

ETHICS

New York City Bar Issues Opinion on Dual Representation

Opinion addresses joint representation of a corporation and its employees

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When faced with a government investigation, companies often ask attorneys to represent both the company and one or more of its officers, directors, or other employees. In most instances, the company's and the individual's interests at least potentially conflict. Yet specific guidelines for analyzing the appropriateness of such dual representation have been scarce.

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics has issued what appears to be the first for-

under appropriate circumstances.

The opinion applied DR 5-105(C) of the New York Code of Professional Responsibility, which addresses multiple representation generally. DR 5-105(C) imposes two fundamental requirements: First, the attorney must determine whether a "disinterested lawyer" would conclude that the proposed representation is in the interest of each client; second, the attorney must obtain informed consent from each client.

The Committee cautioned that the attorney must remain alert for any change in circumstances that renders potential conflicts actual ones. The opinion provides hypotheticals to illustrate the spectrum from clearly permissible to clearly impermissible representation. For example, an

employee who admitted wrongdoing likely could not be jointly represented, whereas a ministerial employee with secondhand knowledge likely could.

Robert G. Morvillo, New York City, a member of the Section's Task Force on the Image of the Profession, says that the opinion "is a good and comprehensive analysis of the problems." Morvillo cautions, however, that the opinion "does miss one really significant problem that

really underlies this whole area." Specifically, Morvillo warns, "Individuals who know they've done something wrong and know that their lawyer also represents the company are much less likely to be candid for fear of losing their jobs."

Morvillo believes that at

times a lawyer can represent both a corporation and an individual client, but he says, in general, "My view has been for a long time that there is nothing wrong with multiple representation for individuals, but the corporation should probably be separately represented, so at minimum you have two lawyers. It at least protects the truth-finding process and ensures that the lawyer advises the individual based upon what actually happened." □

Resource:

Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Op. 2004-2, Representing Corporations and Their Constituents in the Context of Governmental Investigations, June 2004, available at www.abcnyc.org/eth2004-2.htm.