Inside DC Bar's New Guidance On Multiple Representation

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Until last week, employee-side lawyers in Washington, D.C., were potentially open to attack when they represented both a party and a friendly witness in the same proceeding.

In two ethics opinions issued in late February, the D.C. Bar cleared the way for an employee's lawyer to represent both the client and a friendly witness in the same case, if — and this is an important "if" — there was no conflict between the two.

Although defense counsel in employment cases are routinely authorized to represent both the employer and all the other employees of the employer, it is sometimes an open question whether plaintiffs' lawyers can represent both someone suing the company for discrimination and, as witnesses, other former or current employees who also allege discrimination or who have relevant information supporting the plaintiff.

These two ethics opinions make clear that plaintiffs lawyers can do so, as long as the party's and the witness's interests are not adverse to one another, and the plaintiffs' lawyer will not have to cross-examine a former client or another current client.

These are important issues that often arise in employment litigation. The employee's counsel can be challenged when they seek to represent both their client and friendly witnesses who are or were employees of the employer. Here, these friendly witnesses are unlikely to be able to afford hiring their own lawyer to represent them, and may not want to testify without a lawyer.

Allowing the employee's lawyer to represent these witnesses will enhance the ability of the judge and the jury to obtain all the evidence relevant to evaluating the claims and defenses.

Rule 1.7 of various jurisdictions' rules of professional conduct, covering conflicts of interest for current clients, and Rule 1.9, covering conflicts of interest for former clients, govern these issues.

Subpoenaing a Current or Former Client

D.C. Bar Legal Ethics Opinion 380, "Conflict of Interest Issues Related to Witnesses," addresses the intersection of Rules 1.7 and 1.9.[1]

The D.C. versions of Rules 1.7 and 1.9 differ slightly from the American Bar Association's Model Rules of Professional Conduct and those in other jurisdictions. But the various versions of Rule 1.7 — governing current clients — share the common principle that a lawyer should not undertake a representation that would create a concurrent conflict of interest with a current client, where the representation of one client will be or is likely to be adverse to that of another current client, absent informed consent by both clients.

Similarly, Rule 1.9 — governing former clients — looks to whether the current client's interests are materially adverse to the former client's interests, and requires informed consent by the former client.

The D.C. Bar recognized that the ethics opinions on this issue from several states and the ABA reached divergent conclusions.

The D.C. Bar concluded that there would be a nonwaivable conflict in subpoenaing a current client "only if the client objects, or if it is reasonably foreseeable that the client will object to any aspect of the subpoena or to the burden and costs it creates."[2] The lawyer cannot simultaneously argue for enforcing the subpoena on behalf of one current client, and argue on behalf of the other client/witness against enforcing that subpoena.[3]

Similarly, Rule 1.9 precludes subpoenaing a former client who is unwilling to testify, since "the coercive effect of a subpoena creates material adversity if a former client does not want to testify in a substantially related matter," according to the D.C. Bar.[4] Only if the current or former client is willing to be subpoenaed may the lawyer serve a third-party subpoena on that person.

Cross-Examining a Current or Former Client

The second question addressed by D.C. Bar Ethics Opinion 380 is whether a conflict of interest could still arise that precludes going forward with the deposition or document production in response to the third-party subpoena.

Here, the key issue is whether examining or cross-examining another current client or a former client creates an adversarial relationship. For example, the lawyer may initially believe that the witness will have favorable testimony about the lawyer's client in the employment case, only to learn that the witness has adverse information, or incorrectly remembers key events.

For a lawyer's current clients who are witnesses for another client of the lawyer, D.C. Bar Opinion 380 concludes:

> Rule 1.7(a) would prohibit any cross-examination of the witness adverse to any position that the witness took on direct examination. Informed consent could not remove this conflict.[5]

The same principle applies to former clients under Rule 1.9, since cross-examining the former client could require the lawyer "to attack [the former client's] credibility, implicating confidences and secrets learned in the prior representation," according to the opinion.[6]

A lawyer could address these potential problems by having conflicts counsel — a lawyer at another firm who will handle the cross-examination, since that lawyer will not know the confidences that the first lawyer acquired in representing the witness.[7]

If the lawyer is representing multiple clients who have claims against the same employer, then the lawyer could discuss "advance waivers of conflicts of interest relating to discovery or other

witness-related issues" at the outset of the representation, provided that there is "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation."[8]

Representing a Third-Party Witness

In the companion D.C. Bar Legal Ethics Opinion No. 381, "Responding to a Third-Party Subpoena," the D.C. Bar addressed whether a lawyer may represent both a current client and a third-party witness who received a subpoena from opposing counsel in the current client's matter.[9]

According to the opinion, in this situation, "[o]rdinarily, direct adversity will not exist … because the issuer of the subpoena, not the subject of the subpoena, is adverse to the [third party]."[10] There can be an exception, however, if the lawyer knows or discovers that the third party "possesses responsive information that, if produced, is or likely will be adverse to the subject of the subpoena (the other client)."[11]

In that situation, a conflict under Rule 1.7 likely exists, which could be waived only after obtaining informed consent from each affected client.[12] Alternatively, the lawyer "may retain conflicts counsel to address that portion of the representation if the client agrees and the retention is otherwise consistent with the Rules."[13]

However, if the prospective client does not have information that could be damaging to the current client, then Rule 1.7 allows representation of both the third-party witness and the current client.

If representing a former client served with a subpoena by opposing counsel, Rule 1.9 prohibits a lawyer from using "the former client's confidential information … to benefit another client in a subsequent representation to the former client's detriment."[14] Absent that narrow circumstance, Rule 1.9 allows representation of both the current client and the former client as a witness.

D.C. Bar Ethics Opinion 381 is consistent with those of other courts and bars, which have long recognized the propriety of a lawyer representing both a party and a witness.

The New York City Bar expressly approved of this practice in a detailed 2016 opinion: "It is not uncommon for a lawyer representing a party in a litigation also to represent one or more non-party witnesses at their depositions."[15]

That opinion concludes that a lawyer may ethically represent a nonparty witness so long as the lawyer ensures that the limited representation is reasonable, determines that there is no nonwaivable conflict presented by representing the party and the nonparty, and obtains any necessary informed consent from both the party and the nonparty witness.[16]

Several courts have reached the same conclusion. In 2013, U.S. District Judge Amy Totenberg of the U.S. District Court for the Northern District of Georgia, in the False Claims Act case *United States ex rel. Harris v. Lockheed Martin Corp*., denied a motion to disqualify: "There is thus no

greater risk here of a conflict of interest than in any other case where [a lawyer] properly represents a non-adversarial third party fact witness."[17]

U.S. Magistrate Judge Jeffrey Cole, of the U.S. District Court for the Northern District of Illinois, had an employment case, *Sapia v. Board of Education of the City of Chicago*, where the employer's lawyer challenged the assertion by the employee's counsel of attorney-client privilege over communications with a witness.

Judge Cole analyzed the case law and concluded in 2019: "Still, it cannot be said, certainly not without more factual development from defendants, that the simultaneous representation of a party and a non-party witness is prohibited."[18]

Conclusion

Taken together, these two D.C. Bar ethics opinions provide clear guidelines for lawyers who are dealing with multiple clients and witnesses.

Subpoenaing another current client or a former client is generally prohibited — even if there is no objection to the subpoena itself — due to the adversarial nature of a subpoena and the potential need to cross-examine the other current client or the former client, which may require using client confidences to benefit one client at the expense of the client being deposed.

In contrast, joint representation of both a client and a third-party witness who was subpoenaed by opposing counsel is generally acceptable, so long as that third-party witness does not have information adverse to the current client's interests.

This is going to become a hot area of ethics law, as the courts and state bars are increasingly confronted with multiple-representation situations, and the increasing use of other clients — current or former — as third-party witnesses. The D.C. Bar ethics opinions should prove influential, although ultimately it is up to the courts and state bars in the 50 states to address this issue, or to revisit their prior approaches, some of which are becoming increasingly outdated.

Practice Points

What should law firms in D.C. be doing as a result of these new ethics opinions?

- Avoid serving a third-party subpoena on another current client or on a former client — try to see if they are willing to testify voluntarily in your case, without a subpoena.

- Even if another current client or a former client is willing to testify on behalf of your client, be sure to find out whether the witness has any information adverse to your client, or has a bad memory. If there would be a need to correct the witness, through impeachment or cross-examination, then you should have separate conflicts counsel from another law firm handle that witness, so that you are not breaching the client confidences of that witness.

- You can offer to represent a third-party witness who was served with a subpoena by your opposing counsel, but first make sure that the witness does not have information adverse to your client, so that you do not have to impeach the witness.

- If you are representing multiple employees who worked together at the same employer, it is best to have a joint representation agreement upfront, to ensure that the clients are all aware that they may be asked to testify about each other, and to avoid creating any conflicts of interest among your clients.

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[1] *See* D.C. Bar Legal Ethics Opinion 380, "Conflict of Interest Issues Related to Witnesses" (Feb. 2021), https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-(1).

[2] *Id.*, at 1 (discussing California, New York, and ABA opinions).

[3] *Id.*, at 2.

[4] *Id.*, at 3.

[5] *Id.*, at 4.

[6] *Id.*, at 5.

[7] *Id.*, at 7.

[8] *Id.*

[9] *See* D.C. Bar Legal Ethics Opinion 381, "Responding to Third-Party Subpoenas" (Feb. 2021), https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-(1).

[10] *Id.*

[11] *Id.*, at 2.

[12] *Id.*

[13] *Id.*, at 3.

[14] *Id.*, at 4.

[15] Association of the Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2016-2, "Representing A Non-Party Witness at a Deposition in a Proceeding Where the Attorney Also Represents a Named Party" (2016), http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2016-2-representing-a-non-party-witness-at-a-deposition-in-a-proceeding-where-the-attorney-also-represents-a-named-party.

[16] *Id.*

[17] *United States ex rel. Harris v. Lockheed Martin Corp.*, No. 1:08-cv-3819, 2013 WL 12328947, at *5 (N.D. Ga. Feb. 5, 2013).

[18] *Sapia v. Board of Educ. of City of Chicago*, 351 F. Supp. 3d 1125, 1131 (N.D. Ill. 2019) (collecting cases).