Representing Multiple Parties in One Suit

Litigators are often asked to represent more than one party in a single lawsuit. Although our ethical rules discourage the representation of codefendants in criminal matters,[1] representation of multiple parties in civil litigation is quite common. But ER 1.5(b) now requires all legal engagements to be reflected in a writing. So use your engagement letter to head off ethical problems that could arise if the position of one of your clients becomes adverse to that of the others.

An example: An employee of your corporate client is named as a party defendant in the same suit as his corporate employer. The corporate employer provides a defense for the employee. You have represented both. Now, though, it appears that the employee did do or say whatever it is that the plaintiff contends makes the corporate client liable; the corporate client now wishes to discharge your employee client.

Assuming the corporate client no longer wishes to have its own lawyer represent what is soon to be its former employee, and the former employee now hires a new lawyer, what do the ethical rules allow?

ER 1.9(a), regarding duties to former clients, prohibits a lawyer from representing another person in the same or a substantially related matter in which that client's interests are materially adverse to the interests of a former client. Therefore, because you no longer represent the former employee, you cannot continue to represent his former corporate employer in litigation where they are both parties.

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This situation could have been avoided by requiring the "less-favored client"[2]—in this case the former employee—to consent to allow you to continue to represent the corporate employer if a conflict arises later in the litigation that would otherwise require you to withdraw as counsel for everybody. This result is expressed in ER 1.9(a) and can be inferred from ER 1.7(b), which provides that even clients with concurrent (as opposed to potential) conflicts can be represented by a single lawyer as long as each of the affected clients gives informed consent, confirmed in writing. In other words, if a client can waive a conflict as a *present* client, he can waive one as a *former* client, as well.

Prospective waivers by co-parties have been sanctioned by respected ethics authorities[3] and have been upheld in court decisions.[4] However, both emphasize that (1) the less-favored client must be given enough information to make an intelligent decision as to whether his interests can be protected by the same lawyer representing the other clients and (2) the lawyer must reasonably believe that the multiple representation will not adversely affect the representation of all the clients involved.

In the example, the more informed the employee is about what the potential conflict could be, the more likely it is that his prospective consent will be held to be effective. That will allow you to continue representing the corporate employer in the case of later conflict.[5]

Once you have written consent, are you home free? Not quite.

ER 1.9(c) provides that, even with such consent, you may not thereafter use any information relating to the representation to the disadvantage of the former client except as provided in the ethical rules or when the information becomes generally known. Thus, what that former client has revealed to you during the representation is still subject to the protections of ER 1.6, dealing with the confidentiality of information given to you as his lawyer. So in any engagement letter dealing with the representation of multiple clients, include an agreement that any information that you receive from any of those clients can be shared with the others for as long as you represent all of them. This does not destroy the protections of ER 1.6 *vis-à-vis* opposing counsel and the outside world. Nor does it destroy the attorney–client privilege. It only means that what the lawyer learns from his clients while he represents them may be freely shared among them.

Absent such an agreement, the obligations of confidentiality to the former client could materially limit the lawyer's abilities to competently represent the client who remains. This could amount to a "concurrent conflict of interest" under ER 1.7(a)(2), undoing all that would be otherwise accomplished by a prospective conflict waiver.[6]

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endnotes

1. Comment 22 to ER 1.7, Rule 42, ARIZ.R.S.CT.
2. It is probably not a good idea to use this expression when discussing the case with your clients.
3. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93372 (1993); L.A. County Bar Association, Professional Responsibility and Ethics Comm. Op. 471 (1992).
4. *Rymal v. Baergen*, 262 Mich. App. 274 (2004); *Zador Corp. v. C. K. Kwan*, 37 Cal. Rptr. 2d 754 (Ct. App. 1995).
5. For an example of a comprehensive letter, *see Zador Corp.*, 37 Cal. Rptr. 2d at 756-57.
6. Courts appear to be reluctant to conclude from a prospective waiver that the client has also agreed to waive rights of confidentiality. *See Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978).