

Practice Tip

Inherent Conflicts in Joint Representation

By Robert Litt

A common issue is who should represent corporate employees in criminal investigations. It is well known and understood that counsel for a corporation or other legal entity should not also represent individuals who are targets of the investigation. But management often wants corporate counsel to represent employees who appear to have no culpability, particularly when the company intends to cooperate with the government investigation. Hiring new counsel to represent employees is expensive and bringing them up to speed can be time-consuming. These burdens often seem unnecessary in the case of employees who are mere witnesses. However, the prudent course is that separate lawyers should be retained for employees in most circumstances.

The Association of the Bar of the City of New York last year issued an ethics opinion entitled "Representing Corporations and Their Constituents in the Context of Governmental Investigations." Formal Opinion 2004-02 (June 2004), available at <http://www.abcnyc.org/Ethics/eth2004-2.html>. The opinion is a useful and thorough study of the various ethical problems presented when counsel

simultaneously represent a corporation and its employees. In the end, the opinion concludes that even if the interests of the corporation and the employee may differ, multiple representation is permitted provided that counsel "concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent; and (ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise." *Id.*

Unfortunately, this opinion underestimates the conflicts that are likely to arise in the course of multiple representation. First, if the corporation is ever charged civilly or criminally, and one or more of the jointly represented employees is called as a witness against the corporation, counsel may be disqualified from representing the corporation or at least have cross-examination restricted.

Second, it is often in the company's interest to have all of its employees testify, whereas individual employees may prefer to invoke the Fifth Amendment so as to obtain immunity. Management may believe that this conflict can be avoided if multiple representation is limited to employees who have no apparent exposure. But clients are often not initially truthful with counsel, and corporate employees may be particularly reluctant to tell adverse information to counsel representing the corporation. How can corporate counsel give unconflicted advice to an employee on whether to testify when her

client the corporation wants all of its employees to testify?

Finally, it may be impossible to promise the employee that communications with corporate counsel will remain confidential. In *In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001), corporate counsel also had an individual attorney-client relationship with two corporate officers. The corporation waived its attorney-client privilege in response to a government subpoena, but the officers claimed that some of the material was protected by their personal attorney-client privilege. The Court of Appeals held that the officers could not block the corporation from disclosing any communications that concerned "matters within the company or the general affairs of the company," even if those conversations were otherwise subject to their personal attorney-client privilege. *Id.* at 573. In other words, if corporate counsel represents individual employees in matters relating to their employment, the corporation will have the right to waive the privilege and disclose the employees' communications with counsel. Given the increasing insistence by the Department of Justice on corporate waiver of the attorney-client privilege, corporate counsel cannot, in effect, promise confidentiality to employees.

Corporate counsel should thus rarely represent corporate employees. In the absence of conflicts among the employees, it will usually be possible to have all employees who appear to have no culpability represented by one or a few lawyers, thus holding costs down. But multiple representation of a corporation and its employees risks insoluble conflicts for counsel and inadequate representation for the corporation, its employees, or both.



Robert Litt is a partner in the Washington, DC office of Arnold & Porter LLP.

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**The American Bar Association
Criminal Justice Section**

740 15th Street, NW
Washington, DC, 20005
Phone: (202) 662-1500
Fax: (202) 662-1501

Email: crimjustice@abanet.org
Web: www.abanet.org/crimjust