PROGRAM MATERIALS
Program #2919
January 31, 2019

Ethics and Employment Law: Who is the Client and is it You?

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ETHICS AND EMPLOYMENT LAW:

WHO IS THE CLIENT AND IS IT YOU?

APPLICABLE RULES:

- Model Rule 1.1
- Model Rule 1.2
- Model Rule 1.4
- Model Rule 1.6
- Model Rule 1.7
- Model Rule 1.8
- Model Rule 1.13
- Model Rule 3.7
- Model Rule 4.1
- Model Rule 4.2
- Model Rule 4.3
- Model Rule 4.4

MODEL RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

MODEL RULE 1.2: SCOPE OF REPRESENTATION

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

MODEL RULE 1.2: SCOPE OF REPRESENTATION (Contd.)

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MODEL RULE 1.4: COMMUNICATIONS

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

MODEL RULE 1.4: COMMUNICATIONS (Contd.)

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION

a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION (Contd.)

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION (Contd.)

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION (Contd.)

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

MODEL RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(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.

MODEL RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS (Contd.)

(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

MODEL RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to

MODEL RULE 1.13 ORGANIZATION AS CLIENT (Contd.)

higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> **(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and**

MODEL RULE 1.13 ORGANIZATION AS CLIENT (Contd.)

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

MODEL RULE 1.13 ORGANIZATION AS CLIENT (Contd.)

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

MODEL RULE 1.13 ORGANIZATION AS CLIENT (Contd.)

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT TO RULE 1.13

- **Communications with an organization's representatives are confidential under Rule 1.6**

- **Attorney must follow the direction of the organization's representatives; except, attorney required to take reasonable action where the organization will be substantially injured by the representatives' actions**

- **A lawyer for an organization may also present a principal officer or major shareholder**

MODEL RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

MODEL RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

MODEL RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

MODEL RULE 4.3: DEALING WITH UNREPRESENTED PARTIES

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

MODEL RULE 4.4: RESPECT FOR RIGHTS OF THIRD PARTIES

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

THE CEO'S NEW EMPLOYMENT AGREEMENT:

Your employer client has asked you to prepare the CEO's new employment agreement. The CEO is a client of your firm in his individual capacity, and he hired you to represent the company. The CEO's original employment agreement predates your representation of the Company. Can you draft the employment agreement? Do you need to get a waiver or provide informed consent?

ENGAGEMENT LETTERS

CEO/Firm engagement letter states that the Firm will provide estate planning services to the CEO.

Company/Firm engagement letter states that the Firm will provide general corporate and employment law services to the Company.

CONFLICT AMONG CURRENT CLIENTS

Is the CEO a current or former client? His estate planning work is completed, but, from time to time, he will call the tax attorney in the office to clarify tax questions.

Model Rule 1.7(a):

- **Adverse**
- **Material limitation**

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CONFLICT AMONG CURRENT CLIENTS (Contd.)

Model Rule 1.7(b):

- **Reasonably believe that you can provide competent and diligent representation**
- **Not prohibited by law**
- **Does not involved the assertion of one claim against another**
- **Informed consent in writing**

CONFLICT WITH FORMER CLIENT

Model Rule 1.9:

- **Same or substantially related?**
- **Materially adverse to the interests of the former client**
- **Informed consent in writing**
- **Confidential information (use or disclosure)**

THE OFFICE MANAGER'S MALFEASANCE

Your main contact at the employer client is the Human Resources Manager. You talk to the Manager regularly about employment issues. From time to time, you have assisted the Manager with small personal legal issues, unrelated to his employment, without benefit of payment or an engagement letter. The Company's President calls you to tell you that the Manager will soon be terminated based on his malfeasance: an affair with a co-worker, and financial irregularities. Can you advise the Company regarding this termination?

CONFLICT AMONG CURRENT CLIENTS

Is the Manager a current or former client? There are currently no open personal matters for the office manager, but no closing letters for the small matters you handled.

Model Rule 1.7(a):

- **Adverse**
- **Material limitation**

CONFLICT AMONG CURRENT CLIENTS (Contd.)

Model Rule 1.7(b):

- **Reasonably believe that you can provide competent and diligent representation;**
- **Not prohibited by law**
- **Does not involved the assertion of one claim against another**
- **Informed consent in writing**

CONFIDENTIAL INFORMATION

Up to now, the Manager has been authorized to communicate with you regarding legal matters. The Manager learns that you met with the President and demands to know the topic. Are you free to discuss with him? Are you authorized to continue to communicate with the Manager on other matters?

Model Rule 1.4

- **Keep the client reasonably informed**
- **Means by which the client's objectives are to be accomplished**

CONFIDENTIAL INFORMATION (Contd.)

Model Rule 1.6

- **Who is within the scope of confidentiality?**

Model Rule 1.13

- **Who is authorized representative of the client? best interests of the organization**

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LAWYER AS WITNESS

Assume that you are the one who has uncovered the financial improprieties, and brought them to the attention of the Company. You have questioned the Manager regarding this as the Company's attorney. In the event of litigation, can you testify? Can you represent the Company? Are you the client now?

Model Rule 4.2 and 4.3

- **Be clear with Manager about who you represent**

LAWYER AS WITNESS (Contd.)

Model Rule 1.7

- **Can you even question the Manager?**

Model Rule 3.7

- **Cannot act as both witness and advocate**

INVESTIGATIONS

Your client has received a complaint of sexual harassment. The Company is small and does not have enough human resources employees to appoint one of them to conduct an unbiased investigation. The client asks you to conduct the investigation. Should you? Can you represent the client in subsequent litigation? Is the communication privileged?

Model Rule 3.7

- **Given privilege issues, risky to be a witness**

INVESTIGATIONS (Contd.)

Model Rule 1.4:

- **Have you advised the client of the risks?**

Model Rule 4.2 and 4.3

- **Communications with witnesses**

SHAREHOLDERS

Assume that a shareholder of your company has learned of the complaint and wants to obtain information from you about the issue. Perhaps the shareholder is outraged and wants the Company to take action that you do not recommend. Can you share the results of the investigation? Can you take direction from the share-holder?

Model Rule 1.13

LITIGATION RELATING TO YOUR ADVICE

You have advised the client regarding a compliance issue under the Fair Labor Standards Act. Litigation ensues and the client would like to use your advice as a good-faith defense as permitted under the statute. What is your advice?

Model Rule 1.4

- **Privilege issues – may result in waiver (see, e.g. Scott v. Chipotle Mexican Grill, 2014 U.S. Dist LEXIS 175775 (S.D.N.Y. December 18, 2014)**

LITIGATION RELATING TO YOUR ADVICE (Contd.)

- **Was the client advised of risks? What form did the advice take?**

Model Rule 1.1

- **Were you competent to provide such technical advice?**

Model Rule 1.7

- **Has the client threatened a claim? Are your interests now adverse?**

CLIENT'S EMPLOYEES

As counsel for the Company, you have developed long-term personal relationships with certain employees. They often come to you for personal advice, and legal advice. You have knowledge about their personal lives and some private details. Some things to consider:

Model Rule 4.2 and 4.3

Model Rule 1.13

Identify who is the client, and whether the interest is adverse.

CLIENT'S EMPLOYEES (Contd.)

Engagement Letters

Closing Letters

Do you need to advise the employee that you may need to disclose details to the Company?

Can you provide advice regarding the termination of those employees?

CONCLUSION

Engagement Letters

Clarity in Communications and your role

Protect Privilege and advice client regarding waivers and risk of waivers

Don’t be greedy.