



ALPS

Practice Management Pointers

The Downside of Joint Representation

Mark Bassingthwaighte, Esq.

mbass@alpsnet.com

Some time ago I was asked to review several different sample Consent to Joint Representation forms that a firm was using with their estate planning clients. What I found was troubling. To set the stage, this firm was accustomed to providing coordinated estate planning services to families in situations where such a plan was called for. In other words, they were involved in multigenerational joint representation. Now I have no problem with this initially as there is nothing inherently wrong with joint representation in and of itself. My problem was with what the firm tried to do with their waiver documents.

In one of the forms, the firm sought to inform their joint clients that a potential conflict existed. So far, so good because disagreements on key decisions may arise after the representation has begun. Unfortunately, it went downhill from there. The waiver went on to state that each client will be treated as if they were being represented by separate counsel and that, absent authorization, no secrets would be shared between clients even if the resulting plans were incompatible or that the plan of one client was detrimental to one of the other clients. Now I've got a problem with that!

To make matters worse, this waiver went on to state that each client had the right to loyal and diligent representation. While an accurate statement, in the context of the waiver document that the statement was placed, I don't see how an attorney could view the keeping of secrets in joint representation or the drafting of documents that may end up being detrimental to one or more of the jointly represented clients as meeting the definition of loyal and diligent representation. I also don't think any of the firm's clients would either, particularly if and when one eventually discovers that they were the one harmed by their own attorney's act of drafting estate planning documents that ultimately proved to be detrimental to their interests. As the attorney, you don't get it both ways.

The way that I see it is this; one can't be partially loyal. The duty of loyalty is to be *equal* among all clients, period. It's an all or nothing kind of thing. Should one of the clients insist that a confidence be maintained and as a result an incompatibility in the overall estate plan arises in some fashion, it's over. You are out as the attorney and out for all. Don't try to pick one family member to continue on with, drop the rest, and maintain the secret. Not only would this be unethical (See MRPC Rule 1.7 Conflicts of Interest: Current Clients) but a viable malpractice claim may very well be on the horizon.

This is one of the risks inherent with joint representation. Significant conflicts can and sometimes will arise. When they do, the attorney often must completely withdraw. At ALPS, we have seen viable claims

where an attorney lost contact with one of the joint clients in a personal injury suit and yet carried on with the representation of the remaining client. Often attorneys will attempt to justify such a decision by arguing that too much, in terms of time and money, was invested in the case and they were not about to walk away from that kind of an investment.

The decision to remain or withdraw cannot be based upon what would be best for you as the attorney. This will eventually be viewed as your putting your own financial interests above the best interests of your clients. This decision should be solely about what's best for, and only for, the clients. If proceeding with the representation of the remaining client/s could in any way be detrimental to the one client you no longer wish to represent, you're out. There are very few exceptions to this outcome. The same is going to be true in joint representation of any type; but of particular concern due to claims activity, is when attorneys attempt to jointly represent clients in a business transaction, a real estate transaction, or in a divorce. Tread carefully in these practice areas.

I do understand the temptation to try and anticipate conflict problems and avoid the necessity of having to withdraw by obtaining waivers in advance. It can be very hard to walk away. While waivers are valuable and quite necessary at times, one must also understand that waivers aren't a fix it all solution. Even though I am certain that a number of clients have signed consent to joint representation forms just like the one discussed above, that doesn't necessarily make that waiver effective. Consent, informed as it may be, cannot make a nonconsentable conflict consentable and, for me, that's the bottom line. Again, you don't get it both ways. Nonconsentable conflicts do exist regardless of how much you might wish otherwise.



Risk Management Questions?

Mark Bassingthwaite, Esq. is the Risk Manager for ALPS Property & Casualty Insurance Company. He is available to answer risk management questions and can be reached at 1-800-367-2577 or mbass@alpsnet.com.

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