THE PERILS OF JOINT REPRESENTATION FROM A DEFENSE PERSPECTIVE

1. Introduction

Joint representation of multiple defendants can be especially treacherous as a case progresses and liability and guilt begin to be factually assessed. Added to this are the entanglements engendered by dual identities of one client who is paying the fees and directing the course of the defense strategy vis-a-vis the interests of the other non-paying clients. What are the perils that astute defense counsel should anticipate from the outset of multiple party representation, and how can the ethical dilemmas be kept to a minimum? Further, how does multiple party representation differ from a joint defense arrangement?

2. Standard of Care

Canon 6 of the Canons of Professional Ethics of the American Bar Association states:

“It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel. It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.”

Where the attorney for multiple potentially-adverse clients obtains the consent of the clients or otherwise fully discloses the facts concerning such dual representation, it has generally been held that the attorney has acted properly.¹

When first considering the option of representing more than one party-defendant in employment litigation, counsel should be mindful of Model Rule of Professional Conduct 1.7.² Rule 1.7(a) admonishes counsel to consider the following in joint representation:

(1) Will the representation adversely affect the relationship with other clients? and

(2) Has each client consented after consultation to the joint representation?

Rule 1.7(b) prohibits counsel from representing a client if the representation of that client would be materially limited by the lawyer’s representations of another client or to a third person, or by the lawyer’s own interest, unless the client consents after consultation. (Rule 1.7(b)(2)).
Rule 1.7(b)(2) provides counsel with insight on the scope of the consultation to secure consent. Counsel should include an explanation of the implications of the common representation and of the advantages and risks involved. As a practice pointer, counsel considering multiple representation should make every effort to gather and present any facts demonstrating that the representation will not adversely affect the representation of the proposed defendants. She should also make diligent inquiry of the underlying circumstances of the claim to ferret out potential conflicts which could arise from the assertion of various defenses.

Relevant also to defense counsel’s considerations is Canon 5 of the Model Code of Professional Responsibility, which states that “a lawyer should exercise independent professional judgment on behalf of the client.” Embodied within Canon 5 of the Model Code is Disciplinary Rule 5-105, which outlines the circumstances in which an attorney may refuse continued employment of multiple clients if the interest of one client impairs the independent professional judgment of a lawyer as to another client.

In addition to the foregoing ethical standards, virtually all states maintain a state code of professional responsibility which includes provisions on multiple representation and the duty of independent professional judgment on behalf of each client. Most states’ ethical rules embody either the American Bar Association Model Code of Professional Responsibility (1980) or the American Bar Association Model Rules of Professional Conduct (1992). Although the Model Rules were intended to replace the Model Code, many states still use the Model Code. Counsel should always consult her local State Rules as well as the Model Code or Rules evaluating the propriety of her action vis-à-vis multiple clients.

3. Joint Representation of the Employer and Alleged Perpetrator

The most common employment-related example of multiple defense representation is the simultaneous representation of both the employer and the employee alleged to have committed the improper harassment, discrimination, or other wrongful conduct (the “perpetrator”). While the potential advantages of joint representation (ease of communication, singularity of purpose and defense, reduced attorney’s fees) are obvious, conflicts arise almost immediately upon consideration of defenses, such as whether the alleged perpetrator’s actions were outside the course and scope of the employment; whether his actions were ratified by the employer; and/or whether the alleged perpetrator was directed by the employer to act in a particular fashion or was otherwise acting consistent with company policy. Additionally, the alleged perpetrator may find it behooves him during the course of litigation to assert he did not receive adequate training from the employer on appropriate behavior. Further, confidences carried to the attorney regarding misrepresentations or concealed facts also drive an obvious wedge between cooperative efforts.

4. Confidences

The issue of client confidences that have a negative impact on the representation of the other joint defense clients was addressed in the District of Colombia Bar Legal
Efforts Committee, Opinion 296, February 15, 2000. In that Opinion, the D.C. Bar considered whether the joint representation of an employer and an alien created ethical conflicts when the employee disclosed to the attorney that she had falsified her qualifications. The Committee found that the disclosure constituted a “secret” protected by Rule 1.6. The content of that secret (falsification of her credentials for her visa) would be of extreme importance to the jointly represented employer client. The disclosure thereof, however, would obviously be detrimental to the interests of the alien client.

The Committee concluded that although Rule 2.2 requires, among other things, the written disclosure of risks involved in common representation, with each client consenting to the representation of the risks disclosed. The Committee recognized that joint representation in and of itself does not alter the lawyer’s ethical duties to each client, including the duty to protect each client’s confidences. However, “without clear authorization, a lawyer may not divulge the secrets of one client to another, even where the discussion involves the subject matter of the joint representation.” The Committee observed that it would be prudent “to obtain written consent from both clients that the lawyer may divulge to each client all confidences received during the course of the retention that relate to the representation.”

Upon finding itself in a factual conflict between the clients, the firm could engage in a so-called “noisy withdrawal” through which the firm would disavow documents that were premised on discovered criminal activity or fraud and further disaffirm any earlier written statements in reliance thereon. Further, because the information created a conflict of interest between the two clients, the firm was required to withdraw not only from the representation of the employee but also that of the employer as well.

In California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Op. 1999-153, the California State Bar considered whether an attorney could ethically represent both a corporation and its chief executive officer/president in a suit brought by the only other shareholder. In this matter, the corporation in question had only two shareholders, A and B. Shareholder A was the president and CEO and was responsible for the company’s daily business affairs. A also authorized legal counsel and oversaw counsel’s representation of the corporation.

A dispute between the two shareholders over an earnings distribution prompted B to sue both A and the corporation. A retained an attorney who had never represented the corporation before, to defend both A and the corporation. The Committee concluded that the attorney could ethically represent both the corporation and its CEO and Shareholder B so long as the company and the CEO did not have opposing interests in the lawsuit that counsel would be compelled to advance simultaneously.

The Committee identified six different areas where potential conflicts of interest could arise: Conflicting instructions; conflicting objectives; antagonistic positions; inconsistent expectations of confidentiality; pre-existing relationships that could affect the lawyer’s independent judgment; or conflicting demands for the file once the representation is over.