

Ethics: Representing Multiple Clients in Depositions & Settlement

Lawyers owe duties to clients, primarily, and conflicts of interest come can result when we represent more than one client. Yet we are often required to do just that, and need to have our eyes open to the risks of doing so when there is still time to head off trouble—before we accept representation of multiple clients. The only way to do that is to be aware of the times when we are undertaking representation of multiple clients and make a sober assessment of the risks. Problems are most likely to emerge in depositions and while negotiating settlement.

Representing Witnesses In Depositions

Every day, thousands of lawyers represent individual employees on behalf of companies in depositions. Often they will instruct the employee not to answer questions, most frequently on the basis of an attorney-client privilege of the corporation. It is no wonder that such witnesses assume that the lawyer represents them personally as well as representing the company. Put differently, if ever there was a situation in which the potential for confusion about “the lawyer’s role in the matter” which triggers the Rule 4.3 requirement to provide clarification, this is it. Most

lawyers do not fully understand this distinction; it is hardly reasonable to believe the employee-witness does.

A former chair of the ABA Section of Litigation has suggested in this circumstance that the attorney is required to advise the employee-witness to secure independent counsel if the attorney concludes, during preparation, that separate representation of the employee-witness is in that person's best interests. Fox, "Your Client's Employee Is Being Deposed: Are You Ethically Prepared?" 29 *Litigation* 17, 19 (Summer 2003). Recognizing that the rules only say that if the lawyer gives any advice to an unrepresented person, the advice must be to secure counsel:

...[W]here the lawyer is dealing with an unrepresented person who is an employee of the client, the lawyer for the corporation, in my view, should treat this advice as mandatory rather than simply a best practice. I say so because if the lawyer fails to provide that advice, and it turns out that the client's employee is in serious trouble, the lawyer's silence could have serious repercussions, even if the lawyer escapes liability for failure to act. [citation omitted] Giving that advice guarantees that the employee does not mistakenly assume the lawyer is representing the employee.

The article goes on to counsel that the advice can be accompanied by an explanation that the situation is not unusual, and that it will be up to the company to decide whether to pay for such separate representation.

The alternative approach is for the company attorney represent the individual employee-witness personally. This, however, raises the host of additional problems associated with representation of multiple parties in the same legal matter.

Multiple Representation: Here There Be Dragons (Corporate)

Joint representation is the rule, rather than the exception, where an individual employed by the defendant employer (generally a manager) is named as a defendant in the lawsuit. Joint representation problems can also arise when counsel of record for the employer defends the deposition of a manager or other employee, if the character of the relationship has not been made clear to the corporate employee, resulting in personal representation.

Benefits of Joint Representation. The obvious benefit to the employer is economic: the cost of having two lawyers defend the same action can be double what it costs to have just one of them doing the job. Even if the attorneys cooperate extensively, the requirement that each exercise independent judgment on behalf of the client ensures a significant amount of duplicated effort. For the individual defendant, the cost of defending a significant employment suit can be debilitating. The prospect of recovering

that cost through indemnity rights somewhere down the road is not attractive because litigation can last for years. Joint representation looks like a good deal to the individual defendant, and it usually is.

A less obvious but equally important benefit for the employer is that a single lawyer provides some tactical advantages. The individual defendant is much less likely to enter into a separate settlement with the plaintiff after the individual defendant's employment ends. Such a settlement could include provision for the individual defendant's cooperation with the plaintiff in the litigation against the employer. Since the employer is usually the deep pocket, it has a strong interest in avoiding that.

Discussions about testimony and strategy can be held between the attorney, the individual defendant and the employer and protected from discovery by the attorney-client privilege. The same benefit may exist when the manager has not been sued. When there is separate representation, a joint defense agreement would be required for the privilege to be applicable.

Risks of Joint Representation. Conflicts of interest that were not evident at the outset can arise during the course of the litigation in several ways.

When a corporate officer, director or employee of a corporation is sued, indemnification for liability and defense costs by the corporation is permitted under corporate law, and in some circumstances mandated. Indemnification is *prohibited* where the individual defendant acted in bad faith without an intent to serve the interests of the corporation, as determined by the Board of Directors or, if needed, a separate legal proceeding, after the litigation ends.

Corporate law permits the corporation to advance legal costs to the individual defendant, or to refuse to do so. If it does provide a defense, the corporation is required to obtain an undertaking in writing to repay the legal expenses if, at the conclusion of the proceedings, it is determined that indemnification was not proper. Although this formality is often disregarded, it highlights an inherent problem with multiple representation in employment cases. Evidence establishing that the individual defendant actually was a wrongdoer may surface in discovery or at trial. If it does, the attorney representing both the corporate and individual defendant can become conflicted because of the indemnification implications.

A conflict can arise where the manager has done no wrong. An adverse employment decision concerning the manager's employment will raise a conflict problem. The manager may be fired or demoted for reasons unrelated to the lawsuit. Information that the manager has given to the attorney about the disputed events that is reported to management may trigger or affect an employment decision. Another conflict.

Defenses asserted by the employer at the pleading stage can create a conflict of interest. The employer may wish to have the option to distance itself from the actions of the individual manager in order to avoid *respondent superior* or punitive damage liability. Success could impose loss of indemnity and an obligation to repay defense costs on the manager, or defeat insurance coverage. The decision to keep that option open is inconsistent with joint representation, and it thereby limits the defenses that the employer may plead.

Another serious problem for both the employer and the manager defendant is the sharing of information between the attorney and the clients. Where the attorney represents both, either is entitled to any confidential information related to the representation obtained by the attorney from the other. If the attorney is consulted by management about

the potential firing of the manager, the manager has a right to know it. But it is likely against the company's interests to disclose it. Similarly, if the manager spills the beans to the attorney about something that could result in firing of the manager, the employer is entitled to that information. But it would certainly be viewed as prejudicial to the interests of the manager. The attorney is simultaneously obligated to disclose the information to a client and to withhold it from that client. This is Catch-22. The attorney must withdraw from representing either client.

There is a large downside when a conflict develops after joint representation has been undertaken. The employer will incur substantial additional expense unless the attorney can continue to represent it after ceasing to represent the manager. Whether that is possible will depend on the precise circumstances. But the employer runs the risk that somewhere down the line, it will have to hire an entirely new legal team and bring it up to speed, an expensive proposition. If the original lawyer is found to be at fault for the problem, that expense could be shifted to the attorney.

Multiple Representation: Here There Be Dragons (Employee)

Benefits of Multiple Client Representation. The benefits for employee-plaintiffs from joining their actions and being represented by a single

attorney (which are not necessarily the same decision, but in practice tend to be so) are considerable. The incremental cost of representation for a second or fifth or tenth individual asserting a related claim are small, so both the legal work and litigation costs can be shared, reducing the per-plaintiff cost of proceeding.

Just as important is the strength of numbers and the benefit of synergy. A multi-plaintiff claim will get the attention of management because the stakes of the case are multiplied. Just as unions are able to wrest more favorable wages and working conditions from employers through collective bargaining, employee litigants may stand to obtain superior settlements.

Employee-plaintiffs may legitimately be witnesses in each others' cases as well. This can be a two-edge sword, as the defense would be able to argue bias quite readily. But the plaintiff's attorney can also prepare each plaintiff to testify with the benefit of attorney-client privilege.

The strong cases may enhance the weaker cases if the same jury will hear both. It may be more difficult to persuade a jury that multiple employees were "bad apples" than just one employee. Mutual moral support among the litigants can make the lawyer's job easier as well. But

for the conflict problems, representation of multiple plaintiffs by one lawyer would be a no-brainer. But the problems are considerable.

Risks of Joint Representation. The first risk results from the fact that in accepting a group of clients, the attorney is less likely to pick and choose among potential clients. When an attorney does not screen clients carefully, there is a substantially increased risk that the attorney will represent a problem client. The other clients may have less and less ability to keep the problem client under control as time goes on if they all formerly worked together and have now been terminated.

Even if all the clients are reasonable and in accord at the start of the representation, genuine conflicts in the objectives of the litigation can easily develop as the life circumstances of the clients change. Financial problems may lead one client to push for a quick, cheap settlement while other clients insist on an aggressive negotiating stance. Some clients may be uncomfortable with the litigation process and wish to avoid a trial while others may relish the prospect of the day in court.

Testimony may give rise to conflicts. A client who testifies favorably for another client may be impeached by a prior inconsistent statement written during the employment. Some clients will be impeached while

others will make good witnesses. The stories clients tell may vary from each other. One client's claim may become susceptible to summary judgment while another's does not.

New information may give rise to conflicts, by creating a "zero-sum game" among the clients. Two co-plaintiffs terminated in a reduction in force who claim age discrimination may end up, after discovery, each claiming that they should have received the same position that was given to a younger employer. Even if there is a legal possibility that both could prevail, only one of them could be better suited for a particular job, so there may be direct legal adversity between their claims.

Conflicts are almost *certain* to arise at the settlement stage. Ninety percent of all cases settle. One client will be interested in settling at all costs to gain a sure recovery, another will want to hold out for top dollar even if it means going to trial. These differences may result from economics or personality differences. The lawyer is inevitably in the middle, and taking sides creates malpractice exposure.

These problems may be exacerbated by the defendant, deliberately or not, during negotiations. Employers usually want to settle all the claims or none. This puts the plaintiffs in a position of dividing up scarce settlement

dollars among themselves, a sure-fire recipe for conflict. A recalcitrant client who opposes settlement may veto everyone's recovery unless a larger portion of the settlement is allocated to him or her.

Having the defendant make separate offers to each plaintiff can make things worse. Unless each employee thinks the relative value of the claims is precisely the same as the employer does, one employee will object to and be offended by the offer.

When the employer offers to settle some but not all claims, the situation is also problematic. The employer will generally want to settle the stronger claims and try the weaker ones. This puts pressure on the clients with stronger claims to refuse settlement for the benefit of the remaining clients. If the claims the employer does not offer to settle are weak, the attorney may resist settlement to avoid having to proceed and have a greater risk of not being compensated for the work.

Woe betide the lawyer who simply makes the decision for the clients. RPC Rule 1.8(g) provides that "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims...unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of

all the claims...and of the participation of each person in the settlement.” Moreover, the attorney who participates in the decision-making process among the clients stands in a position to be accused of advancing the interests of one client against those of the other, which can become the basis for a malpractice claim. Especially if the attorney is pushing settlement to ensure that a fee is paid.

The fee-shifting element often present in employment cases appears to present additional conflict possibilities. Typically, the fee recovery is paid to the attorney and the damage recovery goes to the plaintiff. Offers of settlement that require a reduced fee or are premised on waiver of fees are typically viewed by employee’s counsel as creating a conflict of interest between attorney and client. While this creates a business dilemma for the attorney, it does *not* create a legal conflict. The U.S. Supreme Court held in *Evans v. Jeff D.*, 475 U.S. 717, 730-739, 106 S.Ct. 1531, 1539-1543, 89 L.Ed.2d 747 (1986) that both the damage and the fee claim belong to the employee-plaintiff. The fee arrangement between attorney and client is a separate contractual agreement which may provide, within the bounds of the law, whatever fee the two agree upon. Attorneys representing employees have

the ability, then, to prevent this kind of problem by addressing it in the agreement they enter into with the client.

The Inevitable Problem: Settlement of Multiple Plaintiff Cases. Where the attorney about to represent multiple plaintiffs in an employment case begins the representation, the risks (and benefits) of multiple representation must be disclosed, consent to the multiple representation secured, and confirmation provided in writing. The matter should be discussed in a meeting with all prospective clients present, and then followed up with a letter or retainer agreement requiring signature from each client before the attorney undertakes to pursue the clients' claims. The risks and benefits described above should be laid out in simple, understandable terms with examples. Consider using a "FAQ" Question and Answer format to provide specific illustrations. Then everyone must consent or there can be no settlement other than individual-by-individual.