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Limited Fund Conflicts and a Practical Solution

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One of the most vexing conflicts for plaintiffs' counsel occurs when they are representing multiple claimants against the same defendant and it turns out that the funds available will not fully satisfy all of the claims involved. The problem is acute because it potentially pits clients against each other for the same limited fund. Because the conflict arises in the same litigation, it is generally not waivable and, if not addressed, the lawyer may need to withdraw. Although some limited fund conflicts can be anticipated, many only surface deep into a case.

In this column, we'll survey both the problem of limited fund conflicts and a practical solution.

The Problem

In re Barber, 322 Or 194, 904 P.2d 620 (1995), is one of the leading Oregon limited fund conflict decisions and is a ready illustration of how conflicts can develop in deceptively simple situations. The lawyer in *Barber* represented two plaintiffs in an automobile accident case. When the lawyer took the case, it appeared that the defendant had resources to cover both claims. As the case progressed, however, two developments joined to create a conflict. First, the defendant's insurance coverage was inadequate to satisfy both claims. Second,

one of the two clients' injuries proved more severe than the other—exacerbating the shortfall.

The lawyer did not tell either client about the conflict. A bar complaint followed after the clients later discharged the lawyer. The Supreme Court concluded that the lawyer had a non-waivable multiple-client conflict because the clients were pursuing the same limited fund. Although *Barber* was decided under the former Oregon Code of Professional Responsibility, Oregon State Bar Formal Opinion 2005-158 (rev 2015) reaches the same conclusion under the current rule—RPC 1.7.

Practical Solution

Formal Opinion 2005-158, which is also framed against the backdrop of an automobile accident case involving multiple claimants represented by the same attorney, suggests a practical solution: limit the scope of the representation going forward solely to obtaining the largest possible fund and leave the division of that fund to the clients—either on their own or represented by individual counsel.

RPC 1.2(b) allows a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." In the limited fund scenario, reducing the scope effectively eliminates

the conflict because the clients continue to share the goal of having the lawyer's work result in the largest possible fund and they remain free through separate counsel to advance their individual claims to that fund.

Formal Opinion 2005-158 is available on the Oregon State Bar web site and merits close review by lawyers wrestling with this problem. In implementing its recommended solution, three nuances should be underscored.

First, although RPC 1.2(b) does not require that "informed consent" be confirmed in writing, prudent risk management practice counsels carefully documenting both the limitation and the clients' consent in writing in the event there are any questions later.

Second, Formal Opinion 2005-158 notes (at 6) that "consent should be obtained no later than the time at which it is learned that the aggregate of defense resources is inadequate." In instances where there is at least a reasonable possibility of a limited fund scenario developing at some point, a provision covering this contingency may be incorporated into an original fee or related joint prosecution agreement. In other situations that arise unexpectedly later, Formal Opinion 2005-158 clearly permits the clients to agree to the limitation at that point. As *Barber* illustrates, however, the situation cannot simply be ignored. Comment 29 to ABA Model Rule 1.7 on which its Oregon

counterpart on multiple-client conflicts is based observes pointedly: "Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails." In other words, if the situation is not addressed, the lawyer will generally not be free to "pick and choose" which client to continue with but must withdraw altogether in light of the non-waivable conflict.

Third, Formal Opinion 2005-158 counsels that although the original lawyer cannot participate in dividing the fund assembled, that lawyer can provide information to the affected clients (or their separate counsel) to facilitate the process they have chosen—such as arbitration or mediation. There is an important wrinkle, however, on whether the lawyer can suggest a particular allocation mechanism to the clients involved. In *In re Gatti*, 356 Or 32, 44-46, 333 P3d 994 (2014), the Oregon Supreme Court concluded that a lawyer is generally free to include a particular allocation mechanism—such as arbitration—in a fee agreement or an associated joint prosecution agreement negotiated at the outset of a representation but cannot do so later. The analytical dividing line the Supreme Court drew in *Gatti* was that a lawyer is generally free to bargain at arms' length in forming an attorney-client relationship over the terms of a representation but, once formed, the lawyer cannot choose a particular formula or process because it may benefit some jointly represented clients more than

others. *Gatti* cautions that a lawyer facing this problem mid-matter should make clear that, in the absence of a provision included at the outset of the representation covering this contingency, it will be up to the clients—and not the lawyer—to choose the allocation method or formula.

ABOUT THE AUTHOR

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