

Conflict Issues Arising From Joint Defense Arrangements By David Hricik

Joint defense arrangements are common in civil litigation. Typically, multiple defendants whose first line of defense is "none of us did it," may work together to produce a united front. In true joint defense arrangements, each client retains its own counsel, but counsel communicate among themselves to further the joint defense. (This should not be confused with the "shared counsel" arrangement, where several clients will retain one lawyer to represent all of them.)

Joint defense arrangements present unusual issues in disqualification proceedings. Foremost, the lawyer representing one client does *not* by that fact alone have an attorney-client relationship with the co-defendants. Indeed, each client has its own counsel because the interests of the group, though largely common, do differ. For example, it may be that each defendant has cross-claims against each other for contribution or indemnity.

What standards ought to apply to a lawyer who seeks to be adverse to a former co-defendant of a client? The courts apply differing standards.

Texas applies a very odd standard, in my view, treating the co-defendants essentially as if they were co-clients. See *National Med. Enterprises v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996) (orig. proceeding).

Other jurisdictions take different approaches. Some, such as the Fifth Circuit, tend to view the issue more as one of contract, not ethics, while others such as the Eighth Circuit tend to view the issue as presenting a mixture of law and ethics. See, e.g., *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977) (per curiam), *op. on remand*, 1979-1 Trade Cas. (CCH) ¶ 62,569 (E.D. La. March 28, 1979); *Fred Webber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978), *overruled on other grounds*, 612 F.2d 377 (8th Cir. 1980).

Lawyers engaging in joint defense representations need to consider the fact that, in some jurisdictions at least, their representation of one co-defendant in a civil matter may be held by a court to constitute a representation of *all* of the co-defendants, resulting in firm-wide disqualification of every lawyer in the firm in matters adverse to any of those former co-defendants.

The general ethical issue underlying joint defense arrangements arises in various contexts. Essentially, in a joint defense arrangement a lawyer in the course of representing a client is given access to the confidential information of a third party (*i.e.*, the other co-defendants). That same general fact pattern arises in other contexts, and has led to disqualification motions brought, for example, against lawyers who while representing investment bankers performed due diligence on corporations.

Lawyers who are exposed to confidential information of third parties have a variety of tools and procedures at their disposal to minimize the impact of these quasi representations, and should consider whether to use them.

For a more detailed analysis of *National Med. Enterprises v. Godbey*, [**click here**](#).

For a lengthy academic piece from a recent Duke Law Journal, [**click here**](#).

For a discussion of this issue in E-Ethics, [**click here**](#)