

ETHICS—WHO IS YOUR CLIENT?

THE MECHANICS OF JOINT REPRESENTATION

By: David J. Wukitsch, Esq.
McNamee, Lochner, Titus & Williams, P.C.

Presented on:
June 3, 2011

The New York Rules of Professional
Conduct Became Effective
April 1, 2009

Pdf version found at www.nysba.org

Comments to the Rules Adopted By
The NYSBA House of Delegates on
January 28, 2011

McKinney's Practice Commentaries
for the
NY Code of Professional Responsibility

*Professor Patrick M. Connors
Of Albany Law School*

The New York
Professional Responsibility Report

*The Newsletter for New York Lawyers
on Ethics & Professionalism*

Roy Simon, Editor

You represent XYZ Corporation.

XYZ retains you to defend a hostile work environment sexual harassment claim brought by Ms. Jones, a current employee of the corporation.

The named defendants are XYZ Corporation, Jones' two supervisors and seven employees who work in the same office as Jones.

Why is joint
representation
preferable?

- a) Cheaper – reduce legal expenses
- b) Unified Front – many attorneys for each individual employee creates impression of adverse interests
- c) Control of discovery and defense

- Who is your client?
- May you represent XYZ and all named employees?

Rule 1.13 of the New York Rules of Professional Conduct provides that the attorney for a corporation represents the “organization” – not its individual employees.

Rule 1.13 continued:

- (d) A lawyer representing an organization may also represent any of its . . . Employees, subject to the provisions of Rule 1.7.

You Must Comply With Rule 1.7, Which States:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

The term “differing interests,” as used in Rule 1.7 (a) (1), above, is defined by the Rules of Professional Conduct to include “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest.”

Rule 1.0(f)

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyers in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

The term “informed consent,” as used in Rule 1.7 (b) (4), above, is defined by the Rules of Professional Conduct to denote “the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.”

The term “confirmed in writing,” as used in Rule 1.7 (b) (4), above, is defined by the Rules of Professional Conduct to denote “(i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.”

*How do we make certain joint
representation of
a corporation and its
constituents (employees)
meets ethical standards?*

You must investigate carefully
to see whether you are able to
effectively represent
differing interests, and you must
comply with Rule 1.7.

You must educate
the individual employees
involved in the case.

You must explain:

- 1) You are attorney for the corporation (Rule 1.13);
- 2) Attorney-client privilege belongs to the corporation;
- 3) Advise them they might consider obtaining independent counsel.

Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict would adversely affect the interests of the client.

How do you obtain
informed consent?

“Consentability” is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent burdened by the conflict of interest.

Draft a letter to each client stating:

- 1) How the various interests could come into conflict;
- 2) Consequences of agreeing not to pursue differing strategies;
- 3) The delay and cost should an actual conflict arise later and require parties to change counsel.

Listed below are some, but not all, of the circumstances in which a conflict of interest may arise when two or more defendants are jointly represented by a single attorney or law firm. The list is not exhaustive but serves only to illustrate examples of types of conflicts which may result from such joint representation.

1. It may be in the best interests of the employer to assert as a defense that a defendant was not acting within the scope of his or her employment at the time of events in issue. However, such a defense would operate to the detriment of an individual defendant and might place his or her defense in conflict with that of the employer.

2. The attorney may receive information from one defendant which is helpful to one defendant but which undermines the defense of another defendant. Where both defendants are represented by the same attorney or law firm, the attorney-client privilege may prevent the attorney or law firm from using that information in the defense of the defendant for whom the information is favorable.

3. The plaintiff may offer to settle or dismiss claims against one defendant in return for cooperation with the plaintiff's case. If a defendant receives such an offer, a lawyer or law firm jointly representing defendants may not be able to provide unbiased advice on whether to accept or reject such an offer because the acceptance of such an offer may undermine the case of other defendants whom the attorney or law firm represents.

4. During jury selection at trial, a particular potential juror may be perceived as favorable to one defendant but unfavorable to another. Where these defendants are jointly represented by one attorney or law firm, the attorney must choose the interests of one defendant over those of the other in determining whether to select or reject that potential juror.

5. In questioning a defendant during his or her testimony, an attorney who jointly represents other defendants in the same case may be inclined to limit or eliminate certain questions where, although the answers would be helpful to the defense of one defendant, those answers may undermine the defense of another defendant.

6. In questioning non-party witnesses during testimony, an attorney who jointly represents two or more defendants in the same case may be inclined to limit or eliminate certain questions where, although the answers would be helpful to the defense of one defendant, those answers may undermine the defense of another defendant.

7. In determining which witnesses and which exhibits to present at trial, an attorney or law firm jointly representing two or more defendants in the same case may be inclined not to offer certain witnesses or exhibits because, although that evidence may be helpful to the defense of one defendant, it undermines the defense of another defendant.

8. If two or more defendants are found liable for punitive damages and a trial is held on that issue, a lawyer or law firm jointly representing two or more defendants in the same case may be inclined to argue to the fact finder that one defendant was less responsible or less culpable than another. However, while such an argument may benefit the defense of that defendant, it may undermine the defense of another defendant who, the argument would suggest, was more responsible or more culpable.

- UNITED STATES DISTRICT COURT
- NORTHERN DISTRICT OF NEW YORK

- ---

MS. JONES,

- Plaintiff,

- -against-

- XYZ CORP. and Individual Employees,
- Defendants.

- ---

RANDOLPH F. TREECE United States Magistrate Judge

- ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE COMPELLED TO OBTAIN SEPARATE COUNSEL

- On or about _____, 2011, the Court was made aware that Defendants, XYZ Corp. and Individual Employees, are jointly represented by David J. Wukitsch, Esq., of the McNamee, Lochner Law Firm.

- In addition to Defense counsel's ethical obligation to inform each client of the potential adverse consequences of joint representation, this Court has a continuing obligation to supervise the bar and assure litigants a fair trial. *See Dunton v. County of Suffolk*, 729 F.2d 903, 908-09 (2d Cir. 1984). Accordingly, it is the Court's duty to ensure that each Defendant in this action fully appreciates the potential inherent conflict in joint representation of multiple defendants and understands the potential threat a conflict may pose to each Defendant's interests. *Id.* at 909. It is therefore

- ORDERED as follows:

- 1. If it has not already been accomplished, Defense counsel shall, within ten (10) days of the date of this Order, send a copy of this Order and a letter to each client in this action

- (a) outlining the circumstances under which an actual or potential conflict of interest may arise; and

- (b) advising whether counsel plans to take a position adverse to that client's interests at trial.

- 2. Within sixty (60) days of the date of this Order, a Defendant who is jointly represented with other Defendants by a single attorney or law firm shall proceed in one of the two ways described in subparagraphs A or B:

- A. If after being informed in writing of the potential or actual conflicts, a Defendant wishes to retain separate counsel, he or she may do so and new counsel shall file and serve a Notice of Appearance within sixty (60) days of the date of this Order;

- OR

- B. In the event that a Defendant wishes to proceed while being represented by their current counsel, I will require additional assurance that the Defendant has made an informed decision to do so notwithstanding the potential for conflict. That assurance must be provided in the form of a sworn affidavit from the Defendant
- (a) acknowledging that he or she has been given written notice by counsel of the potential for conflict;
- (b) acknowledging that he or she understands the potential conflict and its ramifications; and
- The letter shall include, but not be limited to, the circumstances listed in the Attachment to this Order.
- (c) stating that he or she has knowingly and voluntarily chosen to proceed with joint representation.
- That affidavit and counsel's letter to the Defendant shall be submitted to the Chambers of the undersigned within sixty (60) days of the date of this Order and, after review, will be filed under seal. At the time of submission to the undersigned, the Defendant shall file and serve a Notice of
- In Camera Submission Regarding Joint Representation.
- 3. If a Defendant chooses to exercise the option outlined in paragraph 2(B) above, the Court will review Defense counsel's letter of notification and a Defendant's affidavit *ex parte* and *in camera* to determine if the Defendant has knowingly and voluntarily waived his or her right to separate counsel.
- 4. If the Court determines that the conflict is of a nature which can be waived and a Defendant's waiver of the potential conflict is knowing and voluntary, the Court will allow the Defendant to proceed with joint representation.
- 5. If the Court determines that a Defendant has not knowingly and voluntarily waived his or her right to separate counsel, the Court shall order further action as necessary to safeguard the integrity of these proceedings.
- 6. A Defendant who consents to joint representation will not be deemed to have waived his or her right to retain separate counsel. However, no extension of deadlines established in the Uniform Pretrial Scheduling Order or of the trial date will be granted because of such substitution of counsel unless a Defendant establishes that the substitution resulted from a conflict of interest which reasonably could not have been foreseen when the Defendant filed his or her affidavit agreeing to joint representation and that the Defendant promptly proceeded to obtain separate counsel upon learning of the conflict of interest.
- 7. Copies of this Order shall be promptly mailed by the Clerk of the Court to all counsel in this action.
- IT IS SO ORDERED
- Dated: _____
- _____
- US Magistrate Judge
-

Joint Statement of Facts Approach

- 1) All clients agree to a statement of facts describing incident.
- 2) Attorney reviews and determines that it does not support claims among parties.
- 3) Each party gives up claims or defenses.
- 4) Each party agrees that attorney may disclose facts among group.
- 5) Attorney outlines dangers of joint representation.
- 6) All clients sign off on single attorney.

Attorneys Who Violate the Code
of Conduct Are Subject to
Discipline Which May Include
Admonishment, Reprimand,
Censure, Suspension or Loss
of His or Her License to
Practice Law.

QUESTIONS?
