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PRIVILEGE AND ETHICS ISSUES

*UT LABOR AND EMPLOYMENT
LAW CONFERENCE 2020*

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)

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/Executives 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 HR Managers/Executives as Plaintiffs
 - *Commonwealth v. Spanier*, 132 A.3d 481 (Pa. Super. 2016): attorney-client relationship created between university president and university general counsel before and during president's grand jury testimony and thus general counsel's testimony against president constituted improper disclosure of privileged information.
 - *Commonwealth v. Schultz*, 133 A.3d 294 (Pa. Super. 2016) (same re university vice president)
 - *Commonwealth v. Curley*, 133 A.3d 994 (Pa. Super. 2016) (same re university athletic director)

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. Oper. Co.*, 144 F.3d 364 (5th Cir. 1998))
 - But see *Willy 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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