

## "Judge Rejects SEC's Efforts to Crack Down on Joint Representation in Insider Trading Case"

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A recent ruling in an insider trading case may stymie efforts by U.S. Securities and Exchange Commission attorneys to crack down on joint representation of individual defendants, a defense strategy that has long irked enforcement attorneys because it makes securing cooperators more difficult.

Companies and individuals often prefer joint representation because it cuts down their defense costs. But in recent years, the SEC has grown increasingly frustrated with the practice because it undermines the agency's enhanced cooperation program.

Rolling out in January of 2010, the program allows SEC enforcement attorneys to offer cooperation agreements, deferred prosecution agreements and non-prosecution agreements in exchange for early information. Joint representation makes it harder for the government to play one defendant against another because the defendants have the same attorney.

The SEC has been raising objections to joint representation, with the agency's enforcement director Robert Khuzami telling a group of New York lawyers in a speech last summer, "You will likely see an increase in concerns expressed by SEC staff in those situations."

California defense lawyers cited several instances in which the SEC has done just that. But a recent ruling by Northern District Magistrate Judge Joseph C. Spero appears to brush the SEC back.

Late last year, Spero ruled the SEC didn't have standing to file a motion to disqualify counsel at Fenwick & West LLP, who had previously represented two defendants in an insider trading case but passed off representation of the one who chose to cooperate with the government. Spero ruled the conflict waiver Fenwick's clients had signed was valid, sufficiently alerting them to the risks of hiring the same firm, and he allowed Fenwick to

continue representing its remaining client. Securities and Exchange Commission v. Tang et al., 09-CV-5146 (N.D. Cal., Oct. 30, 2009).

"...Generally, a party seeking disqualification based on a conflict must be or have been a client," Spero wrote, citing a Central District case from 1998. The SEC had argued it had standing to file the motion because the joint representation caused an ethical breach that so infected the litigation that "it impacts the [SEC's] interest in a just and lawful determination of [its] claims." But agency lawyers offered no specifics, and Spero ultimately found the argument unpersuasive.

Fenwick argued the SEC's motion was filed "purely for strategic reasons in order to deprive [its client] of counsel just months before trial, knowing that he will be unable to obtain comparable representation on a pro bono basis if Fenwick is disqualified," according to Spero's ruling.

Attorneys for the SEC and the defendants declined to comment publicly on the case, but legal observers predicted Spero's ruling could serve as much-needed guidance on the question of SEC challenges to joint representation because there isn't a lot of case law on the issue.

"The portion of [Spero's ruling] that says that the SEC does not have standing to assert a conflict..could impact whether individuals have to separate counsel," said **Michael D. Torpey**, chair of the securities litigation group at **Orrick, Herrington & Sutcliffe LLP**. "My view is that [Spero] got it right. The question of whether joint representation is appropriate is whether the clients want it, not whether the SEC thinks it's appropriate."

Legal ethics rules in California allow clients to sign conflict waivers in most situations, making joint representation common here.

But ethicists disagree on how joint representation should be handled, making it difficult to tell how judges will balance Spero's ruling against existing rules.

"It is not unethical for a lawyer to represent multiple people in an investigation, up until a reasonable person can see there's a conflict," said Rory Little, a legal ethicist at UC Hastings College of Law. But he said most ethicists think that if a conflict does arise, a lawyer has to rescue himself

from the case entirely because his duty remains to both former and current clients. "This is what's dangerous about multiple representation."

Little also noted that ethicists disagree about whether a conflict waiver can override ethical violations. The worst-case scenario comes when a lawyer could need to cross-examine a former client in the same proceeding in which he's defending a current client, a conflict that the courts forbid.

In the Tang case, Fenwick attested that its former client didn't plan on implicating its remaining client through his cooperation with the government.

"I would say that Judge Spero has made a clear call that's reasonable based on the authorities he cited," said Little, who was not familiar with the facts of the case. "But there's certainly another view of this."

Laurie L. Levenson, a legal ethicist at Loyola Law School, said Spero's ruling supports the enforceability of conflict waivers, as long as they truly qualify the nature of the risk of joint representation, and the right of a client to choose his or her own counsel.

"If I were the SEC, I'd be worried that this [decision] will empower the defendants to further stonewall in these kind of cases," Levenson said. However, that temptation could backfire, she said, if enforcement attorneys find civil investigations to be so challenging that they give up and refer them for criminal investigation.

Despite the complexities of the issue, Little said Spero's opinion is important.

"The issue will not go away," he said.