



PROGRAM MATERIALS

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The New Normal: Everyday Encounters with Employment and Ethics

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The New Normal: Everyday Encounters with Employment and Ethics

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Overview of Webinar

- What is the “new normal” for employment lawyers, and what ethical obligations should be anticipated?
- What pressures will be caused by business reopenings, individual stress and tension, and cost-cutting measures? How might those pressures translate into problems for employment lawyers?
- This webinar is intended to make you aware of situations that may arise and of the Model Rules of Professional Conduct that may inform how we respond to such situations.

Current Events Direct Encounters

Challenges of Changing Times, Changing Laws and Ever-Present Time Pressures

- December 31, 2019 – First COVID case reported from Wuhan, China
- January 21, 2020 – First US COVID case reported in Washington state
- January 30, 2020 – WHO declares a global public health emergency
- March 13, 2020 – President Trump declares a national state of emergency
- March 18, 2020 – Families First Coronavirus Response Act signed
- March 19, 2020 – California is the first state to issue a stay at home order
- March 27, 2020 – CARES Act signed
- April 2, 2020 – US DOL says 6.6 million Americans filed for unemployment

Challenges of Changing Times, Changing Laws and Ever-Present Time Pressures

- May 14, 2020 – CDC issues return-to-work guidance
- May 25, 2020 – Death of George Floyd in police custody
- May 26, 2020 – Demonstrations/protests begin
- June 8, 2020 – WHO reports largest daily increase in cases: 136,000
- June 10, 2020 – Confirmed cases in the US surpassed 2 million
- June 28, 2020 – Global death toll surpassed 500,000
- July 7, 2020 – Confirmed cases in the US surpassed 3 million
- July 10, 2020 – NYT reports protests in 140 cities across the US
- <https://www.nbcnews.com/health/health-news/coronavirus-timeline-tracking-critical-moments-covid-19-n1154341>

Challenges of Changing Times, Changing Laws and Ever Present Time Pressures

- We are in the midst of a public health crisis
- New laws are being passed
- Regulation and guidance on some of the laws are in flux
- People are taking a close look at racism in the US
- Employment lawyers are close and trusted advisors and have generally been very busy over the last several months

Competence: Rule 1.1

Rule 1.1 – Competence

- Scenario One:
 - Joe has been the long-time outside employment counsel to ABC, Inc., a company with 300 employees who work in both office and manufacturing positions. Joe helped ABC quarantine its workforce at the outset of COVID and is currently assist ABC on return-to work-plans. The CEO of ABC has heard that a new stimulus package may be signed any day and will offer new small business loans. The CEO has asked Joe to start drafting loan application documents for ABC.
- Can/Should Joe do the return-to-work plans?
- Can/Should Joe do the loan application?

Rule 1.1 – Competence

- Model Rules of Professional Conduct (RPC) – 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.

Rule 1.1 – Competence

- RPC - 1.1 Comments 1, 3
 - In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience ... the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.
 - In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

Rule 1.1 – Competence

- Does Joe have the legal knowledge, skill, thoroughness and preparation to do the return-to-work plan?
- Are there any competency issues here?
- Does Joe have the legal knowledge, skill, thoroughness and preparation to do loan application documents?
- Does it matter that the law governing the documents is brand new?
- Does Joe have the knowledge or skills to prepare to do this work?
- What are Joe's alternatives?

Fees: Rule 1.5

Rule 1.5 – Fees

- Scenario Two:
 - Joe, the long-time outside counsel to ABC, Inc., created a return-to-work plan for ABC that reflects and is consistent with the latest CDC, DOL and OSHA guidance. Another client of Joe's, XYZ, LLC, has asked Joe to create a return-to-work plan for it.
- Can/Should Joe change the names and give the ABC return-to-work plan to XYZ?
- Can Joe charge XYZ the same fee he charged ABC even though the work was already done?

Rule 1.5 – Fees

- RPC 1.5, Fees
 - (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

Rule 1.5 – Fees

- RPC 1.5, Fees
 - the time and labor required
 - the novelty and difficulty of the questions involved
 - the skill requisite to perform the legal service properly
 - the likelihood, if apparent to the client, that the work will preclude other employment by the lawyer
 - the customary fee
 - the amount involved and the results obtained
 - the time limitations imposed by the client or by the circumstances
 - the nature and length of the professional relationship with the client
 - the experience, reputation, and ability of the lawyer or lawyers performing the services
 - whether the fee is fixed or contingent

Rule 1.5 – Fees

- RPC 1.5, Fees, Comment 1
 - Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Rule 1.5 – Fees

- California Rules of Professional Conduct, Rule 1.5(e)
 - A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.
 - California Rule looks to unconscionability of fee.
 - Some fee agreements must be in writing* to be enforceable. (See, e.g., Bus. & Prof. Code, §§ 6147 and 6148.)(>\$1,000).

Rule 1.5 – Fees

- How will Joe decide what XYZ should pay for the return-to-work plan?
- Would it be reasonable — or not unconscionable — for Joe to charge all clients the same cost for the plan?

Ethics Reminders on Situations Likely to Arise

Challenges of Changing Times, Changing Laws and Ever Present Time Pressures

- TIME MAGAZINE – “The Coronavirus Outbreak Has Become the World’s Largest Work-From-Home Experiment,”
<https://time.com/5776660/coronavirus-work-from-home/> (February 3, 2020)
- Working remote is not a new concept and is on the rise
- One out of four jobs in the U.S. specify no location in July, up from one out of 10 in January
- CNBC – Facebook CEO Mark Zuckerberg predicted that 50% of their 45,000-person workforce could work remote in the next 5–10 years,
<https://www.cnbc.com/2020/05/21/zuckerberg-50percent-of-facebook-employees-could-be-working-remotely.html> (May 21, 2020)

Challenges of Changing Times, Changing Laws and Ever-Present Time Pressures

- There is an increase in remote and flexible work options
- Most of our legal work can be performed remotely, but not all
- The at-home environment may be “more” or “less” stressful
- No in-person face time, isolation
- Remote work implicates several rules, including confidentiality

Confidentiality: Rule 1.6

Rule 1.6 – Confidentiality

- Scenario Three:
 - Molly, a junior partner, lives in a two-bedroom condo and rents a bedroom to Susan, an aspiring cable journalist. Molly likes to work on the kitchen table because she can spread out her documents, and the table has space for her dual monitors. Molly is defending her client, ABC, Inc., in a sexual harassment lawsuit filed by a former employee against her supervisor, Bill. Molly is preparing for a virtual interview with the supervisor, which she will conduct remotely via Zoom from the kitchen table. The condo is small enough that conversations from the kitchen can be heard in all common spaces.
- Does Molly's remote work environment create any ethical issues?

Rule 1.6 – Confidentiality

- RPC – 1.6, Confidentiality (relevant provisions)
 - (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).
- * * * * *
- (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.

Rule 1.6 – Confidentiality

- RPC 1.6, Confidentiality, Comments 18, 19
 - Paragraph (c) requires a lawyer to **act competently** to safeguard information relating to the representation of a client **against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer** or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.
 - When transmitting a communication that includes information relating to the representation of a client, **the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.**

Rule 1.6 – Confidentiality

- What third parties does the Rule apply to? Specifically is Molly's roommate Susan a third party?
- Would the assessment be different if the roommate were another lawyer at Molly's firm?
- What is inadvertent disclosure v. not competently keeping information confidential? Does it matter?
- Is the kitchen table, the deck or the porch the new elevator?
- Employment cases are often quite interesting.
- Remote work has a casual feel, but compliance with the rules cannot be compromised.

Unauthorized Practice of Law: Rule 5.5

Challenges of Changing Times, Changing Laws and Ever-Present Time Pressures

- US NEWS - “Teleworking Accelerates the Shift Away from Big Cities,” <https://www.usnews.com/news/cities/articles/2020-06-29/how-teleworking-may-accelerate-the-shift-away-from-big-cities> (June 6, 2020)
- Lawyers working remotely may have moved around.
- Financial pressures on businesses are going to have them admonishing lawyers to be more efficient and keep costs to a minimum.

Rule 5.5 – Unauthorized Practice of Law

- Scenario Four:
 - Molly became frustrated with quarantine and her journalist roommate and moved from her Los Angeles condo to her family's farm in Texas to weather the remainder of quarantine. She is not licensed in Texas, but continues to do her job and is not telling her colleagues in California that she is no longer living there. Molly likes being in Texas and closer to family. She decides to ask for a transfer to her firm's Texas office. The transfer is approved, and Molly sells her Los Angeles condo for a single family home with a pool in a Dallas suburb.
- Is Molly engaging in the unauthorized practice of law?

Rule 5.5 – Unauthorized Practice of Law

- RPC 5.5 – Unauthorized Practice of Law (relevant provisions)
 - (a) A lawyer **shall not practice law** in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, **or assist another in doing so.**
 - (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, **establish an office or other systematic and continuous presence in this jurisdiction for the practice of law**; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

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Rule 5.5 – Unauthorized Practice of Law

- RPC 5.5, Comment 1
 - A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

Rule 5.5 – Unauthorized Practice of Law

- During quarantine:
 - What are the jurisdictional definitions of practicing law?
 - Temporary v. permanent
 - Is Molly holding herself out as a lawyer in both jurisdictions?
 - In which state is Molly a “resident”?
 - Should Molly tell her firm she’s temporarily living in Texas?

Rule 5.5 – Unauthorized Practice of Law

- What if Molly sells her Los Angeles condo and moves to Texas?
- What are the jurisdictional definitions of practicing law?
- Temporary v. permanent
- If you move, check out the new jurisdictional requirements to practice and get on top of them immediately.

Rule 5.5 – Unauthorized Practice of Law

- Scenario Five:
 - Molly decided she did not like living in Texas during quarantine and returned to her condo in Los Angeles. One of Molly's clients has operations in California, New Mexico and Nevada. The client wants new-employee confidentiality and noncompete agreements and wants the project completed as cheaply as possible. The client wants Molly to do all of the work and not confer with New Mexico or Nevada counsel.
- If Molly drafts the agreements for all three states, is Molly engaging in the unauthorized practice of law?

Rule 5.5 – Unauthorized Practice of Law

- RPC 5.5 – Unauthorized Practice of Law
 - (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, **establish an office or other systematic and continuous presence in this jurisdiction** for the practice of law; or
 - (2) **hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.**
- RPC 1.1 – Competency
 - A lawyer shall provide **competent** representation to a client. Competent representation requires the **legal knowledge, skill, thoroughness and preparation** reasonably necessary for the representation.

Rule 5.5 – Unauthorized Practice of Law

Rule 1.1 – Competency

- What if Molly says she has a great deal of experience with neighboring states' laws and that she is comfortable opining on and interpreting New Mexico and Nevada employee confidentiality and noncompete law?
- What if Molly suggests that she take a first cut at the agreements and then they have the finished agreements briefly reviewed by lawyer contacts her firm has in New Mexico and Nevada?
- What if Molly says she knows nothing about New Mexico or Nevada law but she'll wing it as best as she can?

Responsibilities of a Partner or Supervisory Lawyer – Rule 5.1

Challenges of Changing Times, Changing Laws and Ever-Present Time Pressures

- LAW360 – “Coronavirus: How Law Firms Are Handling The Downturn,” <https://www.law360.com/articles/1264699> (last updated July 24, 2020)
- Lawyers are feeling pressured by clients to work quickly and to keep costs down.
- Lawyers may be slow on work and may not be efficient.

Rule 5.1 – Responsibilities of a Partner or Supervisory Lawyer

- Scenario Six:
 - ABC asked Molly to spend as little as possible defending pending litigation. Molly asks Blake, a first-year associate, to briefly review the plaintiff's initial disclosures in a sexual harassment case and "dig up" information about the potential witnesses. Blake contacted a former employee, Ed, who worked with the plaintiff. Ed claims that the company does not take complaints seriously, that he reported financial misconduct to an HR representative just prior to his termination, and the company took no action.
 - Sensitive to ABC's financial situation, Blake drafts an email to the client and does not include what Ed said about financial reporting because he does believe it is relevant to the lawsuit. Molly agrees and approves the email.
 - Blake records 7.5 hours for the conversation with Ed and follow-up email.
- What obligations does Molly have as Blake's supervisory lawyer?

Rule 5.1 – Responsibilities of a Partner or Supervisory Lawyer

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make **reasonable efforts** to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - (1) the **lawyer orders or, with knowledge of the specific conduct, ratifies the conduct** involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, **and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

Rule 5.1 – Responsibilities of a Partner or Supervisory Lawyer

- RPC 5.1 – Comment 5
 - Paragraph (c)(2) ...A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor, as well as the subordinate, has a duty to correct the resulting misapprehension.

Rule 8.3 – Reporting Professional Misconduct

Rule 8.4 – Misconduct

- RPC 8.3 – Reporting Professional Misconduct
 - (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- RPC 8.4 – Misconduct
 - It is professional misconduct for a lawyer to:
 - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

Rule 5.1 – Responsibilities of a Partner or Supervisory Lawyer

- Was it appropriate for Molly to assign the interviews to junior lawyer Blake?
- Should Blake have disclosed what Ed said?
- What should Molly do about the time recorded?

Conflicts of Interest – Current Clients – Rule 1.7 Former Clients – Rule 1.9

Challenges of Changing Times, Changing Laws and Ever-Present Time Pressures

- Lawyers must clear conflicts and open new matters in accordance with the Rules.
- Remote work can feel more casual, but compliance with the Rules must be taken seriously and considered in all engagements.
- Don't let speed get in the way of competent practice habits.

Rule 1.7 – Conflicts of Interest, Current Clients

Rule 1.9 – Former Clients

- Scenario Seven:
 - Molly left her firm and is now working at a small defense firm. Inspired by the Black Lives Matter Movement, she is volunteering at a non-profit organizing demonstrations around her community. While at a peaceful demonstration, Molly runs into Jessica, a former customer associate at ABC. Jessica tells Molly that she was passed for promotion at ABC, she believes it is related to her race, and she asks if Molly will represent her.
- Can Molly represent Jessica?

Rule 1.7 – Conflicts of Interest, Current Clients

- RPC 1.7 – Conflict of Interests
 - 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.

Rule 1.7 – Conflicts of Interest, Current Clients

- 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**.

Rule 1.9 – Former Clients

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the **same or a substantially related matter** in which that person's interests are **materially adverse** to the interests of the former client unless the former client gives **informed consent, confirmed in writing**.
- (b) A lawyer shall not knowingly represent a person in **the same or a substantially related matter** in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are **materially adverse** to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives **informed consent, confirmed in writing**.

* * * * *

Rule 1.9 – Former Clients

- RPC 1.9 – Former Clients, Comments 1, 3
- [1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to **confidentiality and conflicts of interest** and thus may not represent another client except in conformity with this Rule...
- [3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that **confidential factual information** as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter...

Rule 1.7 – Conflicts of Interest, Current Clients

Rule 1.9 – Former Clients

- Could Molly have represented Jessica if she was still working at her old firm?
- Can Molly represent Jessica at her new firm?
- Is Jessica's race discrimination claim substantially related to the other matter (i.e., sexual harassment claim)?

Parting Thoughts

Parting Thoughts

- We need to be thoughtful about remote work environments and not let a casual work environment translate to casual application of and adherence to the RPC.
- Lawyers are under a great deal of stress to provide quick answers in a wildly dynamic environment. Sometimes we will have to push back, slow down, and make sure that we are considering implications of the RPC.
- Law firms and clients are experiencing significant financial pressures. Those pressures do not allow for lax compliance with the RPC.
- Stop, look and listen.

Questions and Answers

