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Court of Appeals Issues Rare Decision on Revoking Consent to Conflict Waiver

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Earlier this year, Division I of the Washington Court of Appeals issued a decision touching on an area of the Rules of Professional Conduct that is rarely litigated: revoking consent to conflict waivers. The decision was “unpublished” under General Rule 14.1, but is instructive nonetheless—both for its illumination of this comparatively “unplumbed” area of conflicts law and as an illustration of the result.

R.O. by and through S.H. v. Medalist Holdings, Inc., No. 81040-5-I, 2021 WL 672069 (Wn. App. Feb. 22, 2021) (unpublished), was painted against the backdrop of parallel federal criminal and state civil proceedings against two groups of related companies, Medalist and Backpage, and their executives. A law firm represented both corporate groups and the executives in the civil case under a set of joint representation agreements. In the criminal litigation, Backpage and its CEO pled guilty and, as a part of the plea deal, agreed to cooperate with the Government against Medalist.

After the guilty pleas, Backpage’s CEO notified the law firm that he was withdrawing from the joint representation agreement. The law firm, in turn, moved to withdraw from representing all of the Backpage defendants while continuing to represent the Medalist defendants. The CEO, however, objected to

the law firm continuing to represent Medalist. The trial court granted the law firm's motion to withdraw from representing the Backpage defendants—but also disqualified the law firm from continuing to represent the Medalist defendants. The Medalist defendants sought discretionary review, but the Court of Appeals affirmed the law firm's disqualification.

In doing so, the Court of Appeals relied primarily on Comment 21 to RPC 1.7:

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

The joint representation agreements were sealed by the trial court but the Court of Appeals described them generally as “conflict waivers” and “non-disqualification agreements.” Generically, these kinds of agreements often contain provisions under which jointly represented clients agree that if a conflict develops, the client creating the conflict will voluntarily become a former client of the law firm and prospectively waives any resulting former client conflict.

The Court of Appeals examined whether the CEO had validly revoked consent under Comment 21. It focused primarily on the phrase “material change in circumstances.” The Court of Appeals found that the guilty pleas met that standard. That left the law firm with an unwaived former client conflict. The Court of Appeals then concluded that the trial court was within its discretion in disqualifying the law firm as a remedy for the unwaived conflict notwithstanding the impact on the Medalist defendants.

Although lawyers sometimes assume that conflict waivers are “forever,” this recent decision is a pointed reminder that they can be revoked.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. 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 *Bar News* 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.