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Outside Counsel

The Legal Ethics of Multiple-Client Representations

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It's late on a Friday afternoon and your former law school classmate, now a partner at a major law firm, calls you with a referral. She's representing a large company in the crosshairs of a fraud investigation, and government lawyers have requested interviews with several corporate officers and employees. Your former classmate has determined that she and her firm are unable to represent both the company and the employees simultaneously, and so she graciously offers you the opportunity to serve as "pool counsel" for the handful of officers and employees in whom the government has expressedinterest.

This is not an uncommon scenario. For practitioners in the white-collar and regulatory defense space, corporations (typically guided by their outside counsel) often seek to retain a single lawyer or law firm—referred to as pool counsel—to represent multiple employees in the very same government investigation. While the practice is common, it can be an ethical trap for the unwary. Conflicts issues abound. For instance, what if the employee-clients have conflicting recollections about the same events? What if those recollections are irreconcilable or, worse, one client's potential testimony reflects poorly on, or even inculpates, another client? Confidentiality issues are also present. If one client conveys confidential information, may you use that information to benefit other clients in your pool? May, or must, you share that information with other clients in your pool? What if the imparting client asks you *not* to share? And how much about these potential scenarios, if any, should you discuss with your clients prior to commencing the representation?

These questions, and many more like them, have long plagued white-collar practitioners serving as pool counsel. Surprisingly, the treatment of these issues in the Rules of Professional Conduct is slim and the guidance from bar association legal opinions and the courts has been rare.

> May a lawyer concurrently represent multiple individuals in the same governmental investigation or corporate internal investigation?

The reason may be simply that pool clients often remain witnesses who do not become criminal or regulatory defendants, and thus infrequently require judicial attention. Moreover, those pool clients who do become investigation targets typically leave the pool to be represented by separate counsel. Anecdotal experience and informal surveys suggest that lawyers' approach to handling these issues varies greatly.

In "Formal Opinion 2019-4: Representing Multiple Individuals in the Context of a Governmental or Internal Investigation," published on

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May 16, 2019, the City Bar Association's Professional Ethics Committee squarely addresses these questions, providing both ethical and practical guidance for lawyers serving in the role of pool counsel. To the certain relief of practitioners who have taken on pool counsel representations, the Opinion answers in the affirmative—qualified by 15 pages of analysis—the following question presented: "*May a lawyer concurrently represent multiple individuals in the same governmental investigation or corporate internal investigation*?"

The Opinion

The Opinion begins by defining pool representation—which, as familiar as it is to practitioners, has no entry in Black's Law Dictionary and is not otherwise defined in the law. Pool counsel is a type of representation where the attorney "represents multiple individuals concurrently but separately." In other words, while there is a group of clients, that group is not treated as a single coordinated entity with a unitary goal, but rather as a series of simultaneous parallel representations in which each client makes autonomous decisions about his or her representation.

In this respect, the Opinion might be viewed as the third from the Committee in a series that explores different species of "multiple representation." In 2004, the Committee considered the circumstances under which one attorney can represent a corporation and an employee in the same corporate investigation. See NYCBA Prof'l Ethics Comm., Formal Op. 2004-02 (2004). In 2017, the Committee considered a "joint representation" where multiple clients of one lawyer have a common goal and coordinate decision making (such as in the representation of multiple plaintiffs in a lawsuit, or a husband and wife in estate planning). See NYCBA Prof'l Ethics Comm., Formal Op. 2017-07 (2017). Now in 2019, the Committee considers a third kind of multiple representation—that where the lawyer represents multiple witnesses in the same corporate investigation—and analyzes issues of conflicts and confidentiality.

Conflicts of Interest

As in any multiple representation, the attorney's first step is to consider whether there is a conflict of interest among the potential clients or whether there is "a significant risk that the clients' interests will conflict later in the representation." The Opinion concludes, relying on Rule 1.7, that even when there is no apparent conflict among clients at the outset, pool counsel must disclose to each client the risks and advantages of multiple representation, due to the possibility that a differing interest may eventuate, and also because the attorney has an independent obligation under Rule 1.4 to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions." The Opinion recommends that the attorney confirm the client's informed consent to the multiple representation in writing, even though such written confirmation is only *required* by the Rules when there is a current client conflict.

The Opinion addresses client screening techniques that may be used to identify potential conflicts among prospective clients, without compromising a client's confidential information during intake. These include debriefings by company counsel regarding the information learned to date in the investigation, as well as a private interview between pool counsel and each potential client. In this screening, pool counsel should seek to learn any information that a potential client may have about the relevant conduct of others, and whether a potential client may be suspected of having engaged in misconduct.

The Opinion notes that the types of disclosures the attorney must make to obtain informed consent may vary, but surely include: identity of the other clients in the pool; payment structure; how confidential information will be treated; and how a conflict among clients will be handled, should one arise. Significantly, the attorney's obligation to monitor for conflicts continues during the life of the representation as facts continue to develop and evolve.

Client Confidences

Rule 1.6 provides that confidential client information goes beyond attorney-client privilege and includes anything learned during the representation that could be embarrassing to the client or that the client

may wish to keep confidential. The attorney's confidentiality obligation extends to prospective, current, and former clients (Rules 1.18(b), 1.6, 1.9(c)). Of note to pool counsel, Rule 1.6 prohibits the use or disclosure of a client's confidential information without the informed consent of the client. Accordingly, the Opinion divides its analysis of the treatment of client confidences to two sections: use and disclosure.

In a pool counsel situation, the very structure of the multiple representation requires each client to consent to the attorney's *use* of the client's individual confidences for the benefit of the other pool clients, simply because the lawyer cannot unlearn what she has once learned from each individual. Unlike a singular representation, where the sole client can effectively prevent a lawyer from using *or* disclosing the client's confidences without consent, in a multiple representation, the client gives up some of that control as part of the bargain. After careful analysis the Opinion concludes that prior to retention the attorney should inform each potential pool client of the risks and advantages of permitting the lawyer to *use* all the information she learns for the benefit of all the represented clients. A prospective client must consent to such use of his information to be part of the pool representation.

The Opinion's section on *disclosure* (or sharing) of client confidences provides that the clients must understand and consent to one of two arrangements. Either the client can invest the attorney with discretion to determine which confidences will be shared among the pool, or the client can require the attorney to obtain the disclosing client's consent before sharing any confidence with other pool clients. Whichever sharing mechanism is agreed upon, the information-sharing practice in a pool representation is always guided by two lodestars. First, the attorney has a Rule 1.6 confidentiality duty to maintain any confidence that the client requests not be shared. Second, the attorney has a Rule 1.4 communication duty to share with a client material information relevant to the matter. If those duties conflict, the attorney may need to withdraw. For example, if Client A tells the attorney a fact that is directly material to Client B, but prohibits the attorney from disclosing it to Client B, the attorney may not be able to continue both representations.

> The Opinion provides an analytic framework that is useful beyond the context of government or corporate investigations.

Pointers for Practitioners

White-collar practitioners reading this Opinion will receive advice about best practices in terms of client intake, disclosures, and ongoing client communications. We see at least five practice tips that emerge from the Opinion.

First, construction of the pool can avoid premature termination of the representation. Failure to identify a client with exposure to criminal liability, or a client who compromises the credibility of another client, is the surest way to blow up the pool. Accordingly, prior to commencing a pool counsel representation, make sure to privately discuss with each prospective client: (1) the fact that you will be representing multiple clients in the same matter and the identities of those clients; (2) whether the client with whom you are speaking has engaged, or may be perceived to have engaged, in wrongdoing; and (3) whether the client with whom you are speaking believes that he or she has information that would be adverse, or even merely relevant, to any of the other clients whom you would putatively represent. Such early screening should efficiently help identify conflicts or potential conflicts, including those that may disqualify a potential client from joining the pool in the first place.

Second, the communication duties of Rule 1.4 require that you explain to each pool client the implications of the multiple representation, including the risk that you could eventually be conflicted out of the representation should a nonwaivable conflict arise. In the event you believe there is an actual (and waivable) conflict among prospective pool clients, Rule 1.7 requires that you determine whether you can nonetheless competently represent

each potential client. If so, you must meaningfully explain to each client the risks and rewards of multiple representation, and then obtain each client's informed consent to the representation, confirmed in writing.

Third, obtaining informed consent, confirmed in writing, is the prudent practice, even if it appears from the outset that there is no conflict of interest among the potential pool clients. Such written confirmation is ethically required in the case of an actual conflict, under Rule 1.7. Although a writing is not ethically required where there is no present conflict, we cannot imagine why an attorney would not want to confirm in writing that the appropriate warnings have been given.

Fourth, at the outset of the representation, it is important to have a frank discussion with each potential client about the ways that you may use, and potentially disclose to other clients within the pool, the confiding client's confidential information gained during the representation. With respect to the *use* of such information, each client must understand that you will be able to use his or her confidential information to the benefit of all pool clients. With respect to the *disclosure* of such information, there are essentially two alternatives: either you will or will not have the discretion to disclose each client's confidential information to the other pool clients (unless and until the disclosing client were to revoke such authorization). There is no definitive "right" or "wrong" approach. What is most important is that there exists a clear understanding between you and each client as to how the client's confidential information will be treated.

Fifth, even the best laid plans can be upended by the development of facts during an investigation. Conflicts arise in unexpected ways. Although you have the responsibility to monitor your client relationships for conflicts that may develop during the representation, you may seek to secure the clients' advance consent, in writing, as to how eventual future conflicts will be addressed.

Conclusion

The Opinion provides an analytic framework that is useful beyond the context of government or corporate investigations. Indeed, many of the same analytical perspectives apply to the civil discovery process—particularly where one lawyer represents multiple non-party witnesses.

The Opinion also makes the case that a pool counsel structure can be advantageous for clients caught in the vortex of a corporate investigation. In so doing, it counters a prejudice held in some quarters that pool counsel is merely a corporate cost-saving measure that is second-best to the ideal of a separate lawyer for each client. A lawyer who learns a variety of information from separate clients may have a better grasp of the overall investigation than one who has only a single client's perspective, and thus a pool counsel could be even better equipped to guide a witness-client through a complex investigation. More importantly, the Opinion explains that pool counsel play a vital role for their clients, providing representation to individuals who otherwise may not be able to afford a lawyer specialized in white-collar investigations. The Opinion demonstrates that lawyers can serve this function without sacrificing ethics or client service.

For lawyers who often serve as pool counsel to multiple similarly-situated clients in connection with government or regulatory enforcement actions, corporate internal investigations, and even civil litigations, and for the corporate counsel who often hire them, the City Bar's recent Opinion should serve as a welcome roadmap to navigating the legal ethical landscape.