



Ethical Pitfalls in Employment Situations

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Agenda

- Ethical issues in joint representation
- Ethical issues in investigations

Ethical Issues in Joint Representation

Advantages of Joint Representation

- Save money;
- Control;
- Ease of communications; and
- Corporate culture of supporting managers protected

Disadvantages of Joint Representation

- Limited defenses/arguments
- Confidential information shared
- Compromises may be required
- Actual conflict may arise/opposing party may raise conflict to Court
- Lawyer may be forced to withdraw

ABA Model Rule 1.7(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.

ABA Model Rule 1.7(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 of 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.
- 1.7 (a) and (b) substantially same in Wisconsin.

ABA Comment 29

- "In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination."
- "Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."

Consent?

- Cannot consent if:
 - The lawyer cannot reasonably conclude that the lawyer is able to provide competent and diligent representation to each affected client
 - Representation involves assertion of a claim by one client against another client in the same litigation or other proceeding
 - Consider what may happen down the road

Employment Litigation Situations Where Joint Representation May Be Inappropriate

- Corporate employer and alleged bad actor
 - Attorney may want to assert that the employee was acting outside of the scope of his/her employment responsibilities. The employee would want to argue the opposite for indemnification.
 - Employer may be able to get out of lawsuit on summary judgment, leaving employee holding the bag
- Individual defendant attempting to avoid liability by implicating another company employee
 - The employer's interests are likely directly adverse to the employee's interests

Employment Litigation Situations Where Joint Representation May Be Inappropriate

- Discrimination and harassment cases
 - The employer will assert that the employee was acting outside the course and scope of employment
 - The employer may want to discuss ending the employment of the individual defendant

Hypothetical No. 1

- Larry Lout is very vocal about his beliefs regarding what he characterized as the "traditional roles of men and women in the workplace." Eventually, his comments lead another employee to accuse both him and his employer, Protocal Plastics, of sexual harassment. Larry adamantly denies the allegations. Risks to representing both Larry and Plastics?
 - Defenses potentially available to Plastics which would be adverse to Larry:
 - Larry acted outside the scope of his employment
 - Plastics did not know or exercised reasonable care to both prevent and correct harassment once it became aware
 - Victim failed to take advantage of Plastics' complaint procedure

Employment Litigation Situations Where Joint Representation May Be Inappropriate

- Non-compete cases
 - The employer co-defendant may want to discharge the employee co-defendant if the case is going poorly or becomes expensive
 - The employer co-defendant may learn of malfeasance by the employee co-defendant, perhaps during the case and in contradiction to what the employee has represented

Hypothetical No. 2

- Three sales employees—Larry, Moe, and Curly—leave Competitor Computers to start jobs with Employer Equipment. Competitor now alleges that Employer and their three employees breached non-compete and confidentiality agreements when they induced many schools who were former clients of Competitor to defect to Employer for their office supply needs. Risks to representing both Employer and Larry, Moe, and Curly?
 - Defenses potentially available to Employer which would be adverse to Larry, Moe, and Curly:
 - Even if alleged violations by Larry, Moe, and Curly occurred, Employer had no knowledge of Competitor's restrictive covenants
 - Similarly, Employer had no knowledge that Larry, Moe, and Curly were using restricted customer lists

Informed Consent—Comment 18 to MR 1.7

- 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."
- "The information required depends on the nature of the conflict and the nature of the risks involved."
- "[T]he 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."

Confidentiality

Between commonly represented clients, the prevailing rule is that the attorney-client privilege does not attach. ABA Comment 30; ARPC Comment 29 to MR 1.7.

"[C]ontinued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests...." Comment ABA Comment 31; ARPC Comment 30 to MR 1.7.

Minimum Requirements of Consent Letter

- 1) A conflict of interest may arise between the clients during the representation
- 2) Ethical standards may prohibit a lawyer from representing a client when the representation conflicts with the lawyer's responsibilities to another client
- 3) Although communication of confidential information between an attorney and client are ordinarily protected by the attorney-client privilege, because the clients are jointly represented, counsel may disclose information one gives counsel to the other
- 4) Counsel may desire to represent one client after the joint representation is no longer feasible
- 5) Client's signature

Ethical Issues in Internal Investigations

Who is Your Client?

- Model Rule 1.13(a):
 - "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."
 - Comment to Rule 1.13: "Officers, directors, employees and shareholders are the constituents of the corporate organizational client."

Who is Your Client?

- Rule 1.13(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 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."

Revealing of Info

- Rule 1.13(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
 - (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.

Revealing of Info

- Rule 1.13(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."

Candor

- Model Rule 1.13(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."

Unrepresented Employees

- Model Rule 4.3:
 - "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."
- Wisconsin requires lawyers to inform the individual of the lawyer's role in the matter. SCR 20:4.3

Communications with Represented Employees

- Rules of Professional Conduct 4.2 provides:
 - "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..."

Attorney-Client Privilege

- Information needed to provide legal representation;
- Relates to a matter within the employee's scope of employment;
- Aware information being given so the attorney could provide the organization with legal services or advice; and
- Intend communications to remain confidential.

The Interview

- Provide *Upjohn* warning:
 - Lawyer represents Company; not witness
 - Purpose of investigation is to gather information to provide legal advice
 - Conversation is, therefore, privileged
 - Privilege is between Company and its lawyers
 - Company may decide to share information with others without the witness' permission

The Interview

- 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 knowingly use methods of obtaining evidence that violate the legal rights of such a person
- Do not give legal advice to any witness
- Do not give the impression that you are acting in the employee's interests
- If a witness asks to consult a lawyer, do not discourage

Representing Company and Others

- Make sure you consider conflicts
- Model Rule 1.13(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."

Hypothetical No. 3: Non-disclosure Agreement

- In-house lawyer gets report that an assistant ended a romantic relationship with the CFO several months ago
- Assistant claims he sexually assaulted her two days ago after work. Report is credible.
- CFO worked out a deal with the assistant involving resignation, payment, and confidentiality/non-disclosure agreement
- CEO is committed to keeping the CFO
- This is the third complaint (all are similar) against the CFO in 5 years
- Does the in-house lawyer violate any ethical rule by participating in drafting the agreement?

Hypothetical No. 3: Non-disclosure Agreement

- Lawyer does not violate any ethical rule by participating in the finalization of the agreement, but barring assistant from reporting sexual assault to law enforcement is not enforceable
 - See *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981) ("A promise...is unenforceable on grounds of public policy if...the interest in its enforcement is clearly outweighed...by a public policy against the enforcement of such terms.")
 - Agreement that conceals a crime may constitute the state law crime of "compounding" (accepting consideration for a promise not to report a crime) or the federal crime of obstruction of justice per 18 U.S.C. § 1505

Hypothetical No. 3: Non-disclosure Agreement

- Model Rule 3.4: Fairness To Opposing Party And Counsel
 - "A lawyer shall not:
 - * * *
 - (b) ...offer an inducement to a witness that is prohibited by law;"
- Non-disclosure terms in settlement agreement should allow reporting to law enforcement or other investigative agencies as well as truthful testimony under subpoena
- Non-disclosure agreements are under attack now

Hypothetical No. 4: Police Report

- Six months later, the police visit the in-house lawyer stating the assistant reported a sexual assault by the CFO and that she was afraid he would do it again
- During the privileged internal investigation, the CFO admitted he had a "problem," "could not control himself," and he wanted the sexual relationship with the assistant to continue
- May the in-house counsel report what he knows to the assistant or the police?
 - Not unless the lawyer reasonably believes he must report it to **prevent** the assistant's reasonably certain death or substantial bodily harm
 - Model Rule 1.6(b)(1): "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary...to prevent reasonably certain death or substantial bodily harm..."

Is an Attorney's Action Unethical Facilitation of Harassment?

- No
- It is the Company (client) that decides the consequences for CFO's violation of Company policy
- In-house lawyer as advisor may talk with Company (client) about other considerations
 - Model Rule 2.1 Advisor
 - "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."
 - In-house lawyers are trusted advisors and should talk with clients about consequences of retaining CFO

Moral Duty

- Committee on Ethics and Professional Responsibility (1972): "[T]here is a duty on the part of a lawyer as a good citizen to aid in the enforcement of criminal laws...and to report unprivileged knowledge of criminal conduct to the appropriate authorities."
- State Bar of New Mexico (1988): "[A] lawyer's duty to report observed or suspected criminal activity is no different than that of any other citizen. One does not become obligated to a different or higher standard of conduct of qualifying to practice law."
- Illinois State Bar Association (1994): "[A] lawyer has no different duty than any other person to report a crime."

Conflicting Roles: Advocate v. Witness

- Hypothetical No. 5:
 - HR calls general corporate in-house attorney at the end of an internal harassment investigation for some advice
 - HR asks in-house attorney for legal advice and to communicate result of investigation to complaining employee, which she does
 - Complaining employee files charge and litigation, seeks attorney's notes, and issues notice to depose attorney
 - The company has cut the budget of Legal
 - May in-house attorney handle everything herself without hiring outside counsel while complying with her ethical obligations?

Conflicting Roles: Advocate v. Witness

- Hypothetical No. 5:
 - May in-house attorney handle everything herself without hiring outside counsel while complying with her ethical obligations? Probably not.
- 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."

Conflicting Roles: Advocate v. Witness

- In-house lawyers need to always consider their roles
- Participating in business and personnel decisions converts them to witnesses, which usually precludes them from acting as attorney advocates in a hearing or trial
- It also may jeopardize keeping communications confidential
- Same issue occurs with internal investigations

Conflicting Roles: Advocate v. Witness

- Hypothetical No. 6:
 - HR reports back to in-house counsel on the termination of an employee who alleged harassment
 - HR's report is a long email to in-house counsel recounting the discussion in detail
 - Two years later in litigation, the HR person who wrote the email has left the Company and moved out of state
 - The only record of the termination meeting is the email
 - May the Company use the privileged email in its defense?

Conflicting Roles: Advocate v. Witness

- Hypothetical No. 6:
 - May the Company use the privileged email in its defense? Not without risking waiving attorney-client privilege.
 - Model Rule 1.6 Confidentiality Of Information
 - "(a) A lawyer shall not reveal information relating to the representation of a client ... "
- States and federal law differs on selective waiver of privilege
 - Those that allow it require negotiation of confidentiality agreement to which opposing party may not agree

Spoliation

- Hypothetical No. 7:
 - A company has no record retention policy or schedule
 - Company's lawyer receives demand from a terminated employee who alleges her manager sexually harassed her
 - Demand requests preservation of documents and electronically stored information
- Does the preservation demand implicate ethical issues?
 - Possibly. Model Rule 3.4(a)

"A lawyer shall not:
unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act..."

Spoliation

- Does the preservation demand implicate ethical issues?
 - In-house counsel should carefully consider whether he or she may ignore demand for preservation outside of litigation without violating any ethical obligation
 - Consider forum's obligations for attachment of obligation to preserve documents and electronically stored information

Questions?
