

Reproduced with permission from ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, 31 Law. Man. Prof. Conduct 630, 10/21/2015. Copyright © 2015 by The American Bar Association and The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Corporate Counsel

Joint Representations in SEC Investigations



BY MEG KEELEY

Almost every corporate enforcement investigation by the Securities and Exchange Commission ("SEC") will at some point involve the testimony of company employees (or former employees). There are many advantages to having the same firm that is representing the company represent the employees too, but there are also disadvantages.

Joint representations pose a number of strategic and ethical considerations that should be well vetted before any joint representation is undertaken. This article explores some of the key ethical considerations from both counsel's perspective and the clients', using a recent ethics decision from the Supreme Court of Oregon to illustrate some of these issues.

*In re Ellis et al.*¹ ("Ellis"), involved a company (FLIR Systems Inc.) that restated several years' worth of financials, triggering both a shareholder class action suit

and an SEC investigation into the company and some of its officers.

The "SR law firm" represented both the company and two of the named officers in the class action lawsuit. The firm then also represented all of the current employees and board members who received subpoenas in the SEC investigation—what amounted to slightly more than half the witnesses examined by the SEC.

Some of the firm's clients provided testimony arguably unfavorable to some of the others, in particular the former Chief Financial Officer Sampers. The SR law firm reevaluated the potential for conflicts after this testimony, but still concluded that there was no conflict necessitating that they withdraw.

The SEC ultimately issued Wells notices to several of the officers, including Sampers, as well as to the company. (In a Wells notice, the commission sets out its case against companies or individuals and invites them to file responses that typically frame ensuing settlement negotiations.) The SR law firm continued to represent both the Company and Sampers, but Sampers also had independent counsel who took the lead in drafting a Wells response on his behalf.

The company's Wells submission, drafted by the SR law firm, "emphasized a near-complete turnover of management and auditors, and its expansion and strengthening of its accounting personnel and controls, including removal of senior management responsible

¹ 344 P.3d 425, 31 Law. Man. Prof. Conduct 122 (Or. 2015).

Meg Keeley, a partner of Williams & Connolly LLP in Washington, D.C., concentrates her practice on defending clients in complex civil and criminal matters, including securities litigation and legal malpractice actions.

for FLIR's troubles."² It then went on to note that to the extent that any wrongdoing might have occurred, the company understood that the SEC was "pursuing fraud claims against one or more individuals who may have been responsible."³ The company later stated that when it wrote this statement, it intended to refer only to two former members of senior management whom the SR law firm did *not* represent, not to Sampers.

The Oregon State Bar ("Bar Association") brought ethics charges against the participating attorneys from the SR law firm, and ultimately determined that they had violated several conflict of interest rules by undertaking a joint representation during the SEC investigation.

The Oregon Supreme Court, in a detailed and thorough opinion, reversed those findings.⁴ Although the Court applied an ethical code that Oregon has since replaced with a version of the Model Rules, much of the Court's analysis is pertinent to the ethical issues that all counsel should explore before taking on a joint representation, as discussed below.

1. Do Consider the Potential for Conflicts.

It goes without saying that you have to evaluate the potential for conflicts of interest prior to taking on a joint representation.

This will typically involve talking to your existing corporate client, as well as to your potential new clients to determine if anyone has information that they would not want shared with the others, including the corporation. You also should ensure that no one will be taking a position adverse to another—for instance, an employee who believes her boss directed her to engage in wrongdoing.

That clients' interests could potentially diverge at some point in the future does not give rise to a current conflict of interest, however.

In *Ellis*, for example, the Bar Association contended that the SR law firm had a conflict because it was in the company's interest to cooperate with the SEC, and at some point in the future individuals may want to take self-protective steps adverse to that cooperation interest. The Court rejected this argument, holding that the potential conflict of interest was not sufficiently "likely" to prevent the SR law firm from taking on the joint representation.⁵

The Court pointed out that the SR law firm attorneys had testified to the commonality of interests that often arises in the context of an SEC investigation:

[A] public company subject to an SEC investigation has two principal interests: to move the process along quickly toward resolution, and to maintain public confidence. The company's board has similar interests, plus an additional interest in assuring itself that current management maintains accurate financial statements. Officers—who run the risk of liability for past conduct—also share the same interests as the company and have an additional interest in not

being damaged by speculative testimony. . . . And, all witnesses have an interest in avoiding becoming embroiled in any "process violation" during the investigation, such as SEC accusations of untruthful testimony, failure to produce requested documentation, or obstruction of justice.⁶

In short, there is often a commonality of interest, and benefits to be gained by joint representation. But counsel should fairly evaluate the potential for a conflict to arise, and undertake the necessary prefatory interviews to determine the likelihood of a conflict emerging.

2. Do Consider the Potential for Conflicts Again. And Again.

Just because a conflict of interest does not exist at the time a joint representation is first undertaken, that does not mean a conflict cannot subsequently arise, as was alleged in *Ellis*. Thus, counsel is well advised to reevaluate the conflicts of interest question throughout your joint representation—particularly as you learn more facts, and when there are significant developments in the investigation.

In *Ellis*, the Bar Association alleged that even if there was not a conflict of interest at the outset, a conflict arose during the SEC investigation "once it became apparent that actual or likely conflicts had arisen."⁷

In support of the position that an "actual or likely" conflict of interest had arisen, the Bar Association in *Ellis* pointed to the fact that several clients' testimony was arguably unfavorable to others, including a witness who testified to the alleged destruction of documents.

The Court noted that "differing recollections are common during the SEC interview phase" and, without more, do not give rise to a conflict of interest.⁸ Similarly, the mere reliance of one client on the opinion of another does not create a conflict of interest.⁹

And with respect to the testimony regarding the purported document destruction, the Court found that the incident illustrated one of the benefits of a joint representation: because the SR law firm represented each of the witnesses at issue, they were allowed to be present for the SEC interviews and investigate the alleged document destruction further, resulting in the ability "to provide the SEC with explanations about issues arising from [the employee's] testimony—particularly concerning circumstances about which [the employee] had been unaware."¹⁰

The Bar Association also pointed to the company's purported acknowledgement that some wrongdoing had been committed by individuals when the Company referred in its Wells submission to the SEC " 'pursuing fraud claims against one or more individuals who may have been responsible' for accounting errors, 'to the extent that wrong-doing may have occurred.' "¹¹

The Court rejected this argument too, noting that the focus of the Company's Wells submission was on remediation: "Although isolated statements in [the Company's] Wells Submission arguably could be read to inferentially cast a negative light on [certain individuals],

² *Id.* at 432.

³ *Id.*

⁴ This article is not intended to be an exhaustive examination of the *Ellis* opinion, which examined numerous potential conflicts at length, including potential conflicts arising in a subsequent investigation by the Department of Justice. Rather, this article seeks merely to use *Ellis* to illustrate some of the issues that can arise in a joint representation situation.

⁵ *Id.* at 437, 441.

⁶ *Id.* at 439.

⁷ *Id.* at 442.

⁸ *Id.* at 444.

⁹ *Id.* at 443-444.

¹⁰ *Id.* at 445.

¹¹ *Id.*

other evidence in the record provides contrary context to those statements, regarding [the Company's] remediation defense and its objective interest in persuading the SEC to look forward, not backward."¹²

That the Court rejected the Bar Association's argument in the end should not be taken as leeway to ignore the potential for conflicts among your clients developing during the course of the joint representation. While differing recollections and reliance standing alone are not sufficient to raise a disqualifying conflict of interest, attempts to shift blame or to point fingers do. Reevaluate the conflict of interests issue any time there is a significant development in the facts, or a change in the legal theories pursued by the government.

3. Don't Automatically Defer to the SEC's Assertion of a Conflict.

You have evaluated the conflict of interest issues as set forth above, and concluded there are no present conflicts of interest that preclude you from undertaking a joint representation. Yet when you call the SEC attorney to inform her that you will be representing the employee, the SEC attorney asserts that you cannot represent the individual because you have a conflict of interest. The SEC attorney goes on to explain that it would like to discuss a cooperation agreement with the individual employee, and that obviously such a discussion cannot include counsel for the corporation. What do you do?

First, you should ask once again whether there indeed might be a conflict of interest that precludes you from undertaking the joint representation. Such an analysis will ordinarily include a discussion with the individual employee as to whether there is any information that she may have that could provide the basis for a cooperation agreement, and advise that she engage separate counsel if there is.

Second, assuming you have not changed your conclusions regarding the absence of a conflict after this inquiry, you should not change your view based merely on the SEC's conclusion. The SEC cannot "create" a conflict by asserting that a conflict exists.

Consider again the typical conflict of interest that can arise in a government investigation—one witness pointing the finger at another, asserting that if they engaged in any wrongdoing, it was because someone else directed them to do it. The SEC may very well be seeking to find that witness who will point the finger; but if your investigation reveals that none of your clients (or potential clients) is in fact pointing the finger at another, the SEC's hopes and desires cannot change that.

Thus, while the SEC's claim of a conflict should cause you to scrutinize the situation even further, you should not defer to the SEC's conclusion if your investigation fairly leads to a different one.

4. Don't Rely on a Verbal Agreement or Understanding.

Both to ensure that your clients understand the potential downsides of a joint representation, and that your own ethical obligations are satisfied, do not rely on

an oral agreement to jointly represent the corporation and any of its employees in an SEC investigation.

Joint representations pose a number of special considerations, including the possibility of disqualification should a conflict of interest develop down the road. **Get your advice and your clients' waivers in writing.**

Make clear that during the joint representation, you will not be able to make claims against any of your clients, to elicit evidence against them, and/or to attempt to shift responsibility between them.

Also make clear that (a) in the event of a dispute between them, a court may allow one of them to use the confidential attorney-client information communicated by the other during the period of the joint representation; and (b) there is law to the effect that a corporation controls privileged information when there is a joint representation of the corporation and its employees.

5. Do Provide for What Happens if a Conflict Develops Down the Road.

You successfully navigate the ethical obligations incident to undertaking a joint representation, but months afterward a conflict arises between your clients related to the investigation. What do you do now?

Do not wait for such a situation to present itself; discuss the alternatives and get agreement from your clients at the outset. There are several options, and the decision is ultimately theirs, so long as they can agree:

► a. Withdraw from representing the employee(s), but continue to represent the Company.

This is the outcome most often agreed to by the parties when counsel starts out as counsel to the Company. But it is not without its risks—clients have successfully disqualified former counsel on the grounds that they learned confidential or privileged information that they cannot erase from their minds.

Thus, should your clients select this option, it behooves you to reach agreement on whether you can use confidential and privileged information in the event of a partial withdrawal *before* you take on the joint representation.

► b. This reverse option is sometimes selected as well—with the attorney staying on as counsel to one or more individuals, and the Company retains new counsel.

The same cautionary note applies with respect to addressing ahead of time whether confidential and privileged information can be used or not in order to avoid a motion to disqualify down the road.

► c. Withdraw entirely (an inefficient result, but the only one that may work in some circumstances).

6. Do Advise Your Individual Clients to Seek Independent Legal Advice.

Individuals contemplating a joint representation with their employer's (or former employer's) outside counsel may have a lot to gain from such joint representation, but, as set forth above, they also waive a number of rights.

Give your clients the opportunity to consult with outside counsel regarding the decision, and encourage them to take that opportunity as it will provide much greater assurance that any waivers secured are enforceable. Indeed, it is a good idea to recommend to your

¹² *Id.* at 450.

corporate counsel that the Company pay for the consultation of an independent lawyer as it is the best means of protecting all parties involved.

7. Don't Promise to Keep Secrets Between Your Clients.

Secrets between joint clients create an untenable situation for both clients and lawyers. Make clear to your clients that there will be no secrets between them.

8. Do Consider Using Separate Counsel as Well.

In some circumstances, you may want to encourage the retention of separate co-counsel even when you do not believe there is a conflict of interest and the parties have agreed to joint representation.

For example, where the SEC is claiming a conflict of interest, it may be in both the Company's interest and the individual's interest to have independent co-counsel who can assuage the SEC's conflict concerns. Indeed, although the *Ellis* Court never expressly relied upon the existence of independent co-counsel for Samper, the Court repeatedly noted their participation in the defense, and the fact that they had made the same conclusions concerning potentials for a conflict of interest at the SR Firm.

Conclusion

Joint representation has its advantages, but it can also result in disqualification of counsel in the future, or allegations of ethics violations and malpractice. Joint representation should not be undertaken lightly. Examine the issues carefully, make sure there is full disclosure and understanding by all involved, and then continue to reexamine the potential for conflicts throughout your representation.