

ETHICAL DILEMMAS

Deciding When to Assign Separate Counsel for Public Human Service Agency Co-Defendants

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Nationwide, how many government department of human services employees are there? The Illinois Department of Human Services has 14,057;¹ the Michigan Department of Human Services has 14,000;² the Los Angeles County Department of Public Social Services has 13,681.³ The nationwide grand total? Unknown. How many of those employees get named as a defendant in a lawsuit for work-related reasons? Also unknown.

If a department employee is sued, is that person entitled to their own attorney, an attorney who is not representing another department employee in the same lawsuit?

Government human services employees can be sued for job-related actions, omissions, and decisions in their official and/or individual capacities. In most cases the government's attorney or outside counsel will provide legal representation. In complex, multi-party litigation against government departments of human services officials, conflicts of interest may occur despite the co-defendants generally having mutual litigation interests. In such circumstances, some defendants may need their own independent counsel.

Under what circumstances should an individual employee-defendant request and be provided his or her own attorney? Given the unique nature of each lawsuit and the laws that apply, no one prescription applies to all situations. Like many legal ethics questions, the answer may begin with "it

depends..." One thing is certain: Serious conflicts of interest can be avoided if the government agency clearly states in writing the scope of each attorney's representation. There should be no ambiguity about whether an attorney represents the agency, an individual employee, more than one employee, or the agency and multiple employees. This clarification should occur before conducting interviews of any agency employees.

When Employees Should Request their Own Attorney?

When an employee's interests diverge from the interests of co-workers and/or the employer, the employee should request his or her own attorney. This can occur in a range of situations. The clearest circumstance is when there is a question whether the employee's actions were within the scope of employment. This is a crucial issue to understand at the start of representation, because the agency may choose to defend the case at the expense of

the employee by blaming the employee. Any time this is a possibility, the employee should have separate, independent counsel. For example, an agency worker faced with an out-of-control youth might be accused of using excessive force to de-escalate the child's behavior. If the alleged use of force falls outside the agency's official policy, the employer could seek to characterize the conduct as outside the scope of employment, particularly if

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the employee was terminated after the incident. Because the employer would have an additional defense that is at odds with the interests of the employee, separate counsel for the employer and employee would be called for.

Allegations involving intentional torts can always give rise to potential conflicts. In many jurisdictions, intentional torts are outside the scope of employment, yet the lawsuit may include allegations of negligence against the employer for negligent hiring or failure to train, supervise, or monitor. Most insurance policies exclude intentional wrongdoing from coverage, further complicating these situations. Separate counsel is essential in these situations.

Separate counsel should also be considered when there are divergent factual accounts that pit supervisors against subordinates. For example, in many residential foster care settings, agency workers are expected to maintain eyes-on or line-of-sight supervision of the youth in their care. This relatively high intensity of supervision can be challenging, particularly when the direct care worker is responsible for supervising multiple children. If a child goes AWOL, or a child is assaulted by another in his room, the worker responsible for supervision may defend himself by claiming his supervisor permitted laxer supervision than official policy allowed. This type of conflict

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presents two distinct challenges. In such a situation, liability becomes virtually impossible to defend because the question shifts from whether someone was negligent to an argument focused on who was negligent.

In situations where the employee is still employed by the agency, the issue of collusion may be raised. Because supervisors are in the

unique position to exert control over their subordinates, it is important to insulate employees (supervisory and subordinate) and the agency from not only actual or potential undue influence, but also from the appearance that such influence may have an effect on a willingness to testify truthfully. This can sometimes best be accomplished by providing both employees separate counsel.

When the Government is Likely to Provide Counsel for an Individual Employee

Civil litigation against a government human services agency can be stressful, time-consuming, and expensive. While each defendant-employee is entitled to proper legal representation, the government justifiably wants to minimize self-defeating behaviors. Indeed, the government may believe common representation and cooperation will yield a successful result, not just for the government but for the individual defendant-employees.

Initially, co-defendants may agree with a certain defense strategy that has one attorney representing all their interests. As the lawsuit develops this posture may be reevaluated if finger pointing starts and conflicts become apparent. In the long run, from a strategy, ethical, and financial perspective, it is often wiser and cost-effective to retain separate counsel early on rather than delaying. This posture is especially compelling when the interests of the

government are adverse to those of an employee if there are allegations of criminal conduct.

Defense attorneys frequently find at least one co-defendant no longer works for the government agency. This may be due to high staff turnover rates or the slow pace of litigation. The ex-employee may have retired on good terms, found a new job, or left under a

cloud. In each case, defense counsel must locate these defendants and decide how best to best represent them. Simultaneously, from an ethical 'solicitation' perspective, defense counsel must be careful to properly approach such ex-employees.

Ethical and Substantive Legal Considerations

In most instances, the case calls for one attorney to represent one client. At what point should a defendant be advised that he or she should obtain separate counsel? The ABA's Model Rules of Professional Conduct, Rule 1.7 [Rule 1.7 Conflict Of Interest: Current Clients] provides:

- 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 another 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 a personal interest of the lawyer.
- b. Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 1. the lawyer reasonably believes that 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 duty of an attorney to a client is not a mere cliché. From an ethical perspective, in all cases each party must understand what multiple representation means and what its possible effects may be.

Financial Considerations

The temptation to put cost issues first is ever-present. However, in most

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jurisdictions, a lawyer disqualified due to a conflict may be barred from further involvement in the litigation. If this occurs, the consequences can be more expensive than if separate representation had occurred from the start. Following the initial attorney's withdrawal, two new attorneys will join the case midstream, both reviewing documents already reviewed by the prior lawyer and further duplicating that attorney's work just to get up to speed. A diligent attorney is unlikely to be satisfied with the work of another, particularly following the emergence of a conflict, and his or her duty to the client may require a re-analysis of many of the legal and factual issues to verify the conclusions continue to be sound and determine how they may be affected by new conflicts.

Because of the costs of potential conflicts, it is important to consider separate representation at the start of the case. It is also important to acknowledge that although the litigation may be more expensive with separate representation, benefits may result as well. Defendants with their own attorneys will likely be entitled to give their own opening and closing statements and perform their own separate cross-examinations of adverse witnesses. In addition, most jurisdictions permit joint defense agreements. Other cost-conscious strategies can be pursued, such as sharing costs for records and/

or experts needed by both parties. If the question of separate representation is a close call, it is usually best to err on the cautious side and provide it.

Conflict Waivers

If all parties agree that no current conflict exists, and it is unlikely a future conflict will arise, representation may move forward with a shared lawyer. However, whenever it is possible that a conflict may emerge during the litigation, it is prudent to obtain a

conflict waiver from all represented clients. A conflict waiver should closely track the local rule of professional conduct governing conflicts. The waiver should acknowledge that the prospective client has had an opportunity to consult independent counsel before agreeing to the waiver. The waiver should also state that the client agrees, after consultation, that joint representation is in the client's best interests. Finally, it is important to include a provision allowing the attorney to continue to represent one or more parties even if a conflict arises. This provision should also identify which client has ultimate decision-making authority to decide which lawyer and law firm will represent which client when a separate lawyer is retained for one or more parties.

Conclusion

An attorney may represent multiple clients if their interests are not directly adverse to each other. However, the attorney must explain any circumstances that might cause a client to question the attorney's undivided allegiance. Similarly, if there are questions of conflict of interest the attorney seeking to undertake the representation must satisfactorily resolve them. During litigation, many states allow the court to raise the question if it believes the attorney has failed to do so.

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Endnotes

1. https://en.wikipedia.org/wiki/Illinois_Department_of_Human_Services
2. https://en.wikipedia.org/wiki/Michigan_Department_of_Health_and_Human_Services
3. <http://www.ladpss.org/>

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