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Privilege and Ethics Issues

UT Labor and Employment Law Conference 2019

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Who is the "Client"?

- ABA Model Rule 1.13
  - A lawyer employed by or retained by an organization represents the organization acting through its duly authorized constituents.

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Who is the Organizational "Client"?

Interviews with Individual Corporate Employees/Officers:

- Explain that the client is the organization (unless a joint representation situation)
- Give warnings regarding confidentiality and privilege
- Dispel any misunderstanding about separate attorney-client relationship

Good Examples:

In re Grand Jury Subpoena (4th Cir. 2005)

United States v. Ruehle (9th Cir. 2010)

Nester v. Textron, Inc., 2015 WL 1020673 (W.D. Tex. 2015) (representation of subsidiary by parent's in-house attorney)

Not So Good Examples:

Commonwealth v. Spanier (Pa. 2016) (failure to clarify who in-house counsel represents)

Estate of Paterno (Pa. 2017) (engagement with subgroup of entity)

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Who is the Organizational "Client"?

- Talking to Individual Employees/Officers: ABA Model Rule 1.13(f):
  - In dealing with an organization's directors, officers, employees 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.

Conflicts Involving "Virtual" Clients

- Former HR Managers/Employer Representatives as Plaintiffs
  - Unless law firm individually represented corporate constituent, there is no express attorney-client relationship/disqualification (*See Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373 (10th Cir. 1994))
  - However, attorney-client relationship can be implied by conduct, especially where lawyer is not sufficiently clear with constituent as to whom firm represents (*See Home Care Industries v. Murray*, 154 F. Supp. 2d 869 (D. N.J. 2001))
  - Note: Former corporate constituents may carry with them "property" of the employer (attorney-client privilege information, trade secrets, etc.)

Conflicts Involving "Virtual" Clients

- Former In-House Counsel as Plaintiffs
  - Most states give in-house counsel right to pursue personal employment claims against former employer/client.
  - (*See Douglas v. DynMcDermott Petrol. Opers. Co.*, *144* F.3d 364 (5th Cir. 1998))
  - However, in-house attorney's obligations to former client may be limited by duty of confidentiality (*See In re Koeck, 178 A.3d 463 (D.D.C. 2018)* (former in-house attorney and her lawyer violated Rule 1.6 by disclosure of client info in support of personal claims to (i) reporter, (ii) US Attorney's Office, (iii) Brazilian authorities, and (iv) SEC))
  - *But see Will v. Admin. Review Bd.* 423 F.3d 483 (5th Cir. 2005) (draft report admissible in in-house attorney's whistleblower case under breach of duty exception to privilege).

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