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WHOSE LAWYER IS IT ANYWAY?

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Question:

My firm and I have been named in an arbitration filed by a former client. The firm agreed to provide me with a lawyer who is representing it, too. The firm is also going to pay for my legal fees. I am concerned that the lawyer chosen by my firm will place the firm's interests above mine. I do not want to "contribute" to any settlement as I did nothing wrong and would go to hearing if necessary. Do I have any reason to be concerned about this joint representation?

Answer:

As a named party to a customer-initiated arbitration, you may find yourself liable to that customer for a monetary award, either jointly with your employer or on your own. In addition to the potential arbitration award, there are fees and costs associated with the administration of a self-regulatory organization arbitration that you might also be responsible for paying.

Finally, and most importantly, an adverse arbitration award could result in a disciplinary referral to the NASD or NYSE Divisions of Enforcement. Given the potential for any or all of the aforementioned outcomes, you need the most effective assistance of counsel — one free from conflicts of interest. If you're aware of the pitfalls to avoid and take necessary precautions, you should receive the legal guidance and representation that you need and to which you are entitled given the possibility of conflicts that can arise in joint representation of clients.

As a former in-house counsel with a major wirehouse, all too often I found myself in the position of representing both the interests of the firm and those of the registered representative. I say "all too often" because, as an attorney, I have an ethical obligation to provide my client with the most effective legal representation that I am capable of offering. It should come as no surprise that, particularly in litigation and arbitration, the interests of two parties do not always coincide. The potential for conflicts may impede an attorney's ability to concurrently represent both the firm's interests and yours. Moreover, should an actual conflict of interest arise — the needs of the firm in defending against the arbitration claims are no longer the same needs as yours — the allegiance of counsel will be to the firm, and you may find yourself without legal representation midway through the process.

What happens when the firm's lawyer tells you that he can no longer represent your interests because the firm believes that you did something wrong for which they feel that they have no liability? Or that the firm has decided that for the sake of economic efficiency it wants to settle, but you want to see it through to the end in hopes of being vindicated? While it is not impossible, it is a fine line for an attorney to walk when they agree to

represent parties who may very likely have differing views of a matter and, ultimately, have different stakes in the outcome of that matter.

There are certain precautions that you can take in advance of agreeing to a joint representation situation. While none can prevent conflicts of interest from arising, they will hopefully diminish your concerns.

At the onset, your attorney should have a discussion with you that outlines the potential for a conflict arising, addresses the precautions that will be taken to lessen the potential conflicts and provides you with a framework for how you will proceed should he later conclude he can no longer represent you. This conflicts talk should be followed by a letter that puts in writing those things you and the attorney have discussed. Moreover, the attorney should request your permission to represent both you and the firm (and any other parties to the arbitration that the firm wants under the same umbrella).

It is your responsibility to make certain that you have a straightforward discussion with the attorney about your view of the case, your desired outcome and your ability to participate in your own defense. You may also want to discuss with the firm's representatives the possibility of having them retain separate counsel for you so that conflicts may be avoided.

In the end, there may always be a question of the adequacy of your joint representation. Given the serious consequences of an adverse arbitration award, it may be in your best interests to retain your own counsel, either as a sounding board to discuss the joint representation or as your own legal representation that has only your best interests at heart. My recommendation: Each party should have its own counsel so that these problems never have an opportunity to arise. While this last recommendation is most likely the costliest to you in financial terms, can you really put a price on your reputation and your license to do business?

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