Information You Must Give Joint Clients

Some years ago, we looked at a few of the considerations lawyers need to think about when engaging in what we call joint representations: i.e., where one lawyer or firm represents multiple clients in a single litigation or transactional matter.[1] Since then, there's been another excellent opinion[2] that should be read by every lawyer contemplating a joint representation, particularly as concerns the information the lawyer needs to communicate to the jointly represented clients in order to satisfy the requirement, found in ER 1.7 (Conflict of Interest: Current Clients) of our ethics rules,[3] that each client give "informed consent" to any situation where the lawyer's obligation to one client might impair his or her obligations to another client, always a concern in any joint representation. "Informed consent" is a defined term and, by virtue of ER 1.0 (Terminology) at subsection (e), "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

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First, let's recognize that joint representation is not in and of itself unethical. It is specifically addressed and discussed in Comments [28] through [32] to ER 1.7 and is often viewed as a way several persons with common interests can more easily afford legal representation, particularly where the appearance of a united front is desirable.

Second, being able to adequately communicate the risks of a given joint representation generally requires the lawyer to exercise sufficient diligence to acquire enough knowledge about the case to be able to understand what conflicts between the clients exist or are reasonably possible in the future so that they can be discussed and understood by the clients.

Third, lawyers need to realize that clients cannot be expected to understand the finer points of the duties of client confidentiality and the attorney–client privilege, both of which most probably will not apply as between joint clients if, later, their interests diverge and they end up litigating against each other. This means that the lawyer can't keep anything he or she is told or given by one joint client from being communicated or disclosed to the other joint client(s), and that communications seeking or giving legal advice between one joint client and the lawyer during the joint representation will not be considered privileged should they later become an issue in litigation between any clients no longer associated in the joint representation. Jointly represented clients need to fully understand these limitations and be aware of their implications.[4] It is the lawyer's responsibility to make sure this happens.

Lawyers need to be aware that multiple representations are a prime source of claims for breach of fiduciary duty and for malpractice as well as disciplinary complaints.[5] In view of this, lawyers need to tread carefully, especially because so many of the reported decisions involve differences that spring up between clients in a joint representation that have nothing to do with the way the lawyer has handled the case or the result of personal differences over which the lawyer has little, if any, control. Consider:

- It is not enough for the lawyer to simply warn the joint clients that there may be potential conflicts and ask them to waive whatever those conflicts turn out to be.[6]
- Although the communication necessary for implied consent need not take any particular form, the lawyer is generally required to orally discuss the specific potential risks and advantages of the joint representation with each client so that each has an opportunity to ask questions.[7]
- The lawyer should disclose that he or she may be forced to withdraw from representing all of the joint clients (and why) if a non-waivable conflict should later arise during the representation, and explain as well the delay and expense that might result in that event. This would, presumably, encourage one or more of the clients who have any reservations about the representation to seek

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their own lawyer.[8]

The adequacy of the required disclosures mandated under ER 1.7 ultimately depend on the circumstances of each individual case and the care taken by the lawyer to understand the potential conflicts that not only exist at the outset of the representation but that could arise "mid-stream"—such as the potential for conflicting testimony,[9] conflicting settlement positions[10] and whether the kinds of conflicts contemplated are capable of being waived.[11] This can require timely diligence on the part of the lawyer before the representation is even commenced.

endnotes

1. *Representing Multiple Parties in One Suit*, ARIZ. ATT'Y (Nov. 2004) at 10.
2. Ariz. Ethics Op. 07-04 (Joint Representation; Conflicts; Communication; Informed Consent) (Nov. 2007).
3. Rule 42, ARIZ.R.S.CT.
4. *See* Comments [29] and [30] to ER 1.7.
5. *See* references in ABA/BNA LAWYERS' MANUAL OF PROFESSIONAL CONDUCT at ¶ 51:306
6. *Iowa Supreme Court Disciplinary Board v. Clauss*, 711 N.W.2d 1 (Iowa 2006).
7. Comment [20] to ER 1.7; Ariz. Ethics Op. 07-04, *supra* note 2, at 4.
8. Ariz. Ethics Op. 07-04, *supra* note 2, at 6; Ariz. Ethics Op. 02-06 (Corporate Representation; Multiple Representation; Lawyer–Client Relationship; Confidentiality; Conflicts of Interest) (Sept. 2002).
9. To see how complicated a situation like this can get, *see Sellers v. Superior Court*, 742 P.2d 292 (Ariz. Ct. App. 1987).
10. *See* Ariz. Ethics Op. 07-04, *supra* note 2, at 5; ER 1.8(g), regarding aggregate settlements.
11. *See* ER 1.7(b)(1)-(b)(3) for the requirements of effective waivers.