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Common Problems with Common Representation

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Common or “joint” representation is a frequent fact of life for many lawyers in a wide variety of areas in civil practice.¹ In the litigation context, for example, a lawyer may take on two defendants in the same case. In business settings, a lawyer may be advising multiple family members. Common representation is generally permitted as long as the respective positions of the jointly represented clients are—and remain—aligned. Even permitted common representations, however, can raise nuanced confidentiality issues. In this column, we’ll look at both conflicts and confidentiality in the common representation context. We’ll then close by surveying the potential consequences to lawyers who don’t carefully structure common representations at the outset and monitor them along the way.

Conflicts

Comments 29 through 33 to RPC 1.7, which addresses conflicts among current clients, warrant close review by lawyers contemplating a common representation.² Comment 29 summarizes both the predicate need for the common clients to be aligned and the result if adversity develops among them:

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the

result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.³

It is important to stress that “adversity” for conflict purposes means more than simply asserting a claim against another client. Comments 6 and 7 to RPC 1.7 discuss the phrase “directly adverse” and underscore that taking opposing legal positions also meets that definition in both litigation and transactional settings. In *In re Carpenter*, 160 Wn.2d 16, 155 P.3d 937 (2007), for example, a lawyer was disciplined for taking conflicting legal positions for commonly represented defendants in commercial litigation. Similarly, in *In re Botimer*, 166 Wn.2d 759, 214 P.3d 133 (2009), a lawyer was disciplined for taking conflicting legal positions for commonly represented clients in a business advisory context.

As Comment 29 notes, if it is apparent that conflicts exist at the outset of a matter, the lawyer should not take on the common representation.⁴ *Gustafson v. City of Seattle*, 87 Wn. App. 298, 941 P.2d 701 (1997), for example, revolved around the contention that a conflict between a driver and a passenger in an automobile accident case was so apparent from the beginning that the lawyer should not have taken on their common representation.⁵ More often, however, the clients' disparate interests only develop mid-matter. In *Carpenter*, for example, an indemnity agreement that appeared to align two defendants at the outset later came into dispute between them when the indemnitor did not have the financial resources to perform.⁶ In still other instances, the conflict may arise near the end of a case during settlement. *Matter of Lauderdale's Guardianship*, 15 Wn. App. 321, 549 P.2d 42 (1976), for example, involved a conflict that surfaced in attempting to allocate settlement proceeds among jointly represented claimants in a wrongful death case.⁷

Comment 29 to RPC 1.7 notes the difficult result if a conflict develops among the clients in a common representation: "Ordinarily, the lawyer will be forced to withdraw from representing all of the clients[.]" The reason is simple. Conflicts that arise in the same matter are non-waivable under RPC 1.7(b).⁸ Moreover, under the colorfully-named "hot potato" rule, a lawyer cannot "fire" a

current client to “cure” a conflict or, in the vernacular of this judicially-created rule, drop a client like a “hot potato.”⁹

Reflecting these constraints, law firms sometimes structure common representations from the outset so that one (or more) of the commonly represented clients agrees that in the event of a conflict, the client involved will voluntarily become a former client and prospectively waives the resulting former client conflict. In theory, all former client conflicts are waivable under RPC 1.9 and Comment 22 to RPC 1.7 permits advance waivers of future conflicts.¹⁰ In practice, however, “outplaced” clients may contend later that they did not understand what they were agreeing to and object to the law firm remaining in the case. In *R.O. by and through S.H. v. Medalist Holdings, Inc.*, 2021 WL 672069 (Wn. App. Feb. 22, 2021) (unpublished), for example, a law firm using this construct was disqualified when a conflict arose and the outplaced client revoked his earlier consent.¹¹ In short, the inherent complexity of this theoretical construct leaves it vulnerable precisely when a law firm tries to rely on it.

In other instances, law firms can avoid conflicts by limiting the scope of the representation under RPC 1.2(c)—which permits limitations as long as they are reasonable under the circumstances and the clients consent. For example, a law firm might represent a manufacturer and a distributor in defending a product

liability claim by structuring the representation so that any potential cross-claims are reserved for later resolution in a different proceeding through separate counsel.¹² Similarly, a plaintiffs' firm might structure its representation so that in the event a defendant's assets are insufficient to fully satisfy the commonly represented clients' claims, the firm's representation is limited to assembling the largest possible fund and the clients' competing interests in that fund are then allocated through an agreed mechanism using separate counsel.¹³

Confidentiality

Comments 30 and 31 to RPC 1.7 focus on the confidentiality aspects of common representation.¹⁴ They emphasize that although privilege protects confidential attorney-client communications from those beyond the common representation, privilege does not apply in the event of later litigation among the commonly represented clients over the matter concerned. Similarly, the comments stress that a lawyer cannot generally withhold information from some of the commonly represented clients that is material to the joint representation.¹⁵ The comments point out that this required sharing of information reflects both the duties of loyalty and communication to all of the clients involved. Although not part of the comments, related evidence law generally holds that one commonly represented client cannot waive privilege for others in a joint representation.¹⁶

Reflecting the sensitivity and the potential complexity of confidentiality issues in this context, Comment 31 advises that “[t]he lawyer should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.” Prudent practice suggests that the lawyer use the informed consent process to also warn the clients of the financial costs involved if a conflict develops and they need to obtain separate replacement counsel. Prudent practice also suggests using the engagement agreement to confirm that based on reasonably available information, the clients’ positions appear aligned at the outset—which, as discussed earlier, is the foundation on which common representation rests. Although “informed consent” under Comment 31 does not require written confirmation, risk management considerations counsel memorializing both the advisories and the clients’ consent in writing in the event there are any questions later.¹⁷

Consequences

The potential consequences for lawyers who do not carefully structure common representations at the beginning and monitor them closely along the way are many, varied and difficult. In some of the examples discussed above, the lawyers involved were disciplined. In others, their law firms were disqualified. When common representations unravel, the allegations left in their wake often run along the lines of the lawyer supposedly favored one client over the other to the “disfavored” client’s detriment. That tenor, in turn, lends itself to being recast as civil damage claims for legal malpractice or breach of fiduciary duty. Still others involved the lawyer’s efforts to collect a fee, with, for example, the former client in *Gustafson* claiming that her former lawyer’s attorney lien was unenforceable because he had a conflict from the outset.

These potential risks do not mean that common representations should necessarily be avoided. At the same time, the risks suggest that lawyers should not enter into common representations reflexively but, rather, should reasonably evaluate the specific circumstances before proceeding and continue to monitor them as the matter progresses.

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¹ This column focuses on common representation in civil matters. Although multiple client representation in criminal cases is not prohibited outright, the conflicts typically presented—such as plea offers contingent on testifying against co-defendants—effectively make common representation in criminal cases rare. See generally Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering* § 12.19 (rev. 4th ed. 2020) (surveying common representation and associated conflicts in criminal cases).

² Comment 41 to RPC 1.7 addresses common representation by governmental counsel. Restatement (Third) of the Law Governing Lawyers §§ 128-130 (2000) (Restatement) also address common representation.

³ Comment 33 notes a related principle that a client in a common representation also retains the right to discharge the lawyer.

⁴ If it appears from the outset that common representation will not work, a practical option is to have separate law firms represent the clients involved while coordinating their efforts as appropriate.

⁵ The Court of Appeals in *Gustafson* found that there were insufficient facts in the appellate record on this point and remanded the case to the trial court for further proceedings. 87 Wn. App. at 304-05.

⁶ See 160 Wn.2d at 19-21.

⁷ RPC 1.8(g) deals with a separate and much more complex set of issues arising out of common representation: aggregate settlements. Although the term “aggregate settlement” is not defined in the rule, it ordinarily occurs when commonly represented clients are presented with a single settlement offer on an “all or nothing” basis or the offer otherwise links their individual allocations. See generally ABA Formal Op. 06-438 (2006) (addressing ABA Model Rule 1.8(g)). Although aggregate settlements are not prohibited, they typically involve extensive disclosure to the clients involved. *Id.* See also *In re Gatti*, 333 P.3d 994 (Or. 2014) (discussing Oregon’s version of the aggregate settlement rule and surveying authorities nationally in a case involving multiple plaintiffs); American Law Institute, *Principles of Aggregate Litigation* § 3.16 (2010) (identifying the characteristics of aggregate settlements).

⁸ See, e.g., *In re Cellcyte Genetic Corp. Securities Litigation*, 2008 WL 5000156 at *4 (W.D. Wash. Nov. 20, 2008) (unpublished) (disqualifying law firm for non-waivable conflict between clients in the same matter). RPC 1.16(a)(1) states the corollary principle that a lawyer must withdraw if “the representation will result in violation of the Rules of Professional Conduct[.]”

⁹ See, e.g., *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 at *8, *13 (W.D. Wash. Apr. 22, 2016) (unpublished) (applying the “hot potato” rule in disqualifying law firm); see generally *Unified Sewerage Agency of Washington County, Or. v. Jelco, Inc.*, 646 F.2d 1339, 1345 n. 4 (9th Cir. 1981) (discussing the analytical underpinnings of the rule).

¹⁰ See generally WSBA Advisory Op. 1950 (2001) (discussing this construct). See also ABA Formal Op. 05-436 (2005) (addressing advance waivers).

¹¹ Comment 21 to RPC 1.7 addresses revoking consent.

¹² See Peter R. Jarvis and Allison Martin Rhodes, *The Ethical Oregon Lawyer* at 10-29 4th ed. 2015) (discussing structuring representations to avoid conflicts using this example).

¹³ See generally Oregon State Bar Formal Op. 2005-158 at 6 (rev. 2015) (discussing this approach); see also *Matter of Lauderdale’s Guardianship, supra*, 15 Wn. App. at 325 (describing this approach before RPC 1.2(c) was adopted).

¹⁴ See also ABA Formal Op. 08-450 (2008) (surveying confidentiality issues when representing multiple clients in the same or related matters).

¹⁵ Comment 31 creates a narrow exception when the clients have agreed that the lawyer can maintain some separate confidential information: “In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.” Comment 31 then gives the example of an agreement permitting the lawyer to keep one client’s trade secret information confidential from the other when it will not affect the representation.

¹⁶ See generally *U.S. v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012) (surveying case law on this point); see also Restatement, *supra*, § 76, cmt. g and accompanying Reporter’s Note (same).

¹⁷ Comment 32 counsels that any limitations on the scope of the representation under RPC 1.2(c) should also be discussed with the clients. Again, prudent risk management suggests confirming these discussions and the clients' consent to any limitations in writing.