



PROGRAM MATERIALS

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Ethical Issues for Employment Lawyers


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Ethical Pitfalls for Employment Law Attorneys

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What We Will Cover

- Representing multiple parties
 - In transactional matters and in litigation
- Ethical considerations in employment litigation
 - Litigation hold notices
 - Inadvertent discovery of privileged documents
 - Purloined documents
 - Discovery and use of social media
 - Electronic Discovery
- Employment counseling and advisor consideration
 - Role of in-house counsel
 - Represented and unrepresented parties
 - Use of social media
- Ethical Considerations in Workplace investigations
 - Outset of investigation
 - Impartiality and thoroughness of investigation
 - Investigation interviews
- Q&A



Representing Multiple Parties

Tracey I. Levy

Representing Multiple Parties: MR 1.7

- A concurrent conflict of interest exists if:
 - the representation of one client will be directly adverse to another client; or
 - 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.
- Notwithstanding ... a lawyer may represent a client if... [it does not present a nonwaivable conflict] and each affected client gives informed consent, confirmed in writing.

MR 1.7(b) Nonwaivable Conflicts

- If in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation;
- If the representation is prohibited by applicable law; or
- If the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal.

MR 1.7: Advising on a New Employment Opportunity

- Bill and Nadav work together at ABC Financial Services, Inc. Bill contacts you and advises that he and Nadav are planning to leave ABC, as they each have been offered new employment with Finance Express. Bill asks you to represent and advise him and Nadav on the following:
 - Bill's noncompete and non-solicitation agreement with ABC and the limitations that poses;
 - Bill's and Nadav's employment offers from Financial Express; and
 - The provisions of restrictive covenants that Financial Express will be requiring Bill and Nadav to sign as a condition of their employment.

Can you accept the joint-representation?

MR 1.7 Applied: New Employment Opportunity

- Who are the clients?

Two existing colleagues of the same entity, who are leaving for employment with another entity

- Does a conflict exist – will representing one be directly adverse to or significantly risk compromising the representation of the other?

Will advising on/negotiating terms of Bill's departure/new hire conflict in any way with negotiations of Nadav's departure/new hire?

How are legal fees to be paid, and does that present a conflict?

- Can the representation nevertheless be undertaken?

Non-litigation context; Check for no legal prohibition on doing so; can you provide competent and diligent legal advice to both?

- Will the clients consent to the joint representation?

Need written agreement

MR 1.7: Acquisition of Business

- Martin and Millie have worked together at Nonprofit XYZ for the past 5 years. Martin is the Executive Director, and Millie is a Program Director. Nonprofit XYZ is a small organization that has been floundering and is being acquired by a larger not-for-profit organization. Martin asks you to advise him and Millie as they negotiate the terms of their exit from Nonprofit XYZ.

MR 1.7 Applied: Acquisition of Business

- Who are the clients?
Two existing colleagues of the same entity
- Does a conflict exist – will representing one be directly adverse to or significantly risk compromising the representation of the other?
Are Martin and Millie both leaving the organization?
Have either been asked to stay?
Will the terms of one's departure adversely affect the terms of the other's departure?
How are legal fees to be paid, and does that present a conflict?
- Can the representation nevertheless be undertaken?
Non-litigation context; Check for no legal prohibition on doing so; can you provide competent and diligent legal advice to both?
- Will the clients consent to the joint representation?
Need written agreement

MR 1.7: EEOC Charge of Discrimination

- You have been retained to represent PQR Co., which recently received a charge of discrimination filed by a former employee with the Equal Employment Opportunity Commission. The charge alleges racial comments made by a supervisor at PQR Co. and asserts the charging party was constructively discharged because of the intolerable work environment created by this supervisor.
- As you work on the position statement in response to the charge, you receive an amended EEOC charge, which now names the three owners of PQR Co. as additional defendants. Owner 1 is the CEO of the company, Owner 2 is the CFO who works remotely from another state, and Owner 3 has no involvement in the operation of the business.
- *Can you represent the three owners in addition to PQR Co.?*

MR 1.7 Applied – EEOC Charge Joint Defense

- Who are the clients?
Corporate entity and three business owners
- Does a conflict exist – will representing one be directly adverse to or significantly risk compromising the representation of the other?
Is there reason to believe one or more of the business owners have engaged in unlawful conduct?
Or would the legal defense be the same for the company and all three business owners?
How are legal fees to be paid, and does that present a conflict?
- Can the representation nevertheless be undertaken?
Not yet at hearing stage before tribunal and the potentially joint clients are not directly adverse to each other; Check for no legal prohibition on doing so; can you provide competent and diligent legal advice to both?
- Will the clients consent to the joint representation?
Need written agreement

MR 1.7: EEOC Charge Further Amended

- You have submitted the position statement for PQR Co. when you receive yet another amendment to the EEOC Charge. This time the charging party has added her former supervisor as a named defendant.
- In preparing the original position statement on behalf of PQR Co., you had interviewed this supervisor and various other employees. The supervisor denied making any racial comments, three witnesses corroborated the supervisor's account, and no one you interviewed supported the charging party's assertions. Instead, you found that the charging party left her job with PQR Co. a few days after she had a winning lottery ticket. Your conclusion, as argued to the EEOC in the position statement, was that the allegations were false and the supervisor had not engaged in inappropriate conduct.
- *Can you represent the supervisor, in addition to the three owners and PQR Co.?*

MR 1.7 Applied – EEOC Charge Joint Defense

- Who are the clients?
Corporate entity, three business owners and the supervisor accused of engaging in discriminatory conduct
- Does a conflict exist – will representing one be directly adverse to or significantly risk compromising the representation of the other?
Is there reason to believe any of the individuals have engaged in unlawful conduct?
Or would the legal defense be the same for the company, all three business owners and the supervisor?
How are legal fees to be paid, and does that present a conflict?
- Can the representation nevertheless be undertaken?
Not yet at hearing stage before tribunal and the potentially joint clients are not presently adverse to each other;
Check for no legal prohibition on doing so; can you provide competent and diligent legal advice to all?
- Will the clients consent to the joint representation?
Need written agreement

MR 1.7: Comment 18 - Informed Consent

- Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent).
- The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include:
 - the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and
 - the advantages and risks involved.

Elements of a Joint Representation Agreement

- Identifies the proposed parties to the joint representation
- Identifies the potential conflict
- Confirms that, after review, counsel believes the parties' interests are aligned
- Addresses what happens if a conflict should arise in the future
- Confirms each of the parties individually agrees to the joint representation
- Advises the parties individually to seek independent legal advice and to have their questions answered
- Consider also addressing the scope of attorney-client privilege between the jointly represented clients, the obligation to preserve privileged communications as to third parties, and the implications if shared information is misused or counsel is directed not to share information with the co-client



Ethical Issues in Litigation

Howard Schragin

Inadvertent Disclosure of Privileged Documents

- Model Rule 4.4(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.”
- New York has adopted Model Rule 4.4.
- Comments to the N.Y. Rule of Professional Conduct Rule 4.4:
 - “Although this Rule does not require that the receiving lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion.”
 - “Because there are circumstances where a lawyer’s ethical obligations should not bar use of the information obtained from an inadvertently sent document or other writing, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document or other writing, or to return the document or other writing to the sender or permanently delete electronically stored information, or both.”

Test For Whether Inadvertent Production Of Attorney-Client Privileged Materials Waives The Privilege (Middle Ground Approach):

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure;
- (2) the number of inadvertent disclosures;
- (3) the extent of the disclosures;
- (4) any delay in measures taken to rectify the disclosure; and
- (5) overriding interests in justice.

Federal Rule of Evidence 502

- **(b) Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
 - (1) the disclosure is inadvertent;
 - (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
 - (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).
- **(d) Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.
- **(e) Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
- Selective Waivers under Rule 502

What are Reasonable Steps to Preserve Privileged Documents?

- Quality Assurance – checking production before disclosure including appropriate sampling of large productions
- Use of third-party vendors with expertise in electronic discovery (although a mistake by the vendor may not lead to waiver)
- Efficient record management systems in place even prior to litigation may demonstrate reasonable steps to preserve confidentiality and privilege
- Working with Client's IT Department to understand electronic systems and protocols
- Use of appropriate search terms (keywords)
- Use of the appropriate type of search (keyword vs. Boolean)

What are Reasonable Steps to Rectify Errors of Production?

- Immediately notify counsel of the inadvertent production
- Demand the return or destruction of all copies of the privileged and confidential documents and/or information
- Promptly move for a protective order if the documents and/or information is not returned (*Alrose Steinway, LLC v. Jaspan Schlesinger, LLP*, 2021 N.Y. Misc. LEXIS 883 (Sup. Ct. New York County Mar. 5, 2021))

FRCP 26(B)(5)

- (B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. **After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified;** and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.
- The rules obligating receiving parties to take steps to preserve the privileged documents produced to them have not been adopted by all state equivalent procedural laws. (i.e., New York)

PURLOINED DOCUMENTS

- Can employees take documents and/or information from current or former employer to support their employment lawsuit?
 - FCA vs. personal claims
 - Is it Protected Activity?
 - *Quinlan v. Curtiss-Wright Corp.*
- Take Notes, Not Documents
- Lawyer cannot instruct client to wrongfully take documents from adversary
- Lawyer cannot use documents wrongfully obtained
- “Lawyer may not make use of computer software applications to surreptitiously 'get behind' visible documents or to trace e-mail.” (N.Y. State Bar Ass'n, Committee on Professional Ethics, Opinion 749, "Use of Computer Software to Surreptitiously Examine and Trace E-Mail and Other Electronic Documents" (Dec. 14, 2001))

Ethical Considerations for Use of Social Media in Litigation

- Attorneys may view the public portion of a person's social media profile even if represented.
- Attorneys may not contact a represented person through social networking websites. (Model Rule 4.2). Also applies to includes witnesses and other third parties who are represented by counsel in addition to the opposing party. Connection requests, private messages, follows, comments, likes and shares all qualify as communications under this rule.
- **Attorneys may not contact a party, witness or any third person by pretext.** Cannot use fake or misleading accounts to connect with parties or witnesses. (Model Rules 4.1., 4.2, 4.3, 7.1 and 8.4) (*See Office of Disciplinary Counsel v. Miller*, Case No. 32 DB 2017, 19, 26-43 (Pa. 2019)). Attorneys may contact unrepresented persons through social networking websites but may not use a pretextual basis for viewing otherwise private information on those websites.

Ethical Considerations for Use of Social Media in Litigation (cont.)

- In New York, no “deception” occurs when a lawyer utilizes his or her “real name and profile” to contact an unrepresented party via a “friend” request in order to obtain information from the party’s account. In New York, the lawyer is not required to initially disclose the reasons for the communication or “friend” request. (NYSBA Formal Opinion 2010-02, Obtaining Evidence from Social Networking Sites (Oct. 19, 2010)). Other states require full disclosure.
- Attorneys may not instruct their clients to “friend” request or contact someone on social media whom they may not contact on their own
- Attorneys may advise clients to change the privacy settings on their social media page. In fact, lawyers *should* discuss the various privacy levels of social networking websites with clients, as well as the implications of failing to change these settings. (Model Rule 3.4)
- Attorneys may instruct clients to make information on social media websites “private,” but may not instruct or permit them to delete/destroy relevant photos, links, texts, or other content, so that it no longer exists. (Model Rule 3.4)
- Attorneys may also instruct a client to “take down” certain posts as long as the posts and the underlying data preserved for discovery purposes. (Model Rule 3.4)

Ethical Considerations for Use of Social Media in Litigation (cont.)

- Attorneys must obtain a copy of a photograph, link, or other content posted by clients on their social media pages to comply with requests for production or other discovery requests. (Model Rules 3.3. and 3.4).
- Attorneys must also implement thorough and ethical practices to ensure that all relevant social media content is preserved. Screen shots and photos may not be sufficient.
- Attorneys must make reasonable efforts to obtain photographs, links, or other content about which they are aware if they know or reasonably believe it has not been produced by their clients. (Model Rules 3.3. and 3.4)
- Attorneys should advise clients about the content of their social networking websites, including their obligation to preserve information, and the limitations on removing information.
- Attorneys may use information on social networking websites in a dispute or lawsuit. The admissibility of the information is governed by the same standards applied to all other evidence.

Ethical Considerations for Electronic Discovery

- Competence

- Model Rule 1.1: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- Comment 8 to MR 1.1: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**” (emphasis added)

Ethical Considerations for Electronic Discovery

- Competence

In order to ethically represent a client in connection with E-discovery an attorney must be able to:

- Identify and assess the e-discovery needs of their client and issues that will arise during the litigation
- Understand their client's electronic systems and storage (the sources of ESI)
- Understand the accessibility of those systems and storage devices
- Understand the client's electronic protocols (i.e., auto delete and backup systems)
- Understand and be able to work with third party e-discovery programs
- Litigation Hold and Preservation Instruction: Attorney must be competent in client's systems and technologies and relevant preservation requirements to issue and monitor document preservation

Ethical Considerations for Electronic Discovery

- Competence

In order to ethically represent a client in connection with E-discovery an attorney must be able to:

- Advise the client on available options for e-discovery collection and preservation (i.e., knowledge of third-party vendors and e-discovery programs)
- Confer with opposing counsel to address e-discovery scope and protocols
- Identify appropriate custodians of ESI
- Understanding the different types of ESI
- Understanding the proper use and type of search terms
- Collect ESI in a manner that preserves its integrity (metadata, native format)
- Produce ESI in a usable manner and in a manner which protects confidentiality

Ethical Considerations for Electronic Discovery

–Other Considerations

- Supervision of junior associates or outside vendors (Model Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer) and 5.3 (Responsibilities Regarding Nonlawyer Assistance)).
- Candor to the Court and Counsel (Model Rules 3.3. and 3.4)
- Overproduction (data dumping)



Employment Counseling and Advice

Simone A. Handfield

The Role of In-House Counsel

- The ABA Model Rules of Professional Conduct apply to in-house attorneys equally as they do attorneys in law firms or working for the government.
- Many of the opinions and the way the rules are written are designed to address law firm practice.
- The word "firm" or "law firm" is used throughout the Rules.
- The definition of "law firm" in MR 1.0 Terminology describes lawyers associated in a firm and includes a "legal department of a corporation or other organization."

MR 1.13: The Role of In-House Counsel

- Rule 1.13 is titled the Organization as Client and it speaks to the lawyer employed by an organization representing the organization through its duly authorized constituents.
- Many issues come up when your only client is also your employer:
 - Conflicts of interest may exist between the parent company as well as any subsidiaries, and their interests may differ so who is the client.
 - Conflicts of interest may exist between directors or officers and an organization, and their interests may differ so who is the client.
 - An in-house attorney may be asked to litigate against a former client the attorney represented when they were at a prior law firm or in-house position and they have confidential information pertaining to the former client that is relevant to the litigation.

MR 1.13: Advising on Representation

- Tony and Sue work together at ABC Financial Services, Inc as officers. Tony is the CEO of the parent company and Sue works for the subsidiary company. Tony contacts you as in-house legal counsel and states that he is planning to sell and spin off the subsidiary which Sue works for because it has too much litigation associated with it (litigation which you have worked on and defended in your role as in-house counsel). Tony asks you to work on the sale of the subsidiary.
- *Who are the clients?*
- *Does a conflict exist?*
- *Can joint representation be undertaken?*
- *How should it be handled?*

MR 1.8: In-House Counsel Relationships:

- Rule 1.8 (j) provide that an attorney may not have sexual relations with a client, and this rule also applies where the client is an organization.
- A comment to Rule 1.8 makes clear that a lawyer for the organization cannot have a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

MR 1.8: In-House Counsel Relationships

- You are in-house attorney at a large corporation and begin a sexual relationship with a colleague who works in the C Suite. Your new partner “regularly consults with” you concerning the company’s legal matters and asks for business and personal advice in defending a lawsuit you are handling for the company.
- *Does a conflict exist?*
- *How should it be handled?*

MR 4.2: In-House Counsel and Represented Parties:

- Rule 4.2 states that 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 by law to do so or by court order."
- *As an in-house attorney, are you allowed to speak to a current employee who is suing the company and represented by outside counsel in the matter if you are working with the employee on a separate on-going legal matter?*

MR 4.2: In-House Counsel and Represented Parties


- *What happens when in-house counsel wants to contact an opponent's outside counsel?*
- A Virginia Legal Ethics Opinion stated that a lawyer “is generally permitted to communicate with a corporate adversary’s in-house counsel about a case in which the corporation has hired outside counsel.” The no-contact rule is “to protect uncounseled persons against being taken advantage of by opposing counsel” and to safeguard the client-lawyer relationship from interference.”

MR 4.3: In-House Counsel and Unrepresented Parties: MR 4.3

- Rule 4.3 provides that when dealing with an unrepresented person, a lawyer “shall not state or imply that the lawyer is disinterested”. If the other person appears to misunderstand the lawyer’s role, the lawyer shall try to correct the misunderstanding. Model Rule 4.3 expressly prohibits the lawyer from giving legal advice to an unrepresented person (other than the advice to get a lawyer).

MR 4.3: In-House Counsel and Unrepresented Parties

- You are in house counsel who handles the company litigation and a former employee who is not represented by counsel has a pending lawsuit against the company. The unrepresented opponent asks how many days she has to respond to your discovery requests. You respond that the rules require discovery to be filed within 30 days but that you cannot give any further information because your client's interests are opposite to her own.
- *Was this a proper response?*



Ethical Issues Arising in Workplace Investigations

Gayle F. Wasserman

Overview

- What is a Workplace Investigation?
- Who are the Potential Attorneys Involved?
- Ethical Issues at the Outset of an Investigation
- Ethical Issues in the Adequacy of Investigation: Bias and Thoroughness
- Ethical Issues In Investigation Interviews

Case Study

- New employee Ann reported to HR that the CEO of the Company, Carl, has been "coming on" to her. Ann said:
 - Carl "made a pass" at her on the elevator yesterday, by "inviting her out for a romantic dinner and drinks."
 - In the team meeting this morning – in which there were 5 other team members – Carl sat very close to her, called her "honey" and touched her arm while explaining the new system.
 - Carl came into her office and told her she looked stressed and like she "needed a massage."

What is a Workplace Investigation?

- What is a workplace investigation?
- What is the mandate of an investigator?
- What are the goals of an investigation?

Various Attorney Roles in Workplace Investigations

- Involvement of Attorneys
 - In-House Counsel
 - Outside Defense Counsel
 - Plaintiff/Employee Counsel
 - Attorney Investigator

Ethical Considerations at the Outset of an Investigation: Conflicts of Interest

- Who decides whether an investigation is necessary?
- Who decides who should conduct the investigation?
 - Beware of wearing too many hats (ABA Model Rule 3.7 Lawyer as Witness)
- Who should be the investigator? (ABA Rule 1.7 Conflict of Interest: Current Clients)
- What are the qualifications of an investigator?

Impartiality in Investigations: Considering Bias


- What is Bias?
 - How does bias impact an investigation?
 - Types of bias that investigators may hold
 - How bias may creep into investigation interview questions
 - Managing bias throughout the investigation
- Maintaining Impartiality
- Being Honest in Findings

Thoroughness in Investigations: Meeting Ethical Obligation


- Meeting the obligation of a thorough investigation
- Using consistent methodology for planning
- Consider what else you need and when are you done

Investigation Interviews: Disclosures to Employees

- Employees not represented by counsel:
 - ABA Model Rule 1.13(f) Organization as Client
 - Upjohn warning
 - ABA Model Rule 4.3 Dealing with Unrepresented Person
- Confidentiality statements in interviews



Q&A



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