



Committee on Professional Ethics

Opinion 903 (1/30/12)

Topic: Revocation of consent to conflict

Digest: When a lawyer jointly represents two co-defendants pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the clients, and one of the clients later revokes consent, whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent.

Rules: 1.7(a) & (b), 1.9(a) & (c), 1.10(a), 1.16(b), (d) & (e)

QUESTION

1. When a lawyer jointly represents co-defendants in litigation pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the clients, and one client later revokes consent, may the lawyer continue to represent the non-revoking client?

BACKGROUND

2. The inquiring lawyer (“Lawyer”) has two clients named Alpha and Beta, who were both named as defendants in the same lawsuit. At the outset of the lawsuit, Alpha and Beta each gave their informed consent in writing for Lawyer to represent both of them in the litigation. At the time of the consent, Alpha and Beta had no differing interests and did not believe that any differing interests would develop later. Nevertheless, given the potential for conflicts between co-defendants, Alpha and Beta agreed to waive in advance any conflict that might eventually emerge between them. We assume for purposes of this opinion that the written consent executed by both Alpha and Beta complied with the definition of “informed consent” contained in Rule 1.0(j) and complied with the principles governing consent to future conflicts of interest, *see* Rule 1.7, cmts. [22]-[22A]. However, the consent did not address how the parties or Lawyer would proceed if either client later changed its mind and revoked consent.

3. Two years later, after substantial discovery in the litigation, Alpha determined that its interests differed significantly from Beta’s interests, and Alpha revoked its consent to Lawyer’s simultaneous representation of Beta. Lawyer is now uncertain whether he may continue representing Beta in the litigation without Alpha’s consent.

OPINION

4. Before we analyze the facts presented to us here, we note that an advance agreement can avoid many uncertainties surrounding a client’s revocation of consent to a multiple representation. For example, an advance agreement could specify whether a lawyer may continue to represent either client after consent is revoked, and whether the lawyer may use or

reveal confidential information obtained from the client who has revoked consent during the representation. Unfortunately, the consent at hand did not cover those matters. Accordingly, we must analyze the issues based solely on the New York Rules of Professional Conduct (the “Rules”).

5. We do not question the validity of the initial waivers given by Alpha and Beta. We focus only on Lawyer’s duties and responsibilities now that Alpha has revoked its consent to the dual representation. Of course, a client has the right to discharge its lawyer at any time for virtually any reason, and under Rule 1.16(b)(3) a lawyer must withdraw from a representation when discharged, unless the tribunal’s permission for withdrawal is required and the tribunal denies permission to withdraw, in which case Rule 1.16(d) requires the lawyer to continue the representation. Thus, Alpha has the right to terminate Lawyer (subject to the tribunal’s approval) – but Alpha does not have the right to terminate the attorney-client relationship between Lawyer and Beta. Whether Lawyer must cease representing Beta depends on the Rules of Professional Conduct.

A. Common representation and revocation

6. The basic rule governing concurrent conflicts between two or more clients is Rule 1.7(a)(1), which provides as follows:

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(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.

7. Here, even though Alpha and Beta had no “differing interests” at the outset of the litigation, Lawyer obtained informed consent from each of them, in writing, to their joint representation, including a waiver of any conflict of interest that might later develop between them. After discovery in the lawsuit revealed significant differing interests between Alpha and Beta, Alpha revoked its consent to the dual representation and revoked its advance conflict waiver. Lawyer apparently desires to withdraw from representing Alpha and continue representing Beta.

8. Comments [4] and [5] to Rule 1.7 address this situation as follows:

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). *See* Rule 1.16(b)(1). ***Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client.*** *See* Rule 1.9; *see also* Comments [5], [29A].

[5] Unforeseeable developments ... might create conflicts in the midst of a representation ***Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict.*** The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* Rules 1.16(d) and (e). The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9(c). [Emphasis added.]

9. Comment [21] to Rule 1.7, which is directly on point here, focuses on a lawyer's ethical options and obligations when a client revokes a previously given consent:

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. ***Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on 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. [Emphasis added.]

10. Here, the “nature of the conflict” (a factor identified in Comment [21]) is a dual or “common” representation of co-defendants in litigation. Comment [29A] to Rule 1.7 explains what typically happens when a common representation fails due to conflicts: “Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. *See* Rule 1.9(a). . . .”

B. The Effect of Rule 1.9

11. The cited rule, Rule 1.9(a), provides as follows:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

12. Applying Rule 1.9(a) to the facts here, the Lawyer has formerly represented Alpha and is thus barred from thereafter representing another person (here, Beta) in the same matter if that other person's interests are “materially adverse” to the former client's interests, unless the former client gives informed consent, confirmed in writing. Because Alpha and Beta have developed differing interests, Lawyer's continued representation of Beta in the litigation would be materially adverse to Alpha. And because Alpha has revoked its consent to the dual

representation, we infer that Alpha would not consent to Lawyer's continued representation of Beta, which has become materially adverse to Alpha. We also assume that Beta wants the Lawyer's continued representation and does not plan to find a new attorney in the Lawyer's place.

13. Thus, when differing interests arise during a common representation and prohibit a lawyer from continuing to represent both clients absent the informed consent of both clients, Rule 1.9(a) will prohibit the lawyer from opposing either client in the same matter, and the lawyer therefore must ordinarily drop both clients. But where a client elects to revoke a consent previously given and relied upon in undertaking a conflicting or potentially conflicting representation, whether the revocation prevents the lawyer from continuing the other representation depends, as Comment [21] says, on the circumstances, including (i) "the nature of the conflict," (ii) "whether the client revoked consent because of a material change in circumstances," (iii) "the reasonable expectations of the other clients," and (iv) "whether material detriment to the other clients or the lawyer would result."

14. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §122, comment *f* also directly addresses revocation. Comment *f* provides, in pertinent part, as follows:

*f. Revocation of consent ... A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent. **Revoking consent to the client's own representation, however, does not necessarily prevent the lawyer from continuing to represent other clients who had been jointly represented along with the revoking client. Whether the lawyer may continue the other representation depends on whether the client was justified in revoking the consent ... and whether material detriment to the other client would result. ...***

A material change in the factual basis on which the client originally gave informed consent can justify a client in withdrawing consent. ... [T]he consent of a client to be represented concurrently with another normally presupposes that the client-clients will not develop seriously antagonistic positions. If such antagonism develops, it might warrant revoking consent. ... If the conflict is subject to informed consent, the lawyer must thereupon obtain renewed informed consent of the clients, now adequately informed of the change of circumstances. If ... the lawyer cannot obtain informed consent from the other client ... the lawyer must withdraw from representing all affected clients adverse to any former client in the matter. ... [Emphasis added; citations omitted.]

15. On the other hand, Comment *f* to the Restatement also says that if the revoking client lacks valid reasons for the revocation of consent, then whether the lawyer may continue representing a non-revoking client "depends on whether material detriment to the other client or lawyer would result and, accordingly, whether the reasonable expectations of those persons would be defeated."

16. If Alpha gives informed consent pursuant to Rule 1.9(a) (confirmed in writing) for Lawyer to continue representing Beta in the litigation, that consent does not automatically allow Lawyer to use Alpha's confidential information to Alpha's disadvantage. *See* Rules 1.6(a)(1) and 1.9(c) (prohibiting use of confidential information to disadvantage of clients or former clients

absent their informed consent). Absent Alpha's consent to use Alpha's confidential information to Alpha's disadvantage, Lawyer must determine whether he has a conflict of interest under Rule 1.7(a)(2), either because he cannot avoid using Alpha's confidential information while representing Beta or because there is a significant risk that Lawyer's possession of Alpha's confidential information would adversely affect Lawyer's independent professional judgment in representing Beta. *See* N.Y. City 2005-2 (addressing conflicts arising solely from possession of confidential information of another client).

17. In sum, taking into account the Comments to Rule 1.7 and Comment *f* to the RESTATEMENT, when a lawyer is considering whether to continue to represent a non-revoking client after a co-client has revoked consent to a common representation, the lawyer should consider a wide variety of factors. We lack sufficient facts to evaluate all of these factors, but the inquiring Lawyer should do so carefully. Our views generally agree with D.C. Bar Op. 317 (2002) and N.C. State Bar Op. 2007-11 (2007).

CONCLUSION

18. When a lawyer jointly represents two co-defendants pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the joint clients, and one of the clients later revokes consent, whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent.

(5-10)