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Uncomfortable Position: Conflicts Among Jointly Represented Clients

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Representing two or more clients jointly in the same case is relatively common for defense counsel in a wide variety of practice areas. A manufacturer and a distributor in a product liability case or a manager and a corporate employer in an employment case are but two recurring examples. In most instances, joint representations benefit all of the clients concerned and move forward without problems. When conflicts occur between jointly represented clients in the same case, however, the result can be stark: the defense lawyer—and the lawyer’s firm—are typically required to withdraw altogether. Occasionally, firms proactively plan for potential conflicts by receiving advance consent from one of the clients to continue representing the other if a conflict develops. As a practical matter, the remaining client in this scenario is often the “lead” defendant—the manufacturer or corporate employer in our opening examples. A recent Washington Court of Appeals disqualification decision, however, highlights that advance waivers are not necessarily a perfect solution. In this article, we’ll first briefly survey how conflict issues can arise in joint representations. We’ll then turn to the use—and the limitations—of advance waivers in this context.

Joint Representation Conflicts

RPC 1.7 governs conflicts among multiple current clients and associated waivers. Comment 29 to RPC 1.7 summarizes the difficult result if conflicts develop between jointly represented clients in the same case: “Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.”

Although outright claims between clients create conflicts, “adversity” for conflict purposes is much broader and under Comment 6 to RPC 1.7 also includes conflicting legal positions and “finger pointing” defenses among the jointly represented clients. Often, these conflicting positions only emerge well into a case. In *In re Carpenter*, 160 Wn.2d 16, 155 P.3d 937 (2007), for example, two jointly represented defendants appeared aligned at the outset of a case through an indemnity agreement but conflicts arose later when one of the defendants proved unable to perform on the indemnity. The lawyer in *Carpenter* did not withdraw when the conflicts developed and was later disciplined for continuing despite the conflicts.

When conflicts occur in joint representations, they are usually non-waivable under RPC 1.7(b), which governs waivers, because they are in the same case. Further, under the judicially created “hot potato rule” illustrated

locally in *Atlantic Specialty Insurance Company v. Premera Blue Cross*, No. C15-1927-TSZ, 2016 WL 1615430 (W.D. Wash. Apr. 22, 2016) (unpublished), a law firm is not permitted to unilaterally drop a client “like a hot potato” to “cure” a conflict with another firm client.

Advance Waivers

To address the risks of unanticipated conflicts that may only surface deep into a case, firms sometimes use a construct under which one (or potentially more) of the jointly represented clients agrees to voluntarily become a former client if a conflict develops and waives the resulting former client conflict in advance. RPC 1.9 permits waiver of all former client conflicts and Comment 22 to RPC 1.7 allows advance waivers. The key to any advance waiver, however, is whether, in the phraseology of Comment 22, “the client reasonably understands the material risks that the waiver entails.” Given the inherent complexity of this construct, the potential flaw in this solution is that the client who is forced out may claim later that they did not understand the waiver or that circumstances had changed and, therefore, the waiver should be revoked or is otherwise unenforceable. The recent Court of Appeals decision noted above reinforces this point.

R.O. by and through S.H. v. Medalist Holdings, Inc., No. 81040-5-1, 2021 WL 672069 (Wn. App. Feb. 22, 2021) (unpublished), involved parallel criminal and civil litigation against two corporate groups, 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 case, Backpage and its CEO (represented by different counsel) pled guilty and as a part of the plea deal, agreed to cooperate with the prosecution against Medalist. The law firm in the civil case then moved to withdraw from representing the Backpage defendants while continuing to represent the Medalist defendants. Although the joint representation agreements were filed under seal with the court, the general description suggests they were similar to the advance waiver construct discussed above. Backpage's CEO objected to the law firm continuing to represent the Medalist defendants. The trial court allowed the law firm to withdraw from representing the Backpage defendants but disqualified it from continuing to represent the Medalist defendants. The Court of Appeals affirmed. In doing so, the Court of Appeals relied on Comment 21 to RPC 1.7, which allows clients to revoke a waiver when "a material change in circumstances" occurs. The Court of Appeals found that the guilty plea met that

standard, allowed the CEO to revoke the waiver and affirmed the law firm's disqualification for an unwaived conflict.

As an "unpublished" opinion, *Medalist* is not precedential. It is, nonetheless, a telling illustration of the unique potential vulnerability of advance waivers in the joint representation context. That is not necessarily a reason to avoid this construct. At the same time, *Medalist* underscores that they can be an imperfect solution to a difficult problem.

A more conventional approach is to assign separate counsel to the defendants involved and then to have their lawyers coordinate the defense as appropriate. Although potentially more expensive, this approach also eliminates the risk of joint representation conflicts and the associated cost to the clients (or their carriers) of retaining replacement counsel well into a case.

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Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management 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 *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author

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