

Ethical Issues in Joint Representation

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RULE 1.7, MRPC

- ▶ Two types of concurrent client conflicts under Rule 1.7(a)
- ▶ Direct adversity – representation of one client will be directly adverse to another client
 - ▶ Direct adversity need not be in same matter in order to constitute a conflict
- ▶ Significant risk of material limitation
 - ▶ Lawyer's representation will be materially limited by:
 - ▶ Responsibilities to another client
 - ▶ Responsibilities to a former client
 - ▶ Responsibilities to third person
 - ▶ Lawyer's own interest

Consentable?

- ▶ The existence of a Rule 1.7(a) conflict is not the end of the analysis
- ▶ May go ahead with representation if all four of the factors in Rule 1.7(b) are met:
 - ▶ (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - ▶ (2) the representation is not prohibited by law;
 - ▶ (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - ▶ (4) each affected client gives informed consent, confirmed in writing.

INFORMED CONSENT (cont'd)

- ▶ Rule 1.0 (f) defines informed consent - “Informed consent” 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.
- ▶ Be specific—identify the specific material risks; identify available alternatives.

CONSENT TO FUTURE CONFLICTS

- ▶ Comment 22 – “The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding”
- ▶ “In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict non-consentable under paragraph (b).”

SPECIAL CONSIDERATIONS IN JOINT REPRESENTATIONS

- ▶ Comment 29 – “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.”

Special Considerations (cont'd)

- ▶ Comment 30 – “A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege.”
- ▶ Comment 31 – “As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.”

Rule 1.8(f) – Fee paid by someone other than the client

- ▶ (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - ▶ (1) the client gives informed consent or the acceptance of compensation from another is impliedly authorized by the nature of the representation;
 - ▶ (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - ▶ (3) information relating to representation of a client is protected as required by Rule 1.6.
- ▶ See also Rule 5.4(c)
- ▶ Implicit authorization – insurance defense

Rule 1.8(g) – Aggregate settlements

- ▶ Basic premise is that joint clients entering into an aggregate settlement may have different interests in how the aggregate settlement is divided up
- ▶ Rule requires each client to give informed consent to the settlement in a writing signed by the client - contrast with Rules 1.7 and 1.9 which require only that consent be confirmed in writing
- ▶ The “informed” part of the informed consent must include the existence and nature of all the claims involved and of the participation of each person in the settlement.

Hypothetical No. 1

- ▶ Karen and Susan are both employed by Widgets R Us. Karen is employed as a production line safety manager, and is Susan's supervisor. Susan is employed to work on the production line. Karen believes that Widgets R Us has unsafe working conditions, so she reports this to the plant supervisor, Mary. Within days of Karen's report, Susan is injured while working on the production line. Susan subsequently made a report to Karen and Mary regarding unsafe working conditions. Mary realizes Widgets R Us is in fact in violation of OSHA laws, and terminates Karen and Susan for performance issues.

Hypo No. 1 (cont'd)

- ▶ Karen and Susan reach out to Law Firm A to bring a whistleblower action against Widgets. Law Firm A interviews each plaintiff individually, and learns that Karen is aware of actual performance issues on Susan's part (e.g., she was late for work on a handful of occasions). Karen does not have the same performance issues.
- ▶ What is the analysis?

Hypothetical No. 2

- ▶ A company and its store manager are sued as co-defendants in a case under the Human Rights Act and Title VII. The plaintiff, a non-supervisory employee in the store, alleges that the store manager engaged in severe and pervasive foul language, off-color jokes, suggestive comments, and other sexually-related speech directed at the plaintiff because of the plaintiff's sex. The plaintiff further alleges having reported the matter to the regional manager several times, to no avail. The plaintiff also alleges that upon finding out about the reports to the regional manager, the store manager took reprisals against the plaintiff. The plaintiff alleges that the overall situation became intolerable, resulting in a constructive discharge.

Hypo No. 2 (cont'd)

- ▶ May the same lawyer represent both the company and the store manager?
- ▶ What if, in addition to the statutory claims, the plaintiff alleges a common law battery claim, based upon alleged offensive touching by store manager? The battery claim is against the store manager directly as the alleged perpetrator, and against the company via respondeat superior. Does that change the analysis of whether the same lawyer may represent both the company and the store manager?

Hypothetical No. 3

- ▶ Acme Tool is a large, non-union iron company in Minnesota. Acme Tool's business is starting to slow down due to the transition to alternative materials. Because revenue is declining, Acme Tool decides to reduce its forces, en masse. Acme Tool asks its plant director at Local Plant 1, David, to lay off employees who do not help the business. David terminates Patricia, an outstanding performing and underpaid 64-year-old female supervisor at his plant. David never liked Patricia, and their relationship has been hostile for a while.

Hypo No. 3 (cont'd)

- ▶ During Patricia's employment, she has heard many discriminatory remarks from David, sufficient for Patricia to allege a prima facie case of age and sex discrimination. Shortly after David terminated Patricia, Acme Tool terminates David because of the costs associated with managing his disability.

Hypo No. 3 (cont'd)

- ▶ Patricia retains Law Firm A to bring her sex and age discrimination claims under the ADEA, Title VII, and MHRA. In addition, David also retains Law Firm A to bring an ADA claim against Acme Tool. Law Firm A jointly represents both plaintiffs against Acme Tool. Later, Company, Inc. states that David is individually liable for the sex discrimination claim brought against Acme Tool under the MHRA. Patricia then files a counterclaim against David, individually.
- ▶ May Law Firm A commence litigation against Acme Tool while representing both David and Patricia?

Hypothetical No. 4

- ▶ Suppose a lawyer has undertaken the joint defense of a company and a non-supervisory employee in employment litigation brought by another non-supervisory employee. The litigation proceeds uneventfully. At mediation, a tentative settlement is reached. The company agrees to pay the entire settlement amount in exchange for a with-prejudice dismissal of the litigation and for a release of all claims in favor of both the company and the co-defendant employee. The co-defendant employee, however, refuses to agree to the settlement, perceiving that the settlement will amount to an admission of wrongdoing, which the co-defendant employee vehemently denies. What should the lawyer do?

Advisory Opinion Service

- ▶ Available to licensed MN attorneys
- ▶ OLPR attorneys will provide no cost verbal opinion on application of specific facts to rules; every day an attorney is assigned to A/O tasks and spends much of the day returning calls; will receive answer the same day or next day
- ▶ Confidential; non-binding on third parties
- ▶ No opinion will be offered on (1) conduct of third parties, (2) where conduct has already occurred, and (3) OLPR does not approve lawyer advertising, but will advise rules relating to same
- ▶ In 2017, the OLPR provided 2051 opinions.
- ▶ Options: Submit a written request on line (preferred where facts are complicated or detailed); call 651-296-3952 or toll-free 1-800-657-3601 and ask for the A/O attorney
- ▶ Website: <http://lprb.mncourts.gov>

Additional Resources

- ▶ Wealth of Resources on Website, <http://lprb.mncourts.gov>
- ▶ Index and text of Bench and Bar articles and MN Lawyer ethics columns by Office, sorted by Rule, Subject and Year (no precedential value but useful guidance)
- ▶ Current Rules (MRPC and RLPR) and Board Opinions
- ▶ Suspended and Disbarred Lawyer List
- ▶ Attorney Search containing all public discipline, with links to Court opinions and petitions for discipline
- ▶ Trust Account Information and Resources, including FAQs
- ▶ Professional Firm Filing Requirements
- ▶ Cross Border (Multijurisdictional Practice) Information
- ▶ Annual Reports of OLPR, including historical reports
- ▶ Announcements and News
- ▶ Board and Office Directory
- ▶ Complaint forms in English, Hmong, Russian, Somali, and Spanish

Additional Resources

- ▶ During 2017: 103 open disciplinary probations—23 included a disability related condition, either mental health (18) and/or chemical dependency (10)
- ▶ A recent ABA/Hazelden study indicates that one-fifth of U.S. attorneys may suffer from some level of problematic drinking, and a significant percentage of study participants reported mental health concerns.
- ▶ Study participants advised that barriers to seeking treatment included (1) not wanting others to find out they needed help; and (2) concerns regarding confidentiality or privacy.
- ▶ **Lawyer assistance programs like Lawyers Concerned for Lawyers are not required to report misconduct disclosed to them by an attorney seeking assistance. Rule 8.3(c), MRPC.**
- ▶ Please do not let concerns for your license interfere with seeking help from a lawyer assistance program.
- ▶ Lawyers Concerned for Lawyers: 651-646-5590 or help@mnlcl.org
- ▶ 24-hr crisis line: 612-332-4805

Questions?

- ▶ Materials include language of rules
- ▶ Form Joint Representation Agreement
- ▶ Checklist