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## **Alaska Bar Opinion on Representing Parties and Witnesses in the Same Case**

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Earlier this year, the Alaska Bar issued an ethics opinion surveying a recurring issue for litigators: should you represent an occurrence witness in the same case in which you are representing a party? Although framed by the Alaska RPCs, the opinion draws from authority nationally and offers a useful summary of the potential risks involved. Its conclusion is also consistent with a similar, albeit somewhat dated, Washington advisory opinion from 1994—Advisory Opinion 1569. The Alaska Opinion—2020-01 (2020)—is available on the Alaska Bar web site at [www.alaskabar.org](http://www.alaskabar.org).

The Alaska opinion, like its earlier Washington counterpart, acknowledges that, in theory, one law firm can represent both a party and fact witnesses if their respective positions are aligned fully. Again like its Washington counterpart, the Alaska opinion then focuses primarily on the potentially disqualifying conflict that can occur if a represented witness' testimony turns out to be adverse to the party the lawyer is also representing. In that event, the lawyer will have a multiple-client conflict under Alaska RPC 1.7(a)(1). Because the conflict is in the same matter, it is not waivable. In light of the conflict, the lawyer (and the lawyer's firm) would need to withdraw altogether or face potential disqualification. The Alaska

opinion's analysis and conclusions on these points track WSBA Advisory Opinion 1569.

Witness-related issues have also surfaced in Washington litigation. *Newman v. Highland School District No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2016), for example, addressed privilege for represented and non-represented fact witnesses. In doing so, *Newman* was painted against the backdrop of a group of the defendant's current and former employees who had been represented at their depositions by the same law firm representing the defendant. Similarly, in *FMC Technologies, Inc. v. Edwards*, 420 F. Supp.2d 1153 (W.D. Wash. 2006), the defendant's law firm was disqualified because it had earlier represented plaintiffs' key fact witness in related litigation.

The lesson of both the recent Alaska opinion and its earlier Washington counterpart is that lawyers—and their clients—need to carefully weigh the potential disqualification risk along with what may appear initially to be the cost-saving benefits of having the same law firm represent both a party and fact witnesses.

## ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.