

Representing the Corporation Plus Its Employee: The Guidelines.

When a corporation is sued for the acts of an employee, the corporation or its insurer often ask the defense counsel to defend both the corporation and the employee. It certainly is more cost efficient for the corporation or insurer to only have one attorney handle the matter as joint defense. Frequently the employer wants to control the defense of the employee, so that a unified and powerful defense is raised to the claim. From sad experience, the company may have learned that the employee with a separate attorney often has a less than desirable defense, harming the company's defense by stupid disclosures or maneuvers. Frequently the employee's desire for joint defense arises because the employee has no insurance; naturally, the employee thinks it wonderful that the company-paid attorney is also "his" attorney. Furthermore, as we all know, the employee usually wrongly assumes you as the company attorney are also "his" attorney for the defense of any corporate activity. That is why you always start out your conference with the employee by telling him/her that you are not their attorney and they should not tell you anything they want to keep confidential. (Right? That is what you do, isn't it?)

It is technically possible (and in most cases, ethically possible if sufficient precautions are taken and consents signed) to have one attorney represent both the corporation and the employees. Most of us with a defense practice had done that, and we will wind up doing it again. If you represent corporate defendants, you know the practical problems about telling the corporation to spend the money for more than one attorney. Neither the corporate officers in charge of the defense nor the employees charged as defendants usually understand the problems that the attorney faces in such dual representation. The corporate officer asks the attorney to do a joint defense. The employee also asks the attorney to do a joint defense. Now the officer and the employee look at you across the desk. The attorney who raises objections to representing both the corporation and the employee is frequently referred to as a "nitpicker" and is the subject of pressure to agree to represent both the corporation and the employee. So what happens is that you agree to the corporate request; you then sit down and write long informed consent agreements for your two clients to sign, including specifications of what will happen if your two clients (or you) decide to split the representation.

Specific guidelines clearly and comprehensively analyzing what the attorney should do in joint representation situations have been scarce. Now the Association of the Bar of the City of New York has issued a wonderful opinion addressing the problems of simultaneous representation of a corporation and one or more of its employees in a government investigation. Although the opinion is focused on the responsibilities of the defense attorney in a government investigation, what the committee writes about, and their conclusions, apply to almost every instance when the attorney is representing both a corporation and also its employees at the same time.

This long and well-written ethics opinion, with lots of footnotes that can give you further reading and source references, is — Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, *Formal Opinion 2004-2, Representing Corporations and Their Constituents in the Context of Governmental Investigations*, (June 2004), available at www.abcnyc.org/eth2004-2.html or at our Neoethics archives. I recommend that every corporate in house counsel or defense attorney not only read this opinion but also print this opinion out and keep it for future reference. Almost any

question that you as the defense counsel might have regarding dual representation of corporation and employee is discussed in this opinion. Do not miss it! Get the opinion. Read it. Save it for your reference in the future.

Each year it really is getting more difficult to represent both a corporation and also its employee when the corporation is sued for the acts of the employee. That is because employees and the public are becoming more informed regarding the conflicts that arise in dual representation, and they are becoming more critical of the idea that what is good for the company is good for the employee. With that rise in employee empowerment versus the company has come increasing criticism of the attorney who does handle the joint defense of company plus its employees.

Technically it is possible for an attorney to represent both the corporation and its employees in many instances and with the right procedure followed. Yet the attorney with a dual representation is faced with a number of problems. And, when the problems arise, in many instances it is the lawyer who is most chastised and most caught in an unmanageable problem. Lawyers are the ones most strongly condemned, first because the public wants the lawyer to be a good ethical person, and second because the lawyer is the person who is supposed to have thought of all the reasons why the company's and the individual's interests might conflict at a junction down the road in the litigation.

I know that not only the attorney, but also the corporation or its employee, sometimes suffers serious consequences in these unmanageable problems that come down the road of joint legal representation. For example, one client may decide to make a settlement with the government or claimant and a condition of the settlement is that the settling party make full disclosure of all the attorney client papers and confidences both clients shared with the joint attorney (and thus "known or under the control of" the settling client). The nonsettling client then has all his attorney/client privileged information delivered to the adversary and probably available for the inspection glass of the media. But what I am writing about today are the things that you as a defense attorney should consider, so I am not focusing on the clients problems in this short article.

If you represent both company and employee you will need prospective waivers from both clients. Prospective waivers might permit you as the attorney to continue representing the corporation in the event that you. It is prudent for corporate in house counsel or attorneys frequently defending corporations to read about prospective waivers and draft the outline of a form to place in your file. This use of your "spare time" so that a perspective waiver type form is available will be time well spent. You will need the head start you can give yourself by prestudying the problems and doing a little predrafting for your own private forms to use in joint representation.

The summary at the beginning of the New York committee's formal opinion states that there are two primary requirements which must be met if one defense counsel is to represent both the corporation and the employees, to-wit:

A hypothetical "disinterested lawyer" would conclude that the representation would serve the interests of both the corporation and the employee; and

"Both clients give knowledgeable and informed consent, after full disclosure of the potential client conflicts that might arise."

The difficulty, of course, is that in hindsight, when everything hits the fan, it is easy for a jury or bar grievance committee to say that a disinterested lawyer would not have come to the conclusion that dual representation would serve the interests of both corporation and employee. Secondly, it is extremely difficult for you ever to give "full disclosure of the potential conflicts that might arise." The potential conflicts that might arise may well be innumerable and insight into what they are may only develop only after new information becomes known to you later in the litigation

There are some of us that over the years have come to the conclusion that the corporation should most times be separately represented, so that at a minimum you have two lawyers, one representing the corporation and another lawyer representing the co-defendant employees, but with a joint defense agreement to avoid duplication of effort and expense. Yet, there will probably be a time when you represent both the company and its employees. That is why you should get the New York opinion and [read it now](#). Visit www.abcny.org . Or [our site's archives](#).