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New Jersey Legal Ethics: A Roundtable Discussion

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- James Paone II, Esq. - www.RespondLaw.com (Davison Eastman Munoz Paone Pa.)
- Jay McGovern, Jr., Esq. - www.RespondLaw.com (Davison Eastman Munoz Paone Pa.)

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5255 North Federal Highway, Suite 100, Boca Raton, FL 33487
Phone 561-241-1919

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RPC 1.13. Organization as the Client

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and RPC 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data

respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

(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 which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the

seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include

revealing information otherwise protected by RPC 1.6 only if the lawyer reasonably believes that:

(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

(d) 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 believes that

such explanation is necessary to avoid misunderstanding on their part.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7. If the organization's consent to the dual representation is required by RPC 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.

(f) For purposes of this rule "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or

other business entity, state or local government or political subdivision thereof, or non-profit organization.

RPC 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, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact

represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

RPC 4.3. Dealing with Unrepresented Person; Employee of Organization

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. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

Note: **Nothing in this handout is applicable to lawyers who represent organizations involved in the securities industry or regulated by the Securities and Exchange Commission. Any lawyer practicing such a discipline, in addition to the RPC's governing corporate representation, should study the "Material Violations Reporting Regulations" under the Sarbanes Oxley Act.**

It is always essential for the lawyer representing the organization to understand that the lawyer's primary obligation is to the organization and to no other client. It is especially important that lawyers representing organizations make their representation clear in dealing with witnesses or in interviews with employees.

Counsel's loyalty is to the corporate client and counsel should be clear on that point. See Home Care Industries, Inc. v. Murray, 154 F. Supp. 2d 861

Furthermore, counsel who has represented a corporation, but no longer does so if often required to undertake an analysis under RPC 1.9 regarding dealings with former clients when it was the corporation that was the former client.

In representing corporations, the corporation in a legal fiction entitled to a separate and distinct entity from its constituent members. This is made clear by the text of RPC 1.13, but also the opinion in Greate Bay Hotel v. City of Atlantic City, 264 N.J. Super. 213 (App. Div. 1993), holding that the corporation rather than its

constituent members is the client and extending the definition of corporations or business organizations to unincorporated entities such as trusts. Greate Bay held that representation of a trust was distinct from representations of the individual members of the trust and the court permitted counsel that had represented the trust to represent another client whose interests were adverse to the interests of the members of the trust.

The tension between corporate representation and dealing with individual shareholders or members of the corporation can become particularly acute when counsel is engaged in the representation of a closely held corporation. In those instances, counsel frequently deals with the individual owners of the company on the corporation's behalf. Because of that close working relationship, it

is possible for the dividing line between corporate representation and individual representation to be blurred. It is essential for the corporate attorney to understand that his primary duty lies to the corporation and not to the individual members. And the lawyer must understand that it is his or her obligation to enforce that dividing line when it becomes appropriate.

Specifically, when a lawyer represents a corporation, that lawyer shall explain to the shareholders and employees that his representation and his loyalty is to the corporation when it is necessary to make employees, shareholders and members clear about who counsel represents. When it becomes unclear or it appears that the entity's interests may diverge from or be adverse to an interest of an employee, shareholder or member, the lawyer is

under the obligation to tell those members, employees and shareholders that the corporation is his only client and his duty of loyalty lies to the corporation. <u>See</u>, <u>Schiffli Embroidery Workers Pension Fund v. Ryan</u>, 1994 <u>U.S. Dist</u>. <u>LEXIS</u> 2154 (District Court of New Jersey).

Another important aspect of RPC 1.13 which can lead to ethical and other pitfalls for practitioners is the identification and designation of members of the litigation control group. It is essential that counsel not confuse upper management of the company with members in the litigation control group. While the former may be a part of the latter, it is not a given that all senior management will be involved in the litigation control group for a particular matter. The Rule provides that the litigation control group

is deemed to include "agents and employees responsible for or significantly involved in the determination of the organization's legal position in the matter whether or not in litigation." The Rule also provides that significant involvement requires an involvement greater than the supplying of factual information or data.

It is especially important to note that that the existence of a litigation control group for the purposes of corporate representation may arise well in advance of a filed lawsuit. Therefore, it is critically important for counsel to the corporation to review potential claims as they arise and to identify and designate members of the litigation control group for those particular claims. In addition, should counsel receive a litigation hold letter requiring the preservation of electronically stored information, counsel should

immediately designate a litigation control group for that particular claim.

Because the Rule considers former employees and agents who were members of the litigation control group to be presumptively represented by counsel, it is important for the corporate attorney to keep such records or for the attorney to instruct the corporation to keep such records. For small corporations where outside counsel if effectively general counsel, the attorney should, upon learning that a member of the litigation control group has left, immediately forward correspondence to that former agent or employee informing them that they are deemed to be part of the litigation control group and are deemed to be represented by counsel and therefore should not talk to anyone making an inquiry about the subject of the litigation

control group's activities. However, the lawyer is also under an obligation to tell the former employee that they may specifically disavow that representation. In those instances where general counsel is an in-house employee, outside litigation counsel, when retained, should immediately make inquiry as to the current and former litigation control group and the status of their designations.

There have been a number of cases which have addressed whether or not certain employees are in the litigation control group. Those cases have addressed the issue of the employee's involvement in the management of the litigation and in the formulation and implementation of the organization's legal policy. See, for example, Klier v. Sordoni, 337 N.J. Super. 76 (App. Div. 2001) in Michaels v. Woodland, 988 F. Supp. 648 (D.N.J. 1997). As the test has evolved,

the general rule is that if a person provides input and direction to the legal strategy or planning of the entity, they would be within the litigation control group. Mere fact witnesses such as witnesses to an accident, witnesses to conversations or persons who are in possession of data, do not automatically qualify for the litigation control group. Also, simply because the character or caliber of the data they possess would be injurious to the legal interests of the entity, does not justify inclusion in the group.

Determination of the members of the litigation control group, both current and former, is especially important in order to comply with counsel's obligations under RPC's 4.2 and 4.3. RPC 4.2 deals with the communications between persons represented by counsel and outside counsel. RCP 4.3 governs the dealings with

unrepresented persons and employees or organizations. The RPC's prevent communication with persons who are represented. The RPC imposes upon the inquiring lawyer an obligation of reasonable diligence to determine whether or not the person is represented by another lawyer or is deemed to be represented under RPC 1.13 through the litigation control group.

The following checklist may be of some assistance in determining whether or not persons are represented. It should be noted that if counsel, after the exercise of reasonable diligence concludes or is able to conclude that a person is not represented and not a presumptive member of the litigation control group, there is no restriction on communicating ex parte with that person. See

Klier v. Sordoni, 337 N.J. Super. 76 (App. Div. 2001) and Michaels v. Woodland, 988 F. Supp. 648 (D.N.J. 1997).

Checklist

- Is or was the person employed by or associated with an organization involved in the matter in question?

- If not, then RPC 4.2 is not a barrier to the interview.

- If the person is a current employee, is the employee in the "litigation control group"?

- If so, you may not contact the employee without opposing counsel's consent.

- If it is uncertain whether the employee is in the "litigation control group," you may make contact to ascertain whether the employee is in the litigation control group or otherwise represented by counsel.

- If the person is a former employee, was the employee in the "litigation control group"?

- If so, you should advise the former employee of the possibility of representation by corporate counsel and the right to disavow such representation.

- If the former employee was not in the litigation control group and is not represented, you may conduct the interview.

An example of the pitfalls, both ethical and practical, surrounding inquiries and questioning of prior employees can be found in Andrews v. Goodyear, 191 F.R.D. 59 (2000). In Andrews, counsel in a Law Against Discrimination suit made ex parte communication with two management level employees of the defendant, one who is a current employee and one who is retired. During those communications, counsel was less than clear and less than concise in his inquiries with respect to representation and

knowledge. The magistrate judge, on motion of the defense, disqualified plaintiff's counsel and the district court reversed using a rather convoluted line of reasoning to reach the conclusion that plaintiff's counsel had substantially complied with RPC 4.2.

The net result of the holding in Andrews is that RPC 4.2 imposes upon counsel a duty of reasonable diligence to determine whether or not the person with whom he is speaking is represented and that includes a specific direct inquiry of the person as to whether they are represented or whether they are in the litigation control group.

RPC 4.3 goes on to modify that obligation by imposing upon the lawyer a duty of candor in dealing with those individuals.

Specifically, the lawyer must identify who he is and who he represents. A lawyer may not state or imply that he is disinterested in the outcome of the matter. Furthermore, if during those communications the lawyer believes that the interviewee misunderstands the lawyer's role in the case, the lawyer must make reasonable efforts to correct that misunderstanding.

Similarly, if the lawyer knows that he is speaking to a "former director, officer, employee, member, shareholder or other constituent" or an organization, but not a person who has been previously designated as a member of the litigation control group under RPC 1.13, the lawyer has an obligation, to ascertain "by reasonable diligence" whether that person with whom he is speaking is actually represented by the corporation's lawyer, or more

importantly, whether or not that person has a right to representation under the RPC.

Parenthetically, evidence obtained in violation of RPC 4.2 and 4.3 is not subject to automatic suppression, but rather is handled on case-by-case basis. See State v. McCoy, 261 N.J. Super. 202 (Law Div. 1993) as well as State v. Ciba-Geigy Corp., 247 N.J. Super. 314 (App. Div. 1992). Keep in mind also that information gathered either in compliance with RPC 4.2 and 4.3 or in violation of RPC 4.2 and 4.3 may also be covered by other protections, including but not limited to, the attorney client privilege.

RPC 1.13(b) also imposes unique responsibilities upon counsel for the organization. The RPC imposes an affirmative obligation on counsel for the corporation to protect the best interests of the organization. Specifically, the Rule provides that if the lawyer knows that an officer, employee or other person is acting, will act or refuses to act in a manner concerning the corporation that is a violation of a legal obligation to the corporation or a violation of law that might be imputed to the corporation, the lawyer "shall proceed as is reasonably necessary in the best interests of the organization."

This obligation is mandatory. Action under RPC 1.13(b) is required if someone listed in the RPC behaves in a manner that is

detrimental to the organization. However, the nature and extent of the action is up to the lawyer.

The RPC contains a graduated and measured response from counsel. The lawyer is left to determine how to proceed with guidance from the RPC in ascending levels of action. Further, the lawyer must consider the impact on the corporation as the RPC mandates that measures taken by the lawyer be specifically designed to minimize the disruption of the organization and to minimize the dissemination of information outside of the organization.

If those remedial measures, as chosen by the lawyer, do not produce the intended effect, or do not result in a deviation in

conduct by the organization, there are other more drastic measures that a lawyer may, but is not required, to take.

Specifically, RPC 1.13(c) provides guidance to counsel in the event the organization's highest authority insists upon continuing the course of action which the lawyer believes to be in violation of the law or likely to result in substantial injury to the corporation. RPC 1.13(c) says at that point the lawyer **may** take "further remedial action if the lawyer reasonably believes to be in the best interest of the organization. However, counsel is cautioned that should that action be undertaken it may include dissemination of confidential information protected by RPC 1.16 **only** if the lawyer reasonably believes that the highest authority in the organization has acted to further personal interests over the interests of the

association and that that information is necessary to be revealed in the best interests of the association. It should be noted that the court on at least one occasion has deemed that a lawyer's failure to act in accordance with RCP 1.13(b) was sufficient to warrant a reprimand. See In re De Mers, 198 N.J. 398.

Thus, if a lawyer is in the position where RPC 1.13(b) needs to be invoked, the mandatory nature of the invocation of that rule should be in the forefront of counsel's mind together with the discretionary nature of the remedy to be fashioned by counsel.

RPC 5.3 – Responsibilities regarding non-lawyer assistance. The Rule states:

> With respect to a non-lawyer employer retained by or associated with a lawyer:
>
> a. Every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of non-lawyers retained or employed by the lawyer, law firm, or organization is compatible with the professional obligations of the lawyer.
>
> b. Any lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the persons conduct is compatible with the professional obligations of the lawyer and;
>
> c. A lawyer shall be responsible for conduct of such person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if (1) the lawyer orders or ratifies the conduct involved; (2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take or make reasonable remedial action or; (3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the non-lawyer incompatible with the professional obligations of a lawyer which evidence of propensity for such conduct.

The August 1, 2016 comment to the Rule with respect to non-lawyers in a firm states:

> A lawyer must give such assistance, appropriate instructions, supervision concerning the ethical aspects of their employment, representation of the client and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. Examples of conduct by non-lawyers which has the potential to raise ethical issues are keeping the confidences of clients, safeguarding and keeping client property, bookkeeping, candor towards the tribunal and fairness to opposing counsel.

The law firm or the lawyer must make "reasonable efforts" to ensure ethical conduct by non-lawyer assistance. The obligation is personal to the supervising attorney. The Rule applies to all entities that are authorized to practice law in the State of New Jersey.

The types of non-lawyer assistants that are covered by the Rule include secretaries, investigators, para-professionals and law student interns. In Smith-Bozarth v. CARA, 329 N.J. Super 238 (App. Div. 2000), the Appellate Division held that the Rule requires that the attorney exercise "reasonable care" to prevent the non-lawyer assistance from breaching ethical rules. In that case, it was RPC 1.6 which was the confidentiality obligation towards clients.

As noted in the official comment to the Rule, most non-lawyer assistants do not have the equivalent legal training of lawyers and therefore it is the lawyer's responsibility to ensure that they comply with their ethical obligations. Further, non-lawyer assistants are not subject to discipline under the Rules of Professional Conduct. The Rule does not define "reasonable efforts" however it is safe to assume that training, whether it be in house or through continuing legal education courses, would

almost assuredly fit under the Rule as a reasonable effort. Lawyers should be sensitive with respect to turnover in staff recognizing that a regularly scheduled yearly or semi-annual discussion of these issues may result in a large gap of time between the time a non-lawyer assistant is hired, and the next scheduled training occurs. It is not the conduct of the non-lawyer assistant that is necessarily or even the grounds for the discipline of the attorney, but it is the lawyers breach of his obligation to reasonably supervise that employer which causes the imposition of discipline upon the lawyer.

For example, in In Re Stransky, 130 N.J. 138 (1982), a lawyer was suspended for a year because he left all of the bookkeeping and recordkeeping obligations to his wife. His wife then, unfortunately, misappropriated tens of thousands of dollars from the trust account. The attorney was disciplined because of his failure to abide by his responsibility to ensure the sanctity of trust funds and for delegating and failing to supervise that authority when given to a non-lawyer assistant.

Very often, lawyers take possession of client's property that is not in the form of funds in the trust account. For example, firms with trust and estates practices often take possession of property of the Estate, whether it be items of personalty or negotiable securities such as savings bonds, bearer bonds or stock certificates. It is the lawyer's obligation to adequately train the staff interacting or handling those items of client property to properly safeguard them.

Additionally, secretaries and paralegals frequently interact with the public and the Court system. It is not at all unusual for secretaries and paralegals to converse with judicial secretaries and judicial law clerks. Thus, it is reasonably safe to assume that a lawyer has the responsibility to instruct the non-lawyer assistant in candor to the tribunal and proper decorum with the tribunal. It is never appropriate, even when asking for something as simple as a small adjournment to fabricate or otherwise color the reasons for that adjournment. Most likely, a representation that consent for the adjournment request is required. Therefore, the non-lawyer assistant must truthfully inform the Court whether or not consent

to the request has, in fact, been given by the adversary. Additionally, there are RPCs with respect to communications with represented persons. A non-lawyer assistant is under the same obligation to avoid communicating with a represented person as a lawyer. Further, there are additional nuances with respect to client confidentiality. It can be the case that either a parent or a husband or wife is either paying for legal representation of a child or the other spouse or involved tangentially in the case but is not the client of the firm. In that case, the firm owes the duty of confidentiality to the client, whether it be a minor child or a spouse or other relation. Despite the fact that someone may be paying for the representation, the duty of confidentiality runs to the client and the client only. Staff should be carefully trained so that they do not inadvertently disclose information which may have been given to the lawyer in confidence but not given to the parent or spouse. Each of these issues should be the subject of continued training at the firm. Further, RPC 5.3(c) provides that an attorney can be responsible for the non-lawyers conduct if misconduct is "ordered or ratified" by the attorney or (2) the lawyer fails to take corrected action to remediate known misconduct, especially in those instances where the consequences of the conduct can be "avoided or mitigated" or the lawyer is guilty of negligent hiring practices. Thus, when interviewing staff or paralegals, the lawyer should inquire as to whether or not there has been any past disciplinary history, as well as inquire as to what training the prospective employee may have had at their prior firm.