Positional Conflicts of Interest

None of us would consider representing the plaintiff in a case where her rights depend on a federal statute while, at the same time, in the same case, in front of the same judge, we represent the defendant whose defense to the claim is based on the argument that the statute is unconstitutional. Setting aside the prospect of being laughed at or worse by the judge, ER 1.7(a)(1) of Arizona's Rules of Professional Conduct[1] specifically prohibits a lawyer from representing one client whose interests are "directly adverse" to another client before the same tribunal, even if the clients attempt to consent to the representations.[2]

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But what about representing a client in an Arizona proceeding based on the same statute while representing a defendant in another unrelated case in New York alleging that the statute is unconstitutional? Or where the cases are being argued in the same court of appeals?

Traditionally, potential conflicts of this nature, called "positional" conflicts, didn't get much attention. It was just something lawyers did.[3] The first direct questioning of the issue that I have been able to find is an Arizona ethics opinion published in 1987.[4] The situation there involved two lawyers in the same firm, one representing an employee in a case concerning a statute in federal employment law, the other representing, in a different case, an employer defending an employment matter concerning the same statute. Both cases were on appeal to the Ninth Circuit Court of Appeals and, if one of the clients won in its appeal, the other would necessarily lose. Both clients had consented to the representations after consulting with counsel.[5]

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The Committee on the Rules of Professional Conduct appeared to be impressed with the care taken by the lawyers to get their clients' consent and, finding that the issue being appealed involved a purely legal argument, did not find an ethical violation under either ERs 1.7 (Conflict of Interest: Current Clients) or 1.10 (Imputation of Conflicts of Interest: General Rule). They pointed out that appellate judges are presumably trained to recognize that advocates are often required to take positions contrary to those previously taken by their partners when the interests of a client so require, even though the questioning at oral argument "may be somewhat uncomfortable" for the lawyers. The Committee summarized by saying that the opinion did not extend to other fact situations and would not apply if the Court of Appeals consolidated the cases for argument or granted a rehearing *en banc* to resolve disparate results by the two panels hearing the separate appeals.[6]

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Then a 1993 ABA ethics opinion[7] drew wider attention to the issues involved, emphasizing the effect that the conflict might have on each client's interest and the ability of a lawyer with divided loyalties to competently and diligently represent each client. This was followed some years later by a specific Comment [24] to Model Rule of Professional Conduct 1.7 when the rules were updated by the ABA in 2002. Comment [24] found its way into Comment [23] when Arizona adopted the Model Rules as what is now ER 1.7, which became effective in Arizona on Dec. 1, 2003. It's where we look first when confronted with a positional conflict problem.

Comment [23] starts by providing that the mere fact that a given lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients will not be considered a violation of ER 1.7, particularly if the representations are in unrelated matters. This would apply to both current and former clients. The Comment then goes on to emphasize what has become the central inquiry in positional conflict situations: If there is a "significant risk that the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case," then an ER 1.7 conflict of interest will be deemed to exist.[8]

The Comment then deals with what is perhaps the most difficult aspect of any positional conflict situation; i.e., what, if anything, you need to disclose to the clients involved.[9] Aside from wanting to avoid the ill will that could be generated when a client finds out for the first time after his case has been lost that you were in effect arguing against him in another courtroom in an unrelated case for another client, it should be remembered that the clients involved can agree and consent to the conflict as long as the adverse positions aren't being taken in the same case and they give informed consent, confirmed in writing.[10] Here, the Comment provides that the relevant factors include:

- where the cases are pending (if before the same judge, you had better get the clients' consents)
- whether the issue is procedural or substantive
- the "temporal relationship" between

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matters (if the other case for the other client was 10 years ago, there probably wouldn't be much of a problem)
- the significance of the issue to the immediate and long-term interests of the clients involved (you may disagree on this one, but let the client win)
- the clients' reasonable expectations in retaining you

Finally, care must be taken to determine whether the lawyer's personal interest in keeping a desirable ongoing relationship with one of the clients involved may become a factor in the adversarial enthusiasm and diligence exercised in the case.[11] This is a subjective question for the lawyer, but might be tested objectively later in any complaint brought by an unhappy former client. If you think it may be a problem, or if any of the clients refuse to consent to what is being proposed, then you should refuse one of the representations or withdraw from one or both of the matters. AZ AT

endnotes

1. Rule 42, ARIZ.R.S.CT.
2. Client consent is not an option when the representation involves "the assertion of a claim by one client against another client represented by the lawyer in the same litigation." By virtue of ER 1.7(b)(3), the conflict is deemed "nonwaivable."
3. A history of the development of the considerations involved can be found at GEOFFREY C. HAZARD, W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING (4th ed. 2014) at § 11.10.
4. Ariz. Ethics Op. 87-15 (Conflicts) (July 1987).
5. Informed consent confirmed in writing was not required for a client's consent to a conflict of interest in 1987. "Consultation" was required, defined as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question".
6. ER 1.7(a) (1) would apply in that situation and would thus be "nonwaivable" by virtue of ER 1.7(b) (3).
7. ABA Formal Op. 93-377 (Positional Conflicts) (Oct. 16, 1993). Since then, other jurisdictions have weighed in on the issue: *see, e.g.*, D.C. Ethics Op. 265 (Conflicts of Interest; Issues Conflict; Adoption) (March 20, 1996); Me. Ethics Op. 155 (Arguing Different Sides of Same Legal Issue in Unrelated Cases) (1997); and Ore. Ethics Op. 2007-177 (Conflicts of Interest; Disqualification; Imputed Disqualification; Appeals) (Feb. 2007). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §128, cmt. f (2000).
8. ER 1.7(a)(2); conflict will exist if lawyer's representation will be materially limited by responsibilities to another client.
9. ER 1.4 (Communication) provides, at subsection (a)(5), that a lawyer shall consult with the client about any relevant limitation on the lawyer's conduct (like avoiding conflicts of interest) otherwise not permitted by the Rules of Professional Conduct.
10. Both "informed consent" and "confirmed in writing" are defined terms set forth in ER 1.0 (Terminology) at subsections (b) and (e). Informed consent requires the lawyer to explain the material risks and available alternatives (like getting another lawyer) to what the lawyer is proposing.
11. ER 1.7(a)(2) also provides that a concurrent conflict may exist if the representation of a client will be materially limited by a personal interest of the lawyer.