CHAPTER 14: ETHICS IN EQUAL EMPLOYMENT OPPORTUNITY LAW
EEO LAW BASICS

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TABLE OF CONTENTS | CHAPTER 14 | ETHICS IN EQUAL EMPLOYMENT OPPORTUNITY...

EEO LAW BASICS

CHAPTER: 14 ETHICS IN EQUAL EMPLOYMENT OPPORTUNITY LAW

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ITEMS: A through D

14-A | OVERVIEW OF ETHICS ISSUES

The practice of EEO law may often raise a number of ethics issues. A comprehensive review of all potential ethics issues that an EEO practitioner may encounter is beyond the scope of this EEO Basics Program. However, this chapter provides an overview of a few situations that frequently create ethics issues, such as the representation of multiple parties and ex parte communications. This chapter is based on the Model Code of Professional Responsibility ("MCPR" or "Model Code") and the Model Rules of Professional Conduct ("MRPC" or "Model Rules"). In every situation, the prudent practitioner will undertake to know the applicable ethics rules and case law developments in his/her jurisdiction.

(American Bar Association // Section of Labor and Employment Law
Equal Employment Opportunity Committee // EEO Law Basics // Spring 2006)

14-B | REPRESENTATION OF MULTIPLE PARTIES

Representation of multiple parties can present unique ethical issues. Such representation most typically arises when: a) a plaintiffs' counsel represents two or more current or former employees or applicants in cause of action stemming from the same or related events; or b) when a defense counsel represents the corporation and one of its managers in litigation and/or investigations. These situations pose interesting ethical questions, both at the inception of the attorney-client relationship and throughout the process of representation.

In order to demonstrate the ethical issues, these EEO Basics Program materials will focus on: a) the multiple representation of plaintiffs; and b) the representation of the corporation and a manager in an external investigation. Although a complete listing of all ethical issues involved is beyond the scope of these materials, several key topics are highlighted herein, including: relevant ethical rules and how they guide (or fail to guide) attorneys facing the dilemma of representing multiple plaintiffs or the corporation and the manager; and the particularly problematic issues that may arise during settlement negotiations for the plaintiffs' counsel representing multiple plaintiffs.

1. Representation of Multiple Plaintiffs

In the typical multiple representation setting, most if not all plaintiffs involved share a common interest in pursuing the employer. Most often, they assert the same or related causes of action and seek similar remedies for similar injuries. Plaintiffs often choose to work with the same attorney for a number of reasons, including but not limited to: sharing the costs of litigation; the ease of proceeding with the same counsel as a result of the lawyer's familiarity with the claims; and the likelihood of related or "me too" claims. When the plaintiffs have similar interests, the lawyer usually does not face many ethical problems. In some cases, however, the plaintiffs' interests diverge. For instance, in a promotion and pay sex discrimination case, one plaintiff may have suffered great injury and the other plaintiff may have only suffered slight or no real injury. As another example, one employee may have strong direct proof of discriminatory motive and the other employee's case may rest solely on weaker circumstantial evidence. Likewise, certain plaintiffs may have claims that are more vulnerable to affirmative defenses. In these circumstances, it is the

lawyer's duty – at the beginning of the attorney-client relationship and throughout the representation – to conform to the mandates of professional responsibility rules in order to ensure that the lawyer's ethical obligations (including the duty of loyalty to each client) are initially satisfied and maintained throughout the representation.

Joint representation of plaintiffs in an employment setting is fairly commonplace. The main questions such lawyers should be asking in multiple representation settings include the following: a) "Is this permissible?"; b) "What ethical problems exist or could develop?"; c) "How is the duty of loyalty affected by such multiple representation?"; and d) "Even if multiple representation is permissible, is this something that I should undertake?"

There are rules that prohibit representation of multiple parties in some circumstances. Both the Model Code of Professional Responsibility ("MCPR" or "Model Code") and the Model Rules of Professional Conduct ("MRPC" or "Model Rules") express general prohibitions against representing multiple clients with adverse interests, where representing one client could adversely affect the lawyer's representation of another client. "The prohibition is based on three considerations: 1) preserving the sanctity of the attorney-client privilege; 2) ensuring an attorney's zealous representation of clients; and 3) protecting the client's expectation of receiving the complete loyalty of his or her lawyer."[21]

Specifically, Model Code of Professional Responsibility DR 5-105 includes the following provisions:[22] a) DR 5-105(A) generally provides that a lawyer must decline proffered multiple party representation if that lawyer's "exercise of independent professional judgment" "will be or is likely to be adversely affected by" accepting the representation, or if the representation of "different interests" would likely be involved, except as permitted by DR 5-105(C); b) DR 5- 105(B) generally provides that a lawyer must not continue multiple party representation if that lawyer's "exercise of independent professional judgment" "will be or is likely to be adversely affected by" the representation of another client, or if the representation of "different interests" would likely be involved, except as permitted by DR 5-105(C). DR 5-105(C) provides that a lawyer may engage in multiple party representation "if it is obvious that" the interests of

all the parties may be adequately represented and if each party consents to the joint representation after "full disclosure" of the possible ramifications on the lawyer's exercise of "independent professional judgment[.]"

Model Rule of Professional Conduct 1.7 specifically addresses joint representation from a conflict of interest perspective. It provides:

> (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.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law;
> >
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> >
> > (4) each affected client gives informed consent, confirmed in writing.

Many scholars interpret Model Rule 1.7(a) as only restricting representation of multiple clients when a conflict is apparent from the outset.[23] Such scholars focus on the fact that Model Rule 1.7(a) uses the language "will" and, thus, they reason that the rule does not limit representation when

there is only a possibility that the clients' interests "may" conflict at some point during the representation.

In addition, even when Model Rule 1.7(b) bars multiple representation in a situation where there is a direct and obvious conflict, consent of all clients after full disclosure may clear the conflict, provided that the provisions of Model Rule 1.7(b) are satisfied.

Despite the ability to represent multiple clients because there is no concurrent conflict of interest, a lawyer should consider whether joint representation may, nevertheless, be imprudent because of the potential that a conflict of interest may arise. The Comments to Model Rule 1.7 identify some problems with multiple common representation when the potentially adverse interests cannot be reconciled. Comment 29 is particularly insightful in listing the risks and recriminations of joint representation. It states:

> 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. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves

> creating or terminating a relationship between the parties.

Comment 30 clarifies that "[a] particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege." As the Comment indicates, because of the common representation, the attorney-client privilege does not attach" and, consequently, both parties should be advised in advance of the representation.

Comment 31 identifies problems with confidentiality that arise from mutual representation. As the Comment makes clear, "continued 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." According to Comment 31, the problem arises because a lawyer has an "equal duty of loyalty to each client[.]"[24]

The lawyer undertaking the joint representation must be able to conclude that a disinterested lawyer would regard multiple representation as in the interest of both the corporate client and the employee client. ABA Model Code of Professional Responsibility, DR 5-105(c). Once counsel has determined that multiple representation is possible, he/she must secure informed consent from both clients after full disclosure of the advantages and risks involved in multiple representation. ABA Model Code of Professional Responsibility, DR 5-105(c). Full disclosure includes disclosure of any conflicting interests that might cloud their representation, including disclosure of any and all defenses and arguments that a client will forgo because of the joint representation, as well as the lawyer's fair and reasoned evaluation of such defenses and arguments and the consequences of failing to raise them. See e.g., N.Y.C. Assoc. B. Comm. Prof. Jud. Eth., Multiple Representations; Corporations and Corporate Constituents, Op. # 2004-02, 2004 WL 2155079, *7 (2004)..

The lawyer must also be alert to changes in circumstances that would render continuation of multiple representation impermissible. ABA Model Code of Professional Responsibility, DR 5-105(b). If a conflict arises, the lawyer must reassess the joint representation. See ABA Formal Op. 93-372 (stating that lawyer must reassess the conflict when it arises). Assuming both clients consent to representation, counsel

should work to minimize the impact of simultaneous representation. This can be accomplished through prospective waivers of conflict, contractually limiting representation to minimize conflicts, having a written understanding with regard to confidential information, and providing for co-counsel or shadow counsel (because it enhances the likelihood of obtaining substitute new counsel for a party on short notice). Prospective waivers of conflicts require full disclosure in a manner similar to a concurrent waiver of conflicts. In order to render the prospective waiver effective, counsel should at least advise the client of the types of possible future conflicts that might arise. See, e.g., *Rymal v. Baergen*, 686 N.W.2d 241 (Mich. Ct. App. 2004) (discussion of possible future conflict of interest, combined with limited representation, sufficient to preclude disqualification of attorney); *Woolley v. Sweeney*, 2003 WL 21488411 (N.D.Tex. 2003) (rejecting prospective waiver due to ineffective disclosure).

In sum, the prudent counsel will address not only actual conflicts of interest, but potential problems that may arise in the areas of confidentiality, attorney-client privilege, duties of loyalty, discrepancies in the strength of claims, and the like.

2. Settlement Issues In Representing Multiple Plaintiffs

As mentioned above, even when it appears that no direct conflicts exist at the outset of representing multiple plaintiffs in a single case, conflicts may arise during the representation. In the employment litigation setting, one typical area where conflict arises is during settlement negotiations. As an example, for the employer, the only monetary issue in settlement is typically the amount of the total settlement. Thus, the employer may offer the multiple plaintiffs a lump sum settlement, without regard to how the former employees (now plaintiffs) split the total settlement. This situation may pose ethical issues for the plaintiffs' counsel. Questions that frequently arise include the following: a) "What is the lawyer to do when one plaintiff wants to settle and the other wants to proceed with litigation?"; b) "How does the lawyer apportion the settlement when one plaintiff has a greater claim to recovery than the other?"; and c) "What is the lawyer to do when the employer offers a "blanket" take-it-or-leave-it settlement,

especially when one former employee/plaintiff has stronger claims than the other and yet the other former employee/plaintiff believes the settlement should be split equally?"

There is some guidance in both the Model Rules and the Model Code. They both bar aggregate or group settlements unless all clients consent after full disclosure of all relevant issues. In addition, Rule 23 of the Federal Rules of Civil Procedure governing Rule 23 class actions also provides guidance.[25]

Model Code of Professional Responsibility DR 5-106(A) generally provides that a lawyer cannot participate in an aggregate settlement of his/her clients' claims, unless each client has been advised regarding the existence and nature of the claims being settled and the extent of each party's participation.[26]

Model Rule of Professional Conduct 1.8(g) states:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Further, Comment 13 to Model Rule 1.8 makes clear that "[d]ifferences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer." The Comment reiterates the requirement in the Rule that before an aggregate settlement is accepted, each client must be informed of the material terms of the settlement, including each person's participation.

Several state bar association ethics committees have tackled the issue of conflicts that arise in multiple representation during the settlement process. For example, the New York State Bar Association Committee on Professional Ethics issued an opinion entitled, "Multiple Representation; Differing Interests,"[27] in response to a lawyer's inquiry regarding

settling claims for multiple plaintiffs stemming from the same incident. The opinion declared:

> Lawyer may not represent in separate actions two plaintiffs against the same defendant where there will be insufficient assets available for full satisfaction of all claims unless it is obvious the lawyer can adequately represent both plaintiffs and both plaintiffs consent after full disclosure.

In the situation on which the Ethics Committee was commenting, the lawyer had sought advice while representing two plaintiffs who were injured in the same fire, after learning that the available assets and insurance coverage would be insufficient to fully satisfy both plaintiffs' claims. The Ethics Committee determined that the insufficient assets resulted in the clients' interests being inconsistent, and thus the clients had "differing interests" within the rules' meaning.[28] As such, the attorney was not allowed to proceed with the dual representation unless it was obvious that the lawyer could adequately represent both clients and unless the parties both consented following full disclosure. The Committee added, "[i]f, however, the circumstances are such that it is not obvious that the lawyer can adequately represent both clients (because, for example, in certain circumstances, one client's damages vastly exceed any claims that could be asserted or proven on behalf of the other client) or if both clients do not consent, the lawyer may not proceed with the multiple representation." Thus, the New York Bar Association has effectively held that it is an impermissible conflict to represent clients in the same matter who have greatly differing damages claims.

Similarly, in Matter of Lauderdale's Guardianship,[29] the lawyer appointed as guardian ad litem in a wrongful death action was in a predicament whereby he had to recommend a larger settlement to one client at the possible detriment to the other. The court held such attorney could not act as guardian ad litem for the minors, as their interests were not substantially the same. Thus, the court reiterated the notion that representing multiple clients in settling the same action, some of whom have differing damages claims, may present irreconcilable conflicts of interest.

Likewise, the New Jersey Supreme Court Advisory Committee on Professional Ethics has addressed multiple plaintiff

settlement issues in an opinion entitled, Blanket Settlement Offers to Multiple Plaintiffs.[30] In one of the inquiries addressed by that Opinion, an attorney represented multiple plaintiffs who were all injured in the same car accident. At the outset, the attorney perceived no conflicts, although each plaintiff did have different injuries and different degrees of strength of liability claims. Just before trial, however, the defendant's insurance company made settlement offers to each plaintiff in different amounts. The offers were conditioned as "all or nothing." In other words, either all four plaintiffs accepted, or the offer was extinguished. Only three of the four plaintiffs agreed that they would accept the offer. The Committee concluded that, as an initial matter, this representation presented no ethical dilemmas. However, a problem was created by the insurance company's offer. In this instance, the Committee deferred to the commands of Model Rule 1.8(g), as discussed above. As for the question of whether the attorney had to withdraw at the point of this "all or nothing" settlement offer, the Committee stated:

> The "tie-in" offer being made did not create a conflict of interest situation insofar as the plaintiff's attorney is concerned, since there was no decision to be made by him which would put him in the position of favoring one client over another, or having to make a decision in favor of one client to the detriment of the others... Consequently, the determination or decision was not made by the Inquirer but, rather, by the four plaintiffs.

In a second inquiry addressed by this Opinion, the Committee assessed the ethical dilemmas of a mass tort claim case in which the defendant offered a settlement proposal that was unacceptable to most of the plaintiffs. However, upon learning that a hundred of their co-workers' claims could possibly be dismissed on statute of limitations grounds, almost all of the plaintiffs changed their minds and accepted the offer.

The Committee saw no ethical problem with representing these multiple plaintiffs, some of whom could have had statute of limitations problems, as this was a matter of law to be determined by the trial judge. However, the Committee was

concerned by the fact that this scenario gave defendants the unilateral ability to insert a conflict of interest between the plaintiffs' attorney and some of his [her] clients. Again, the Committee determined that this did not constitute an ethical violation on the defense attorneys' behalf, as the defense attorneys were simply following their ethical duty to present the settlement proposal that their clients instructed them to offer. Thus, under these circumstances, the Committee determined that representing multiple plaintiffs in settlement negotiations may be completed in such a way as to avoid ethical conflicts, so long as Model Rule 1.8(g) is followed.

In sum, representing multiple plaintiffs in a case may pose some difficult – and sometimes unanticipated – ethical quandaries. The prudent lawyer will consider the ethical obligations in the applicable jurisdiction, not just at the beginning of but also throughout the representation, and he/she will act accordingly.

3. Representing Organizations and Officers in an Investigation

Lawyers representing organizations face several challenges that lawyers representing individuals do not face, not the least of which is, "Who is the client?" The situation may arise, for example, when the lawyer is faced with the representation of organizations and officers in an investigation. In addition to consideration of the above model rules, Model Rule 1.13, dealing with the "Organization as Client," provides guidance in this area.

a) Who is the Client?

Model Rule 1.13(a) states, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." According to the Comments to Rule 1.13, when an organization's constituents communicate with the organization's lawyer in that person's organizational capacity, the communication is privileged, and protected by Model Rule 1.6.[31] However, it is important to note that this privilege belongs to the organization, not the constituent. Additionally, simply because this communication is protected does not mean that the organization's constituents are represented by the lawyer.[32] Moreover, although the communications may be

privileged, the privilege belongs to the organization and may not offer much (or any) protection to the constituent.

The comments to Rule 1.13 make clear that if the organization's interests are adverse to the constituent's interests, conversations between the organization's lawyer and the constituent may not be privileged.[33] For this reason, Rule 1.13(f) provides, "[i]n 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 interest are adverse to those of the constituents with whom the lawyer is dealing." Additionally, the Comments indicate that when there is an adversity of interest, the lawyer should advise the constituent that he/she may want to obtain his/her own representation, that the lawyer cannot represent the constituent, and that their communications may not be privileged.[34] Further, when the possibility of an adversity of interests is present, the lawyer should comply with Rule 4.3, which dictates that the lawyer make clear that he/she is not disinterested and that he/she represents the organization and not the constituent.

Model Rule 1.13(g) covers joint representation and provides:

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constitutes, 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.

As mentioned above, there are times when the interests of a constituent and the organization may conflict at the beginning of the suggested joint representation. However, often times, decisions as to joint representation are made in the early stages of a claim,

before all of the facts are known and possibly before any potential conflict looms. If joint representation of an organization and its constituent is undertaken and an adversity of interests later develops, the lawyer may be conflicted and may not be able to represent either the organization or the constituent.

In Hicks v. Edwards,[35] the Court of Appeals of Washington addressed an attorney's joint representation of a corporation and its constituents in a minority shareholder's derivative suit. Hicks involved an attorney ("counsel") who filed an appearance and answered a complaint on behalf of a corporation and some of its shareholders. The underlying suit alleged that the shareholders represented by counsel exploited corporate assets for their own benefit.[36] The plaintiff moved to disqualify counsel on conflict of interest grounds. The trial court found a conflict of interest, disqualified counsel from representing both defendants, and imposed Rule 11 sanctions against counsel for failing to investigate the potential conflict of interest before undertaking joint representation. The trial court based its findings on counsel's lack of evidence of undertaking a thorough investigation into the potential conflict and on the finding that any reasonable attorney would have learned of the conflict of interest in this case before undertaking the joint representation.[37]

Because counsel only appealed the sanctions and not the disqualification issue, the appellate court refused to address the issue of whether the disqualification was appropriate. However, the appellate court found that counsel did not violate Rule 11 and should not have been sanctioned in defending the motion to disqualify. The appellate court based its decision on the lack of Washington authority on point, the lack of consistency in foreign jurisdictions, the ABA's comment to Rule 1.13 that suggests counsel could represent both the organization and the shareholder, and the fact that experts in Washington disagreed on the appropriateness of the representation.[38]

Even though the court did not answer the issue of whether the disqualification was appropriate, the case

demonstrates that joint representation of an organization and one of its constituents may create a conflict of interest that may lead to disqualification and even sanctions for the lawyer. Although not discussed in this case, failure to recognize a conflict may also result in an attorney grievance and/or a malpractice suit.[39]

Another instructive case is Felix v. Balkin.[40] In Felix, an attorney represented an organization and an employee in an employment discrimination lawsuit.[41] After the attorney undertook the joint representation, the employee filed her own discrimination suit against the organization.[42] The attorney withdrew from representing the employee and did not represent the organization in the employee's lawsuit against the organization; however, the attorney later agreed to represent the organization in discrimination suits by the employee's coworkers.[43] Approximately one year after the lawyer's withdrawal from the employee's suit, the coworkers' and the employee's actions were consolidated, at which point the employee moved to disqualify the attorney.[44] The court disqualified the attorney and his firm; the court was also very critical of the investigation that the attorney and the law firm undertook before agreeing to joint representation, stating that the attorney and the law firm "did not adequately discharge their professional obligations to their common clients."[45] Additionally, the court specifically noted that the attorney's decision to engage in joint representation was based on only a "thumbnail sketch" of the facts without even speaking to the employee.[46] And, although the employee had acted dishonestly in failing to inform the attorney or the organization of her potential suit, the court found "it is the lawyer, not the client, who has the obligation to search out and disclose potential conflicts[.]"[47]

A key lesson from both Hicks and Felix is that lawyers undertaking to represent the corporation and its manager need to conduct a thorough investigation into potential conflicts of interest before engaging in a joint representation. Additionally, as the Rules contemplate and as one scholar notes in his article discussing Felix, both clients should sign informed consent forms and

> should be told that should a conflict develop, the lawyer will likely have to withdraw from representing both parties and that attorney-client communications will not be privileged and protected from the other party (but will be privileged as to third parties).[48]

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Footnotes

[21] Leonard M. Ring, *The Ethics of Representing Multiple Plaintiffs in the Same Litigation*, 22 SPRING BRIEF 30 (1993), at 31.

[22] **Model Code of Professional Responsibility**, DR 5-105; *The Ethics of Representing Multiple Plaintiffs in the Same Litigation*, 22 SPRING BRIEF at 31.

[23] See e.g., Id. at 30-31.

[24] See also, Rule 1.4 (governing certain obligations to clients).

[25] Because class action litigation is beyond the scope of the EEO Basics Programs, the provisions of Rule 23 are not covered here, but must be considered in Rule 23 class action litigation.

[26] Model Code of Professional Responsibility, DR 5-106(A); *The Ethics of Representing Multiple Plaintiffs in the Same Litigation*, 22 SPRING BRIEF at 34.

[27] N.Y. Eth. Op. 639, 1992 WL 450729 (N.Y. St. Bar. Assn. Comm. Prof. Eth. 1992.).

[28] The Committee concurred "generally in the results reached in Alabama Opinion 82-591 (March 17, 1982) (BNA 801:1030) that a lawyer may not represent all plaintiffs in an automobile accident case where the assets are not sufficient for the full satisfaction of all potential claims and a recovery by one claimant would reduce the assets available for the satisfaction of the other claims."

[29] 15 Wash. App. 321, 549 P.2d 42 (1976).

[30] N.J. Eth. Op. 616, 122 N.J.L.J. 764, 1988 WL 356373 (N.J. Adv. Comm. Prof. Eth.).

[31] Model Rule of Professional Conduct 1.13, Comment 2.

[32] Id.

[33] Id. at Comment 10.

[34] Id.

[35] 876 P.2d 953 (Wash. App. 1994).

[36] Id. at 954.

[37] Id. at 955-56.

[38] Id. at 958.

[39] See John M. Burman, Representing Organizations Part III: Conflicts of Interest, 25 Aug Wyo. Law 37 (2002).

[40] 49 F. Supp.2d 260, 265-66 (S.D.N.Y. 1999).

[41] Felix v. Balkin is also discussed in Kenneth L. Jorgenson, Counsel for the Organization: Employee Conflicts, 61-AUG BENCH & B. MINN. 12 (2004).

[42] Id.

[43] Id. at 266-67.

[44] Id.

[45] Id. at 271.

[46] Id.

[47] Id. (quotation omitted).

[48] 61-AUG BENCH & B. MINN. at 13.

14-C | COMMUNICATIONS WITH FORMER MANAGERS

Another issue that may arise in employment matters is whether the plaintiff's lawyer may contact a former employee of the corporate defendant, particularly a management employee. The answer will depend on the facts and circumstances of the particular situation, but there are some rules that guide a lawyer in determining whether such contact may be made. The Model Rules of Professional Conduct 4.2 bars a "lawyer from communicat[ing] about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter." Further, there is a prohibition against "communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Comments to Rule 4.2.

The ABA Committee on Ethics and Professional Responsibility has issued a formal opinion that addresses the issue of whether communications with former employees may occur. See, *Contact with Former Employee of Adverse Corporate Party, ABA Formal Op. 91-359 (1991)*... The Committee noted that the concerns reflected in the Rule 4.2 and its commentary could survive the termination of the employment relationship. However, the Committee opined that "a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer." Id. at 3.

Further, according to a majority of the courts, "in general, Rule 4.2 does not bar ex parte attorney contacts with an adversary's former employees who are not themselves represented in the matter." See *Olson v. Snap Prods.*, Inc., 183 F.R.D. 539, 544 (D.Minn.1998), citing *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 961 F.Supp. 1288, 1295 (E.D.Mo.1997), aff'd, 132 F.3d 1252 (8th Cir.1998); *Jenkins v. Wal-Mart Stores*, Inc., 956 F.Supp. 695, 697 (W.D.La.1997); *Orlowski v. Dominick's Finer Foods*, Inc., 937 F.Supp. 723, 728 (N.D.Ill.1996); *Concerned Parents of Jordan Park v. Housing Auth. of St. Petersburg*, 934 F.Supp. 406, 408 (M.D.Fla.1996); *Terra Int'l*, Inc. v. Mississippi Chem. Corp., 913 F.Supp. 1306, 1315 (N.D.Iowa 1996); Aiken v. Business and Industry Health Group, Inc., 885 F.Supp. 1474, 1476 (D.Kan.1995); see also,

generally, Benjamin J. Vernia, *Right of Attorney to Conduct Ex Parte Interviews with Former Corporate Employees*, 57 *A.L.*R.5th 633 (1998). (citation omitted). But, the lawyer must be careful, as an "attorney's discussions with former members of an organizational party-opponent's management could intrude upon privileged matters, which would not be permissible under Rule 4.2." Olson, 183 F.R.D. at 545.

A lawyer must also be mindful of Model Rules of Professional Conduct Rule 4.4, which provides that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods in obtaining evidence that violate the legal rights of such a person." At the very least, if the lawyer determines that he/she may proceed with the contact with the former manager, the lawyer must take adequate measures to prevent the disclosure of privileged information. See *Arnold v. Cargill*, 2004 WL 2203410 at *9-10(D. Minn. 2004) (unpub. op.) (sanctioning a lawyer for failure to protect the corporate opponent's privileged information).

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14-D | CONCLUSION

As the above sections demonstrate, the ethics issues in practicing EEO law can be thorny. Indeed, as attorney-client relationships evolve and the law continues to change, one may anticipate that the ethics issues may become even more complicated and that there may be rule changes and/or case law developments designed to address the changing environment. Thus, the prudent employment lawyer will remain ever-mindful of not only the existing ethical obligations but also the obligations that may arise from new rules and case law developments.

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APPENDIX

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