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Always Allies?
Representing Multiple Defendants in the Same Case

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Defense lawyers often represent more than one client in the same case. Joint representation of employers and employees and manufacturers and distributors are two common examples. In other contexts, such as asbestos personal injury litigation, an equally common scenario has a single law firm representing several defendants with different products in the same case. Clients normally benefit from multiple defendant representation in both a strategic sense by presenting a unified defense and in a practical sense by being able to share costs. Even though most joint representations work smoothly, defense lawyers and their firms still need to remain sensitive to ethical issues that may develop in three particular areas: conflicts; confidentiality; and cost-sharing.

Conflicts

Most jointly represented defendants avoid conflicts because their defense is focused solely on defeating the plaintiff's claim. Variants are inevitably case-specific, but examples from employment and product litigation are, respectively, "the asserted conduct did not happen" and "our product is not defective." Conflicts can arise, however, if the facts as developed create "daylight" between what initially appeared to be completely aligned positions. In the employment context, for example, the jointly defended employee may unexpectedly admit the

central facts of the plaintiff's claim during a deposition and those admissions put him or her directly at odds with the employer. In the product context, a jointly defended distributor may admit that the distributor modified the manufacturer's product contrary to the latter's written instructions.

More subtly, conflicts can also develop in mass tort cases when defenses fall out of alignment and, instead, turn into "finger pointing" among commonly represented clients. The California Court of Appeal alluded to this in *Asbestos Claims Facility v. Berry & Berry*, 267 Cal. Rptr. 896 (Cal. App. 1990), where jointly represented manufacturers tried to avoid fees owing to a defense coordinating firm appointed under a local general order by arguing that the firm had conflicts flowing from the manufacturers' inconsistent defenses.

When conflicts develop among jointly represented clients, they are usually nonwaivable because the clients have adverse positions in the same matter. Comment 29 to ABA Model Rule 1.7, which governs current client conflicts, states the often unavoidable remedy: "Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."

Confidentiality

When representing joint defendants, it is important to clarify confidentiality obligations at the outset. Comment 30 to ABA Model Rule 1.7 notes the "default" position that there is normally no privilege between jointly represented clients: "With regard to the attorney-client privilege, the prevailing rule is that, as between

commonly represented clients, the privilege does not attach." In other words, the lawyer is usually obliged to share information material to the joint defense among the clients represented. ABA Formal Ethics Opinion 08-450 (2008) wrestles with the difficult situation of when the lawyer learns information from one client that may affect the other client's duty to defend. It concludes that the lawyer in this situation is prevented by the confidentiality rule, ABA Model Rule 1.6, from revealing the information but must withdraw because there is now a nonwaivable conflict between jointly represented clients in the same matter.

In other settings, clients can and do authorize that their respective confidential information be maintained separately. Unrelated manufacturers who use common counsel in asbestos cases, for example, typically do not share their confidential settlement evaluations with the other jointly represented clients. If those clients do wish to communicate via their shared lawyer on matters of common defense, such as the joint retention of an expert witness, those communications would normally fall within joint privilege that would protect the communications against anyone outside their jointly represented circle. In this scenario, however, outside and internal counsel need to take care to limit joint communications to matters that advance the common defense of the case. In *In re Bairnco Corp. Securities Litigation*, 148 F.R.D. 91 (S.D.N.Y. 1993), for example, the court concluded that the joint defense privilege did not apply to communications between an asbestos defendant and two claims handling

consortiums because the particular communications at issue did not concern the common defense of the parties involved.

Cost-Sharing

When clients share counsel, they usually also have cost-sharing protocols in place. These protocols are often quite specific for both time and expenses, but they typically mirror the pithy mathematical guidance offered by ABA Formal Ethics Opinion 93-379 (1993) (at 6) on how to divide time: "A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours."

Summing Up

Joint representation can provide clear benefits to clients in both a legal and practical sense. Lawyers representing clients jointly in the same case, however, need to closely monitor conflicts, confidentiality and cost-sharing.

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