



A Joint Client Retracts Previously Given Consent

In a recent column,¹ we looked at the information and explanation needed to be given by a lawyer to get the required informed consent concerning confidentiality of information and potential conflicts of interest before undertaking the joint representation of two or more clients.

But what happens if, after the representation is underway, one of the joint clients changes its mind and revokes the consent previously given? Does the lawyer have to withdraw from the entire representation, or can she continue representing the non-revoking clients who remain?

The ABA’s Model Rules of Professional Conduct, under Comment [21] (Revoking Consent) to Model Rule 1.7 (Conflict of Interest: Current Clients), specifically addressed this issue, providing that a joint client may always revoke a consent previously given and terminate the lawyer’s representation as to it. Whether the lawyer would be permitted to continue to represent the remaining joint clients depended upon the circumstances, “including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.”

Whether this would have been helpful in resolving a specific situation for Arizona lawyers became moot when it was decided that Comment [21] would not be incorporated into the Comments when the “new” ER 1.7² was adopted by the Arizona Supreme Court in 2003—leaving us to guess how the Arizona authorities may view the issue.

One clue has been given to us in Comment [4] to ER 1.7, providing that if a conflict arises after a representation has been undertaken and where more than one client is involved, whether the lawyer may continue to represent the remaining clients “is determined both by the lawyer’s ability to comply with duties owed to the former client [the revoking joint client] and by the lawyer’s ability represent adequately the remaining client or clients, given the lawyer’s duties to the former client.” In other words, continuing the representation of the non-revoking clients is not prohibited *per se* but is subject to other considerations, including those provided by the rules of professional conduct.

Let’s look at how other authorities have looked at the issue.

The question was specifically addressed in the RESTATEMENT THIRD.³ There, it is stated that whether the lawyer may continue the representation depends on whether the client was justified in revoking the consent and whether material detriment to the other

clients or the lawyer would result. The comment also states that if the revocation of a previously given consent was provided for in the lawyer’s engagement letter, the provisions so agreed upon would control.

The comment has been cited in an Arizona ethics opinion as deeming appropriate the continued representation by a lawyer in such a situation when so

provided in the engagement agreement.⁴ The comment also includes examples of when the revocation might be “justified” in determining whether the lawyer should be forced to withdraw, such as when a material change occurs in the factual basis on which the client gave informed consent, the shared lawyer begins to favor other joint clients, or another one of the joint clients takes harmful actions against the revoking client.

The gist of the RESTATEMENT view of the issue seems to be that if the revocation is justified, the lawyer must withdraw from all further representation of the remaining clients. This would appear to be contrary to the more lenient position taken in Comment [4] to ER 1.7, cited above, and is not

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Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics




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supported by other authorities that have considered the question. These authorities generally would allow the lawyer to continue representation of the remaining clients as long as she could do so within the rules regulating her continuing duties to former clients found in ER 1.9 (Duties to Former Clients).⁵

There is a notion that seems to be supported in these authorities that if the revocation of its consent by a single joint client would damage or work material harm on the remaining clients or to the lawyer if the lawyer is forced to withdraw completely from the representation, the revoking client should be estopped from objecting to the lawyer's continuing representation of those clients who remain. The answer to this issue will probably turn on the equities of each situation, much like the other cases seeking the disqualification of counsel because of claims of conflicts of interest.⁶

The possibility of a change of heart by any of the joint clients in a given representation, like other contingencies, can best be addressed by providing for it in advance in the lawyer's engagement letter. If it is agreed by all that the lawyer can continue representing the clients remaining after one or more leave the original group, it will then be the lawyer's decision—not that of the former clients—whether her ethical obligations addressed in ERs 1.7(a)(2) and ER 1.9(a) and (c) will allow her to remain as well. 

endnotes

1. *Information You Must Give Joint Clients*, ARIZ. ATT'Y (Nov. 2019) at 10.
2. Arizona Rules of Professional Conduct, Rule 42, ARIZ.R.S.C.T.
3. RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS (2000) at §122, comment f (Revocation of consent through client action or a material change in circumstances).
4. Ariz. Ethics Op. 02-06 (Corporate representation; multiple representation; lawyer-client relationship; confidentiality; conflicts of interest) (Sept. 2002).
5. D.C. Ethics Op. 317 (Repudiation of conflict of interest waivers) (Nov. 2019); N.Y.S. Bar Ethics Op. 903 (Revocation of consent to conflict) (Jan. 30, 2012); N.C. Ethics Op. 2007-11 (lawyer's duties when client revokes consent to conflict) (July 13, 2007).
6. *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981) (reliance of non-revoking client on waiver); *Interstate Props. v. Pyramid Co. of Utica*, 547 F. Supp. 178 (S.D.N.Y. 1982) (lawyer's long continuous relationship with non-revoking client and revoking client's knowledge thereof).