

Conflicts of Interest Issues in Simultaneous Representation of Employers and Employees in Employment Law

*Janet Savage*¹

Plaintiffs suing their former employers for wrongful discharge or employment discrimination often sue their individual supervisors and co-workers as well. In suits by former employees for wrongful discharge or employment discrimination, the alleged conduct of a fellow employee is usually the basis for the lawsuit. Defense attorneys in these cases are often faced with the decision of whether to undertake joint representation of both the defendant employer and the defendant employee. Simultaneous representation of multiple parties in litigation is addressed by ABA Model Rule of Professional Conduct 1.7. Rule 1.7(b) provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROF'L CONDUCT R. 1.7(b).

There are a variety of reasons for a single attorney or law firm to represent both the company and the employee. Representation by a single lawyer or law firm minimizes attorney fees and prevents duplicative preparation and expenditures for litigation. Dual representation provides for litigation strategies that would not otherwise be available. An attorney is able to plan and execute a joint defense, as well as present a united front to the jury. Dual representation

¹ Janet A. Savage, Davis Graham & Stubbs LLP, 1550 17th Street, Suite 500, Denver, Colorado 80202. (303) 892-7341. Ms. Savage has been practicing for 20 years and is a partner at Davis Graham & Stubbs in the Labor and Employment group. She represents employers in all aspects of employment law.

also offers logistical advantages. It facilitates common access to all necessary facts and maintains contact between the defendant employee and defendant employer.

Beyond the legal advantages of dual representation, a joint defense often carries non-legal business benefits. The corporate culture of supporting managers and supervisors who are wrongly accused is enhanced. It can give managers and supervisors a sense of security and confidence if they believe that the company is not going to second guess their decisions and will support them when a decision is questioned.

Before agreeing to joint representation, the attorney must first evaluate whether there is a conflict at the time the simultaneous representation is undertaken. If there is a conflict, the attorney may not represent both parties unless (a) neither would be adversely affected, and (b) both parties consent. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b). If there is a potential for conflict, the attorney may undertake the joint representation but must explain the potential for conflict and the effect and consequences of joint representation. *Id.* Each client should evaluate the situation and make an informed decision.

The nature of the defenses and the position of the employee sued often dictate whether there is a conflict. Generally in employment lawsuits, employers are liable for the discriminatory acts of their agents and employees when those acts concern terms and conditions of employment. *Miller v. Maxwell Int'l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert denied*, 510 U.S. 1109 (1994); *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 751 (9th Cir. 1993). Given this liability, the employer's interest and employee's interest may be coexistent, thereby making joint representation appropriate.

However, the interests of the company and of the employee may conflict. While it is not necessary that the interests of the employee and employer be identical, their interests must not "adversely affect counsel's judgment or dilute his loyalty." *Smith v. City of New York*, 611 F. Supp. 1080, 1088 (S.D.N.Y. 1985).

An attorney may encounter a variety of circumstances that would implicate Rule 1.7, and would certainly want to examine the facts of each case closely before undertaking representation. Several scenarios may suggest that joint representation would be inappropriate. For example, an employee charged with sexual harassment may deny the allegation, but the company may elect to discipline the employee to demonstrate a "prompt and effective response." Also, an employee

charged with misconduct may feel compelled to litigate the claim and prove his innocence, when the company may want to settle. In addition to the more general strategic conflicts, tactical issues can arise as well. Employee-defendants who are less than forthcoming on the details of an alleged incident are difficult litigation partners who can undermine the presentation of an effective defense for the company.

One lawyer or firm can still represent both defendants if the lawyer believes neither clients' interest will be affected and consent is obtained from both after consultation. *See Lee v. Hutson*, 600 F.Supp. 957, 959 (N.D. Ga. 1984) (clients must consent to multiple representation). Assuming that all defenses will be consistent and that consent is given, the question remains whether the consent is informed.

To satisfy the requirement of full disclosure by a lawyer before undertaking to represent two potentially conflicting interests, it is not sufficient to simply inform both parties of the fact that the lawyer is representing both of them. The lawyer must explain to them the nature of the conflict of interest in such detail so that each side can understand the reasons why it may be desirable for each to have an independent counsel, with undivided loyalty to the interest of each of them." *Unified Sewerage Agency, Etc. v. Jelco, Inc.*, 646 F.2d 1339, 1345-46 (9th Cir. 1981) (quoting *In re Boivin*, 533 P.2d 171, 174 (Or. 1975)); *City Consumer Serv. v. Horne*, 571 F. Supp. 965, 971 (D. Utah 1983) (quoting same). In order to satisfy the informed consent requirement, attorneys should communicate to the relevant parties (1) the conflicts of interest that may arise between employer and employee during the course of representation; (2) the ethical standards that may prohibit a lawyer from representing a client when that representation conflicts with the lawyer's responsibilities to another client; (3) the possibility of restricting their respective claims if they were to agree not to take conflicting positions; (4) the possible added cost and disruption if it were necessary for either or both to retain new counsel later; (5) that if in the future, counsel believes representation of both employee and employer would result in adverse impact upon either party, counsel may withdraw from representing the employee and continue to represent the employer; and (6) that although communication of confidential information between an attorney and a client is ordinarily protected by the attorney-client privilege, because the employer and employee are jointly represented, counsel may disclose to

employer any information that employee gives counsel to employer. Judith Harris, *Ethical Issues Arising in Labor and Employment Law*, SF76 ALI-ABA 297 (2001).

In all cases where a single firm or lawyer represents both the company and the employee, the lawyer should give both clients a written explanation of the risks and benefits of joint representation. This agreement should include the concerns mentioned above. Before an attorney agrees to joint representation, he or she should require that all clients involved in that representation sign an agreement governing the disclosure of confidential information. *See A v. B*, 726 A.2d 924 (N.J. 1999). The attorney should also consider requiring the employee to sign an agreement stating that the employee (1) confirms that he or she has not communicated any confidential information to counsel which would raise a conflict between the employee's and employer's interest; (2) accepts the terms of the representation as outlined in the agreement; (3) acknowledges and expressly agrees that counsel may continue to represent the employer if at some time in the future it becomes necessary or desirable for counsel to withdraw from continued representation of the employee; (4) agrees not to take any action to disqualify counsel from representing the employer; and (5) states that he or she will not intentionally waive the protection afforded to communications or documents prepared in connection with the case pursuant to the attorney client or other privilege or the work product doctrine without first obtaining written consent from counsel. *Id.* See also Proposed Rule 1.7, of the Ethics 2000 Commission which requires giving "informed consent, confirmed in writing."

In some cases, the conflict between defendant-employee and defendant-company is obvious. For example, when a company defending against an employment suit claims that the employee's conduct was outside the scope of his employment so as not to be liable for his acts, it creates a conflict between the two unless the employee is prepared to acknowledge the company's position. Also, when a company discharges an employee as a result of sexual harassment and the discharged employee brings a cross-claim or separate lawsuit against the company, it is a clear conflict. In those cases, the lawyer most likely should not attempt to jointly represent the parties.

Even if the lawyer obtains the consent of both parties, it will not always remedy the conflict. A court may still order disqualification even where both parties have consented. *See Capriotty v. Bell*, No. 89-8609, 1991WL22134 (E.D. Pa. Feb. 19, 1991) (court disqualified

plaintiff's attorney where one plaintiff was potentially liable to another plaintiff under an indemnity agreement even though plaintiff's were initially united in interest, the fact that one plaintiff could seek indemnity created an irreconcilable conflict of interest). An employer's defense may create a conflict that warrants disqualification or withdrawal by the attorney. Asserting that the employee was acting outside the course and scope of employment creates a conflict that requires disqualification and possibly setting aside a judgment after the fact. *Dunton v. Suffolk*, 729 F.2d 903 (2d Cir. 1984), *modified* 748 F.2d 69 (2d Cir. 1984); *Shadid v. Jackson*, 521 F.Supp. 87 (E.D. Tex. 1981).

In *Shadid*, citizens filed a civil rights action against a police officer and the city claiming they were subjected to unconstitutional brutality. *See Shadid*, 521 F.Supp. at 89. The lawyer for the city represented both the city and the police officer. The court found that joint representation created a high probability for conflicting loyalties. While defendants correctly pointed out that "no conflict can exist so long as these defendants make common cause," the court found that there was no way of knowing when strategic posture might change. For that reason, the potential for abuse was too great and the court found that a waiver would not cure the "unfairness inherent in the multiple representation of clients with the multiple representation of clients with potentially adverse interests." *Id.*

In *Dunton*, a conflict of interest arose where a county attorney, in the joint representation of the county and a police officer, undermined the police officer's good faith immunity defense by arguing that the officer was not acting within the scope of his employment at the time of the alleged assault. *See Dunton*, 729 F.2d at 907. The county could avoid liability by showing that the employee was not acting within the scope of his official duties. The employee could partially or completely avoid liability by showing that he was acting within the scope of his official duties. The court found that the conflict of interest created was an ethical violation and deprived the police officer of a fair trial. *Id.* at 909.

A firm is permitted to withdraw as counsel for one defendant in a joint representation where that defendant offers a defense that conflicts with the interest of the other defendant. *See O'Reilly v. Executone*, 135 A.D.2d 999 (3d Dept. 1987). The conflict in *O'Reilly* arose when one defendant claimed that it would not be responsible for any misconduct of the co-defendant because it had no notice and did not acquiesce in the conduct. The court found that the firm

could not adequately represent the interests of both parties if it used that defense. The firm was permitted to withdraw from its representation of the defendant offering the additional defense. *Id.*

SPECIAL CIRCUMSTANCES IN SEXUAL HARASSMENT CASES

The Supreme Court of the United States has established rules governing liability in sexual harassment cases. The Court held that if a supervisor's harassment culminates in a "tangible employment action" the employer will be vicariously liable even if the employer did not have notice or knowledge of the conduct. *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Ind., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998). Sex-based mistreatment by a supervisor, whether overtly sexual or facially neutral, creates automatic liability for the employer when it rises to the level of a tangible action. *Durham Life Ins. Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999). A "tangible employment action" constitutes a significant change in employment status. *Ellerth* 524 U.S. at 761. Examples of a "tangible employment action" are "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 762. In most cases, a "tangible employment action" results in economic harm. Generally, only a supervisor or some other person acting with the authority of the company can cause this type of harm. *Id.* Thus, this action becomes an action of the company. A "tangible employment action" taken by the supervisor becomes the act of the employer for Title VII purposes. *Id.* In that situation, the company will typically be liable unless it can prove that the conduct did not occur. In that situation, the interests of the supervisor and the company are likely to be aligned.

In a case alleging sexual harassment by a supervisor, without any tangible job impact, an employer may raise an affirmative defense and escape liability if it can show (1) that it exercised reasonable care to both prevent and correct the sexual harassment; and (2) that the victimized employee unreasonably failed to take advantage of the complaint procedure. *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 807.

In those cases, the company is likely to defend by either denying the conduct occurred, or if it did, asserting the affirmative defense that the plaintiff failed to utilize available procedures within the company or that it took prompt and effective remedial action once it became aware of

the problem. In the latter example, it is likely that the interests of the company and the supervisor will be adverse.

Where the plaintiff alleges sexual harassment by a coworker, the company's defense is likely to be that the conduct did not occur, that it did not know nor could it have known of the conduct or that once it became aware, it took prompt and effective remedial action. Again, in the first situation, the interests of the company and of the employee may be entirely consistent. In the latter situations, they may be adverse.

In all the cases where the employer asserts an affirmative defense that it exercised reasonable care to correct the sexual harassment by the employee, the employee's denial of misconduct will be undermined. The employer will try to show that the employee was disciplined for his actions, while the employee will be arguing that the actions never occurred. In those situations, the conflict will make it very difficult to undertake joint representation.

PRIVILEGE ISSUES THAT ARISE IN JOINT REPRESENTATION

Issues of attorney-client privilege are inevitable when an attorney is representing both the defendant employee and the defendant employer. The issue is whether an attorney's disclosure of an employer's confidential information to a current employee constitutes a disclosure to a third party thus waiving the privilege. The Supreme Court of the United States in *Upjohn Co. v. United States* adopted a flexible, multi-factor analysis to use in this situation. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). The Supreme Court held that communications between an employee and counsel for the corporation are privileged when the following factors are present: (1) the communications were made at the direction of corporate superiors in order to secure legal advice from counsel; (2) the information was not available from upper echelon management; (3) the communications concerned matters within the scope of the employee's duties; (4) the employees were aware that they were being questioned so that the corporation could obtain legal advice; and the company kept the communications confidential. *Id.*

In dual representation, it is possible to assert the joint defense privilege. The joint defense privilege "protects communications [that] are part of an ongoing and joint effort to set up a common defense strategy." *In re Bevill Bresler & Shulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986). In joint representations, this privilege protects comments made by one

defendant in front of a co-defendant and communications made between defendants. The joint defense privilege can be asserted if the following are shown: (1) the communications were made in the course of a joint defense effort; (2) the communications were designed to further the effort; and (3) the privilege has not been waived.

Counsel should consider obtaining a joint defense agreement before undertaking the joint representation of an employer and employee. Although a written agreement is not a prerequisite to asserting the joint defense privilege, a joint defense agreement would support the creation of the privilege. *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999). The agreement would reinforce the argument that communications between parties were made in the course of a joint defense effort.

SPECIAL ISSUES IN TRIAL

When trying a case where the employer and employee are both named defendants, counsel needs to exercise care to ensure that the jury is properly instructed to avoid any potential inconsistent verdicts. For example, if the jury finds the named individual did not discriminate against an employee but still find the company liable for that individual's discrimination, it will result in an inconsistent verdict.

In that situation, the employee will not want to appeal because of the fact that he or she was exonerated. However, the company is likely to want to appeal the verdict. If the case is reversed and sent back for retrial against both, the employee may feel that his or her interests were not fairly represented. Any disclosure at the outset of the case should take that into consideration.

CONCLUSION

Joint representation is often an appropriate and cost effective way to proceed in employment litigation involving both an employer and employee. However, counsel needs to be alert to the potential conflicts and to ensure that the client is fully advised before jointly representing both parties.