

2021 US Labor & Employment Webinar Week

Insights and Compliance Strategies for a New World

February 1 – 4, 2021

Employment Law Ethics Issues for In-House Counsel

February 4, 2021

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Our Agenda

Ethics Rules and the
In-House Lawyer

Who Is The Client?

Duty Of Confidentiality

Attorney/Client Privilege

Work Product Doctrine

Integrity Of The Profession

Attorney As A Witness



Ethics Rules and the In-House Lawyer

The Ethics Rules

- In general, the same rules apply to in-house counsel and outside counsel.
- ABA Model Rules of Professional Conduct have been adopted in all 50 states and D.C., with variations.
- Rules in other countries are similar in some respects but very different in others.
- Must know the rules of each relevant jurisdiction.

Licensure and Regulation

Avoiding the Unauthorized Practice of Law

- All attorneys must be qualified in the jurisdictions where they practice.
- Failure or lapse can result in loss of privilege protection.
- Full bar admission (bar exam or reciprocity).
- Registration under special rules.

Licensure and Regulation

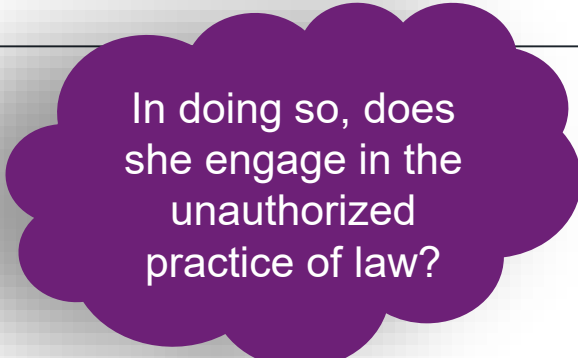
Avoiding the Unauthorized Practice of Law

- Temporary practice in a non-admitted jurisdiction.
 - ABA Model Rule 5.5(b) & (c): “may provide legal services on a temporary basis” so long as there is no “office or other systematic and continuous presence for the practice of law” and the services arise out of or are reasonably related to the lawyer’s practice where she is admitted.
- Practicing remotely—developments in view of COVID-19.
 - ABA Formal Opinion 495 (Dec. 16, 2020).

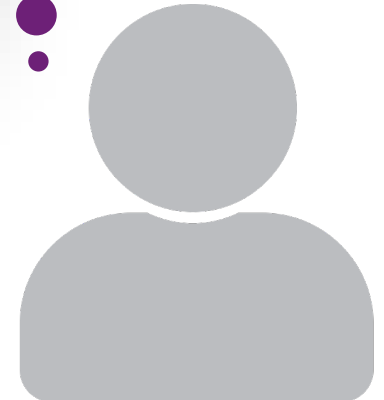
Anne Heads West

Avoiding the Unauthorized Practice of Law

- Anne is Deputy General Counsel for Empire Investment Services, Inc., a financial advisory services firm located in New York City. Anne is admitted to practice only in New York state.
- Anne is offered and accepts the General Counsel position at Frontier Financial Services Corp., also a financial advisory company, with locations and operating subsidiaries throughout the western US.
- Because Frontier is based in Phoenix, Anne relocates to Arizona.
- On her first day in her new office in Phoenix, she is tasked with negotiating and preparing agreements with vendors that provide services to Frontier subsidiaries located in Arizona, Nevada, and Utah.



In doing so, does she engage in the unauthorized practice of law?





Who Is The Client?

Who Is The Client?

The Organization As In-House Counsel's Client

- The answer to this question is important because a lawyer's ethical duties and protective privileges run to his or her client.
- ABA Model Rule 1.13(a): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."
- The attorney's loyalty and other duties are owed to the entity, not the directors, officers, senior executives, or other constituents.
- Avoiding the accidental client may require a disclaimer.

Who Is The Client?

The Organization As In-House Counsel's Client

- Subsidiaries and other affiliates also can be clients.
- Individual officers, directors, and employees also can be clients.
- Separate disclosures and informed consents are required for joint representation.

Who Is The Client?

The Organization As In-House Counsel's Client

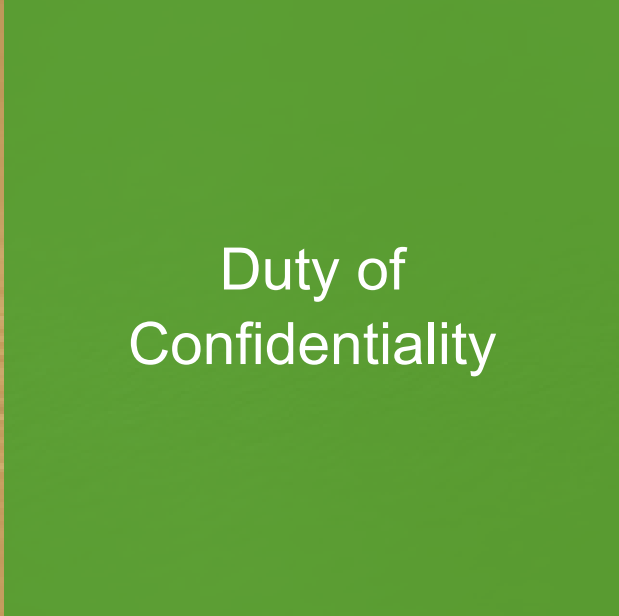
- Joint Representation Can Result In Loss of Confidentiality And Conflicts of Interest.
- There is no confidentiality among jointly represented clients.
- A lawyer cannot represent multiple clients when there is a concurrent conflict of interest.
- ABA Model Rule 1.7(a): such a conflict exists if either “the representation of one client will be directly adverse to another client” or there is a significant risk of a material limitation on a representation.
- Direct adversity in much of the world is present only if adverse matters are the same or substantially related; in most of the U.S, a conflict exists even if the two matters are not related.

Be Careful, Anne...

- Molly is the Head of Investment Research at Frontier. Due to a series of costly errors made by Molly, Frontier's senior management has decided to involuntarily terminate her employment. It has, however, offered her a generous severance package in return for her execution of a general release of all claims against Frontier.
- Anne and Molly quickly became friends when Anne moved to Phoenix.
- Molly stops by Anne's office and tells her that Frontier has fired her, but offered a severance package, and seeks her advice concerning whether Anne thinks she should accept it.



How should
Anne Respond?



Duty of Confidentiality



CONFIDENTIAL

Duty of Confidentiality

- Confidentiality is one of the most critical obligations of the attorney/client relationship.
- ABA Model Rule 1.6: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”
- This duty is very broad and includes all information “relating to the representation of a client.”
- It is broader than the attorney/client privilege.

Duty of Confidentiality

- It applies regardless of the source of the information.
- It applies to remote working arrangements and personal devices.
- It applies after the relationship has ended.
- It may apply even if the information is otherwise public.



Duty of Confidentiality

- It requires security of physical files.
- It requires security of electronic files.
- Duty to prevent data breaches.
- Duty to supervise compliance by junior lawyers and assistants.



Duty of Confidentiality



The duty is not absolute.



There may be a duty to disclose information.

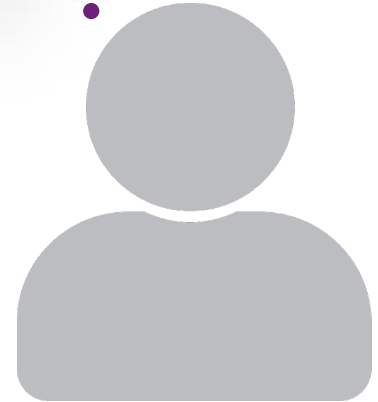
Duty of Confidentiality

- Other countries take similar approaches.
- Most other countries are at least as protective as the US of such information.
- European Code Rule 2.3.2 protects “all information that becomes known to the lawyer in the course of his or her professional activity.”



Poor Tom (and Jerry)

- Tom is Associate General Counsel at Frontier, where he works on mergers and acquisitions.
- Recently Tom has been working long hours on diligence regarding a possible acquisition of Advanced Investment Strategies, Inc.
- Tom's best friend is Jerry, who is the Chief Operations Officer for Advanced Investment Strategies.
- Based on information he has obtained from his colleagues at Frontier (including his boss, Anne), Tom knows that Jerry is likely to be let go if Frontier acquires Advanced Investment Strategies.
- Tom is extremely conflicted about having this information, and declines multiple invitations from Jerry to "hang out," telling Jerry that he's buried with work.
- Jerry finally asks Tom what is keeping him so busy.



Attorney-Client Privilege



Attorney-Client Privilege

- Protecting attorney-client communications is another of the most critical obligations of the attorney-client relationship.
- The privilege applies to:
 - a communication,
 - between an attorney and her client,
 - that is confidential,
 - in which legal advice is sought or provided, or facts upon which legal advice will be based are sought or provided.
- The privilege applies only where legal advice is involved; in-house counsel must be wearing her “lawyer hat”; business communications are not privileged.
- For mixed legal/business communications, legal advice must be the primary purpose.
- The underlying facts are not privileged.

Attorney-Client Privilege

- Most transaction documents, and drafts of them, are not within the attorney/client privilege.
- That materials are “private” does not make them privileged.
- Copying an attorney on an email or memo does not make material privileged.
- The privilege is strictly construed, and there is no presumption that materials are privileged.

Attorney-Client Privilege

- The privilege is owned by the client.
- The client, or its successor, can waive the privilege.

New owner or management

Receiver or Trustee in Bankruptcy

Attorney-Client Privilege

- The privilege is waived by relying on the communication for a claim or defense.
- The privilege can be lost by disclosing the information to a third party.
- The waiver can be as to a particular matter or the entire subject matter.
- All participants in a communication need to know whether it is intended to be privileged or not.
- Loss of privilege can be devastating.


Attorney-Client Privilege

- Other countries?
 - This privilege for in-house counsel is not recognized in most European countries.



Anne's Investigation

- Anne has been working with Human Resources and other internal partners to conduct an investigation into a whistleblower employee's charge filed with the EEOC alleging that Frontier has tolerated and failed to respond to a company-wide culture of sexual harassment.
- As a publicly-traded company, Frontier discloses these allegations, and its shareholders file a derivative lawsuit when the company's stock plummets after the disclosure.
- Anne's investigation report summarizes the many interviews and documents reviewed as part of the investigation, and ultimately concludes that the allegations are unfounded.
- Frontier includes Anne's report in its response to the EEOC charge.
- In the derivative lawsuit, Frontier asserts attorney/client privilege to deny plaintiffs' discovery request for Anne's report.



Is the report privileged?

A close-up photograph of a person's hand holding a silver pen, writing on a document. The person is wearing a dark suit jacket and a red and white striped tie. The background is blurred, showing a window with light coming through. A semi-transparent teal box is overlaid on the right side of the image, containing the text 'Work Product Doctrine' in white.

Work Product Doctrine

Work Product Doctrine

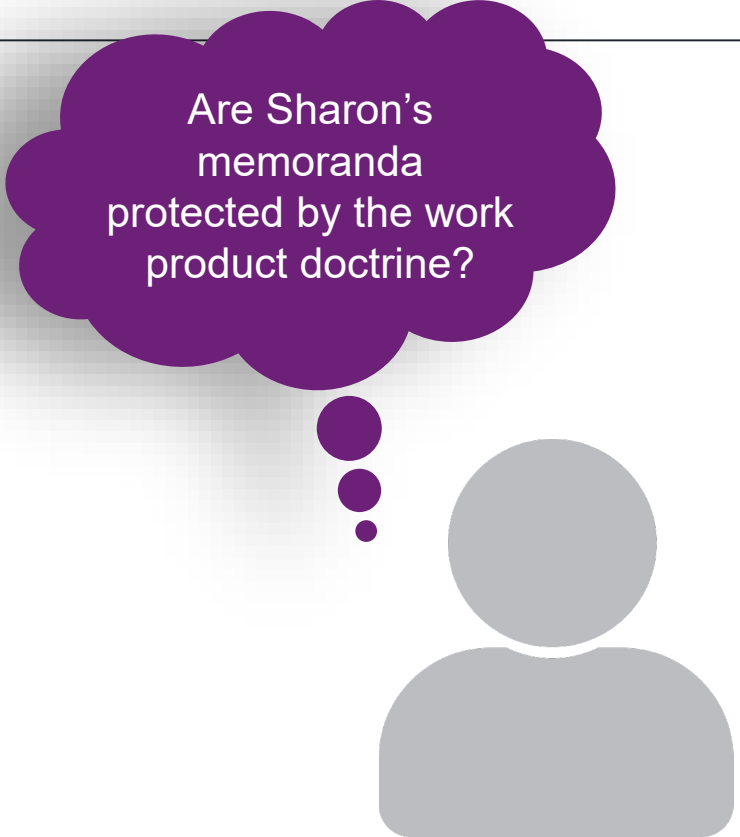
- The work product doctrine may protect a lawyer's thoughts and other work product.
- The doctrine protects from disclosure materials both:
 - Prepared by a party or its representative, and
 - For or in anticipation of litigation or trial.
- Where there is a joint business and litigation purpose, the litigation must be the primary purpose.
- The materials also must be confidential.

Work Product Doctrine

- Work product doctrine does not protect underlying facts.
- This protection is not absolute and can be waived.
- Work product protection in other countries.

Sharon's Role in Anne's Investigation

- Sharon is Assistant General Counsel at Frontier, and reports to Anne.
- As part of Anne's investigation, Sharon is tasked with interviewing percipient witnesses and providing summaries of those interviews to Anne.
- For each interview she conducted, Sharon prepared two memoranda, one a factual timeline of events and the other with her thoughts regarding the witness' credibility and her analysis of the how the witness' information may impact the outcome of the EEOC charge claim.



Are Sharon's memoranda protected by the work product doctrine?

Integrity of the Profession



Integrity of the Profession


- Lawyers are required to be truthful in dealing with others.
- ABA Model Rule 4.1: In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”
- ABA Model Rule 8.4: “It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Integrity of the Profession

- Lawyers must maintain the integrity of the profession.
- ABA Model Rule 8.4: “It is professional misconduct for a lawyer to: ...(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law”
- ABA Formal Opinion 493 (July 15, 2020).

Anne's Dilemma

- In addition to her other responsibilities, Anne serves as Frontier's lead negotiator in its collective bargaining with the labor union that represents Frontier's research staff and its office clerical employees.
- In one bargaining session, the company and union are discussing wage and benefit increases.
- During the session, Eddie, Frontier's Comptroller and also a member of Frontier's bargaining team, provides the union's negotiating team with financial information projecting operating losses as a justification for Frontier's proposal for very modest wage and benefit increases.
- Based on her attendance at the most recent meeting of Frontier's Executive Committee (which Eddie did not attend), Anne knows the information Eddie provided to the union is based on incorrect assumptions that materially lower the projections.

A background image showing a stack of US dollar bills. A purple thought bubble is positioned above a grey silhouette of a person's head and shoulders. The thought bubble contains the text: "What, if anything, should Anne do regarding the financial information?".

What, if anything, should Anne do regarding the financial information?

A close-up, shallow depth-of-field photograph of a judge in a black robe, holding a wooden gavel over a sound block on a wooden bench. The judge's face is partially visible in profile, looking down. The background is blurred, showing other people in a courtroom setting. A teal rectangular box is overlaid on the left side of the image, containing the text 'Attorney as a Witness'.

Attorney as a Witness

Attorney as a Witness

- A lawyer's involvement in contested events may make the lawyer a fact witness.
- In-house counsel may participate in events or have relevant personal knowledge regarding disputed matters.

Transactions

Internal Investigations

Terminations and other
disciplinary actions

Attorney as a Witness

- As a consequence, the lawyer may be precluded from being the organization's lawyer in the dispute.
- ABA Model Rule 3.7(a): "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness"
- Attorney/Client privilege and work product protection may be lost if counsel becomes a witness.



Another Dilemma For Anne

- Although Anne's investigation into the EEOC charge that alleged a pervasive culture of sexual harassment at Frontier determined that those allegations were unsupported, Frontier's Chief Administrative Officer has decided to replace Franklin, the company's Director of Human Resources.
- The CAO asks Anne to sit in on his termination meeting with Franklin, both to serve as a witness and to provide any necessary information supporting the decision to terminate his employment.



Questions? Please let us know.



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