to another client[.]" The Oregon Supreme Court parsed the meaning of the word

"adverse" within the joint representation context in *In re Ellis/Rosenbaum*, 356 Or 691, 713, 344 P3d 425 (2015). The Supreme Court took a practical approach and looked to the plain-language dictionary definition: "'acting against or in a contrary direction.'" The Supreme Court also reviewed its earlier decisions in concluding that adversity extends beyond outright cross-claims to include situations in which commonly represented clients' legal positions have become opposed—such as when one client wants to "point the finger" at another to shift the risk of an unfavorable outcome. In our opening illustration, for example, the respective legal positions of the two defense clients are no longer aligned because the company will likely want to distance itself from the manager.

When a conflict arises mid-matter, the focus then usually turns to the question of whether the lawyer must withdraw altogether. Comment 29 to ABA Model Rule 1.7 on which Oregon's version of the rule is now patterned, supplies the general answer: "Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails." This stark result flows directly from the corresponding provision in RPC 1.7 governing waivers between current clients. Under RPC 1.7(b)(3), a waiver is only available if "the representation does not obligate the lawyer to contend something on behalf of one client that the lawyer has a duty to oppose on behalf of another

client[.]" This approach to "non-waivable" conflicts is consistent with long-standing Oregon case law, such as *In re Barber*, 322 Or 194, 199-200, 904 P2d 620 (1995), where a lawyer was disciplined for failing to withdraw once a conflict developed between two jointly represented clients.

In theory, one of the clients could agree to become a former client voluntarily and then waive the former client conflict involved. Under RPC 1.9(a), all former client conflicts can be waived by the clients involved (both current and former) because our duties are narrower to a former client than to a current client. In practice, however, former clients are usually reluctant to permit their old lawyer in the same matter to represent another party that has become an adversary. Further, under the so-called "hot potato rule" (discussed in OSB Formal Opinion 2005-11 n. 1 (rev 2016) and *Unified Sewerage Agency of Washington County v. Jelco*, 646 F2d 1339, 1345 n. 4 (9th Cir 1981)) a lawyer cannot "fire" a client to turn the client involuntarily into a former one.

Anticipating Conflicts

Given the disruption that inevitably occurs when conflicts develop mid-matter, lawyers should carefully assess the possibility of conflicts when they are considering taking on a joint representation. Two approaches are available if conflicts are reasonably anticipated.

The first is to only represent one client. Typically, this will be the lead party—for example, the company in our opening illustration. Because the lawyer is only representing one client, a later rift between co-parties will not trigger a multiple-client conflict. At the same time, the lead counsel can coordinate with separate counsel for the other and most communications between them should be protected under the common interest doctrine reflected in OEC 503(2)(c).

The second is to incorporate a provision into a joint representation agreement under which one client agrees to become a former client in the event a conflict develops and prospectively waives any former client conflict involved. Oregon permits advance waivers of potential future conflicts under OSB Formal Opinion 2005-122 (rev 2016). The key to any waiver, however, is "informed consent," which under RPC 1.0(g) is only effective if the lawyer adequately explained the material risks and alternatives. A potential problem with this second approach is that a client will claim later that the client did not understand the advance waiver and, consequently, the waiver is invalid because the requisite informed consent was not secured.

ABOUT THE AUTHOR

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