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Danger Ahead

Caution Needed When Defending Company Witnesses

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It is not unusual for counsel defending a corporation in a product liability lawsuit to be called upon to prepare current or even former employees for deposition. Preparing such witnesses is one thing, representing them as counsel in the deposition is quite another. The word "caution" should be the watchword when taking on a dual representation. The act of "defending the witness' interests" by taking on his/her limited representation may leave counsel with real ethical dilemmas and even perhaps a legitimate disqualification motion.

THE PROS AND CONS OF 'PROTECTING THE WITNESS'

The reasons for preparing a company witness for deposition are obvious and many. Corporate counsel can ascertain and mitigate, if necessary, the witness' attitude to the company, particularly if the witness is a former employee. Counsel can also

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set the stage and educate the witness on what the litigation involves, the merits of the company's defenses, and its trial themes. Documents can be shown to refresh the witness' memory. "Prepping" a witness can be an effective way to steer him/her to give answers in a way consistent with the company's trial themes and defenses.

Absent an attorney-client relationship, however, the preparation of a witness will be fair game for opposing counsel at the deposition. (This article does not address whether former employees should be considered protected under the attorney-client privilege. *Upjohn Co. vs. United States*, 449 U.S. 383 (1981).) Questions about how the litigation was described to the witness, what documents were reviewed, and what was discussed about the case will be all fair game for inquiry. The very thought process of counsel may be revealed. For that reason, counsel may be tempted to create an attorney-client relationship to "protect" the witness in the deposition, thereby shielding communications between counsel and the witness under the cloak of attorney-client privilege. As noted above, however, this could lead to ethical issues, at the very least, and a potential disqualification motion at worst.

THE UNREPRESENTED WITNESS

First, counsel should always be circumspect when dealing with

potential witnesses who are unrepresented by counsel. The A.B.A. Model Rules of Professional Conduct, which address an attorney's ethical duties, have a specific rule addressing how and when a lawyer may communicate with an unrepresented individual. The rule is clear: An attorney shall not give legal advice to an unrepresented person where there is a reasonable chance of a conflict, other than the advice to secure counsel.

Moreover, Rule 4.3 of the Model Rules provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented party, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Telling an unrepresented individual that he does not need counsel is in itself providing legal advice. It is also improper for one party's attorney to advise an unrepresented

witness as to the course of conduct the lawyer thinks the latter should pursue.

Virtually all states have adopted this rule or one similar to it. There are thus three requirements under the Model Rule for dealing with unrepresented witnesses. First, the lawyer must not state or imply that the lawyer is disinterested. An attorney must make clear to the unrepresented individual his role in the case, including the nature of the case, the identity of the lawyer's client, and the fact that his client may be an "adverse party." Second, the lawyer must act affirmatively to correct any misunderstandings about his role in the case. Finally, the Rule provides that an attorney cannot provide any advice or counsel if there is a "reasonable possibility" of being in conflict with the interests of the client.

However, what if the witness is a key former employee, one whose knowledge can make or break the lawyer's case? Or someone who, with proper preparation, will be a great witness (for one side or the other). Taking on their representation in the discovery phase may appear to be a simple solution. It is not.

CONFLICT ISSUES

The representation of a witness in addition to an underlying party is a multiple representation. Once again, the Model Rules of Professional Conduct address this situation. Rule 1.7 provides as follows:

(A) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to the other client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by personal interest of the lawyer.

Multiple representation is not permissible where an "ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice either the public interest or the interest of one of the clients."

The operative rule thus calls for analysis of whether the representation will be either "materially limited" or "directly adverse." These are broad terms, but there is little doubt a direct conflict arises if one has to cross-examine one client whose testimony damages another, or that one's defense will be "materially limited" if a lawyer proffers individuals whose testimony will do damage to the company's defense. All the while counsel should keep in mind the basic precept: avoid the appearance of impropriety. Courts have consistently held that the appearance of impropriety doctrine is not even intended to prevent conflicts of interest, but rather to "bolster the public's confidence in the integrity of the legal profession. Representing witnesses whose testimony damages another client's defenses certainly crosses that line.

Courts use a variety of approaches to judge whether a conflict of interest is materially adverse, but generally look to the positions each party has asserted to determine if they are antagonistic or whether adequate representation is possible based on the duties owed to each client. In determining whether an attorney can "adequately" represent adverse clients, the courts have

looked at factors such as: the nature of the litigation; the type of information to which the lawyer may have access; whether the client is in a position to protect his interests or knows whether he will be vulnerable to disadvantage as a result of the multiple representation; the questions in dispute; and whether a government body is involved.

The next question becomes whether the conflict may be waived. Once again, the rules address this. Rule 1.7(b) provides a lawyer may represent a client if:

(1) The lawyer reasonably believes 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 lawyer in the same litigation or other proceeding before a tribunal; and

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

The fact that the client knows of the conflict is not enough to satisfy the lawyer's duty of full disclosure. The lawyer must explain the nature of the conflict of interest in detail so that the client can understand the reason that it may be desirable to secure independent counsel. The client must be told of the particular circumstances of the conflict in order for a waiver to be meaningful.

While in some instances reasonable minds can differ on whether a waivable conflict exists, counsel should also contemplate his or her professional obligations or duties of loyalty and confidentiality to the proposed new client. This too can play a role in the handling of the potential representation.

DUTIES OF LOYALTY AND CONFIDENTIALITY

In addressing whether there is a conflict, waivable or not, the lawyer must address the potentially conflicting duties of loyalty and confidentiality. On the one hand, the lawyer must share with his clients "information reasonably necessary" to make informed decisions regarding the representation. The client has the right to be informed of anything that might affect the client's interests, and the right to expect that the lawyer will use that information to the client's benefit. Similarly, counsel has a potentially conflicting duty of loyalty. The lawyer owes a fiduciary duty to act in the best interests of each client throughout the duration of the representation. The duty of loyalty has been described as "perhaps the most basic" of a counsel's duties. It is the core of the lawyer's fiduciary duty to the client, and attaches to both current and former clients. In short, the lawyer must be assured he or she can represent adverse clients concurrently with equal vigor, without conflict of loyalties, and without using confidential information to the detriment of either client.

These duties of loyalty and confidentiality can easily overlap. For example, what if the corporation has imparted confidential information about its business which negatively impacts the witness? What if the witness has adverse views concerning his colleagues in the company? What if the lawyer knows that the witness will soon be without a job? Common representation is viewed as inadequate if one client asks that the lawyer not disclose information to the other client. If the potentially adverse interests are not reconciled, the result can be additional cost, embarrassment, and recrimina-

tion. Even less-than-material conflicts can create difficult questions of loyalty for the witness. A lawyer who withholds key information or facts from one client will no doubt be viewed as "disloyal" by one or both. Throughout the entirety of the joint representation, the lawyer will owe the co-clients an equal degree of loyalty. The lawyer may not favor one over the other, or aid one against the other. Each client should expect full loyalty and full disclosure. Should the lawyer be unable to deliver, recusal is the remedy.

SOLICITATION ISSUES

Finally, an offer to represent a witness for purposes of discovery may itself be treated as an improper solicitation, regardless of whether there is a conflict of interest.

Model Rule 7.3 prohibits an attorney from directly soliciting clients. A.B.A. Disciplinary Rule 2-103 provides that "a lawyer shall not ... solicit employment ... of himself, or herself, a partner or an associate to a person who has not sought advice regarding employment of a lawyer" Recognizing that dual representation presents a potential for abuse in that it provides a means for the party to exert influencing control over a non-party witness, courts have been critical where lawyers initiate the representation of a witness. For example, in *United States v. UDC-Love Canal, Inc.*, 606 F. Supp. 1470 (W.D.N.Y. 1992), the court criticized the solicitation of witnesses as clients where the witnesses did nothing to originate the relationship. The court recognized that an attorney-client relationship cannot be created unilaterally by the company for its former employees without their consent. A prospective client must manifest to the lawyer the intent to be represented. Other

courts have similarly shown a willingness to address this issue when ethical abuses are feared.

CONCLUSION

Taking on the representation of a witness for discovery purposes when already representing an underlying party is a significant undertaking. Fiduciary duties of loyalty and confidentiality are created. The short-term benefit of a "friendly" witness who will be protected in discovery may be far outweighed by the ethical dilemmas created by the dual representation. Any doubt as to conflicting positions should be resolved in favor of keeping the client you have, and not adding a new one lest you lose both.