Indoor Ethics Award:

What happens when Your Advocacy Goes Viral



So What is so Special about Practicing before Employment Law Agencies?

- Oftentimes, they not only make the laws or rules, but also interpret them and enforce them as judge and jury

- More than any other area, the "deciders," those who enforce the rules/preside over investigations and rule on evidence are often not lawyers.



THE PECULIARITIES OF AGENCY PRACTICE

- Many cases that come before the EEOC/DOL or comparable FEPA agencies involve individuals who are not represented by counsel.
- The EEOC/FEPA does not represent the Charging Party



Model Rule Peculiarities Of Employment Practice

- General presumption: All lawyers should be governed by the same ethics rules *See, e.g.,* MODEL RULES OF PROF'L CONDUCT pmbl.
- Nevertheless, the Model Rules deviate from this principle in several respects:
  - A few scattered rules impose additional obligations on lawyers practicing before administrative agencies,
  - Most notably, Rule 3.9 requires a lawyer "representing a client before a legislative body or administrative agency in a non-adjudicative proceeding" to "disclose that the appearance is in a representative capacity."

This Rule aims to prevent lawyers from misleading an agency into thinking that a lawyer appearing before the agency is presenting the lawyer's own views.

Two other rules that reference agency practice are Rule 8.4(e) and Rule 7.5(a).

Rule 8.4(e) prohibits a lawyer from "stat[ing] or imply[ing] an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law."

Rule 7.5(a) prohibits a lawyer in private practice from using a "trade name" that "impl[ies] a connection with a government agency."

ADMINISTRATIVE AGENCY LAWYERING UNDER ABA'S MODEL RULES



Model Rules include a small number of rules specifically applicable to lawyers practicing before agencies.



Model Rules impose different obligations on lawyers practicing before agencies depending on which governmental function the agency is engaged in.



Finally, the Model Rules in some cases incorporate an agency's ethics rules.

The Tripartite Division of Agency Conduct

A second way the Model Rules address lawyers who practice before government agencies is by making some ethics rules inapplicable to certain types of agency practice.

The Model Rules in effect establish a tripartite structure for lawyers practicing before government agencies, depending roughly on whether the agency is acting in a judicial, legislative, or executive capacity.

When an agency "act[s] in an adjudicative capacity," it is a "tribunal" under Rule 1.0(m). That label matters because the Model Rules include a number of provisions specifically applicable to a lawyer practicing before a "tribunal," many—but not all—of which are found in the group of rules falling under the heading captioned "Advocate" (Rules 3.1–3.9).

A rose by any other name…..

- The Model Rules somewhat unhelpfully use the terms "administrative agency," "government agency," and "governmental entity" interchangeably, as does the Restatement, which also occasionally uses the term "regulatory agency."



- Some of the Advocate Rules refer to a "proceeding,". See MODEL RULES OF PROF'L CONDUCT rr. 3.1, 3.3(b), 3.3(d), 3.5(b), 3.6(a).

- Other Advocate Rules refer to "litigation." *See id*. rr. 3.2, 3.6(a).

- Still others refer to "trial." *See id*. rr. 3.4(e), 3.7.. It is not clear whether administrative agency adjudications are "litigation" or "trials" within the meaning of these rules.

Legislative or Tribunal?



- When the agency acts in a legislative (rulemaking) capacity, lawyers practicing before that agency are bound by some, but not all, of the rules applicable to advocates practicing before tribunals.

- Rule 3.9 identifies specific rules that a lawyer in this situation must follow: Rules 3.3(a) through (c) (Candor Toward the Tribunal), 3.4(a) through (c) (Fairness to Opposing Party and Counsel), and 3.5 (Impartiality and Decorum of the Tribunal).

Revised Rule of Professional Conduct 1.13: ORGANIZATION AS CLIENT

Comment [9] makes clear that the Rule applies in the administrative law context.

When Practicing before a Government Agency:

Know the "rules of engagement" when representing an organizational client vs. constituents of the organization.

Stayin' Alive: Rule 1.3(a): A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.



ISSUES REGARDING IN-HOUSE COUNSEL

I. IDENTIFYING THE "CORPORATE "CLIENT"

A. The Rule: ABA Model Rule 1.13 provides that a lawyer represents the organization, as distinct from its directors, officers, or other constituents

B. Reality: Dispelling the Myth for the directors, officers etc.

CONFLICTS OF INTEREST



Who is the Client?

- Representing an organization as a client can generate conflict of interest issues. A lawyer who represents an organization or other entity does not necessarily represent affiliates or subsidiaries of that entity.

- Thus, a lawyer who is representing an entity is not barred from accepting representation adverse to an affiliate, unless the circumstances are such that the affiliate should also be considered a client. Rule 1.7, Comment [34].

THE “MIRANDA” WARNING in Employment Cases

- https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/

- Colo. Ethics Op. 120 (2008); D.C. Ethics Op. 305 (2001); D.C. Ethics, Op. 269 (1997); Miss. Ethics Op. 248 (2001); N.Y. Ethics Op. 978 (2013). See also, http://www.iml.org/file.cfm?key=2597
- Suggestion: “I am conducting this interview as the attorney representing [the city] regarding an employment claim/matter [describe nature of investigation/proceeding]. Anything you tell me may be disclosed to city management or as the City directs regarding. While what you say may be considered a confidential communication between the City and its attorneys, I do not represent you personally. I therefore cannot promise to keep anything you tell me from the appropriate city management or officials.”

TEXAS 2-STEP
COMMUNICATIONS
& CONFIDENTIALITY
– Rules 1.4 & 1.6

ATTORNEY-CLIENT PRIVILEGE

Two court-developed tests for determining corporate/governmental "Client Confidences": the "control group" test and the "subject matter" test.

1) **"Control group"** test" Rejected by SCOTUS, *Upjohn Co. v. United States*, 449 U.S. 383 1981)
2) SCOTUS applied an ad hoc balancing test consistent with the **"subject matter"** rubric of *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977):

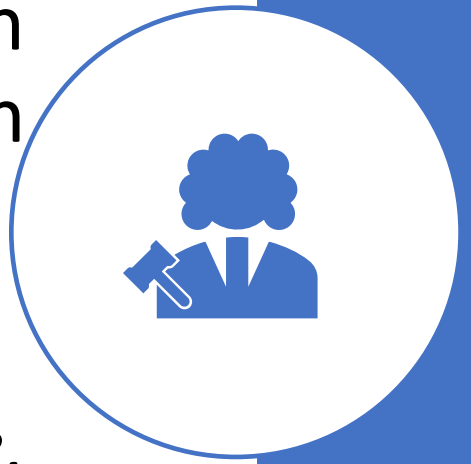
The corporate attorney-client privilege

applies to an employee's communication if: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his city superior; (3) the superior made the request so that the city could secure legal advice; (4) the subject matter of the communication is within the scope of that employee's municipal duties; and (5) the communication is not disseminated beyond those persons who, because of the governmental structure, need to know its contents



Corporate Privilege, continued…

- *Upjohn* and its progeny are binding only upon federal courts. *See In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994)



- Many state courts now reach the same result. *See, Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993) (rejecting control group test); *Fireman's Fund Ins. Co. v. Super. Ct.*, 196 Cal. App. 4th 1263 (2011)

WAIVER

a. BUT the privilege will not apply if to obtain legal advice to the city. *Adams and Associates v. NLRB*, 871 F.3d 358 (5th Cir. 2017) **OR**

b. Where the individual providing the advice is not an attorney or isn't acting in that capacity; *In re Grand Jury Subpoena* (Mr. S.), 662 F.3d 65 (1st Cir. 2011) **OR**



WAIVER, continued

c. Where a non-essential constituent was included in the communication.

See, e.g., United States ex rel Barko v. Halliburton Co., 74 F. Supp. 3d 183 (D.D.C. 2014)); *See also Reed v. Baxter,* 134 F. 3d 351 (6th Cir. 1998)





FORM

The privilege extends to confidential communications in a variety of forms, such as

emails or preliminary drafts of documents containing attorney legal advice in the form of notations/ suggestions

Waiver of the Privilege

The attorney-client privilege may be expressly waived, or found not to exist, where:

(1) disclosures of privileged information to the government (however, some courts have found only a limited waiver, or no waiver, if the privileged information is provided in response to a government agency's subpoena.



When is a Disclosure a Waiver?

Disclosures to persons other than the client that without a demonstrated interest in maintaining the confidentiality of the contents of the communications:

- Accountants, outside auditors, supervisors and managers not essential to providing or obtaining legal advice
- Board/Committee members;
- insurance brokers, adjusters or representatives (however, some communications with the insurer or its representatives may be deemed essential to the representation of the insured and thus within the privilege);
- “public” disclosures, such as communications media websites, blogs or ListServs



60 ways to waive your privilege…

(5) disclosure to nonessential third parties which may include social workers, family members and friends;

(6) disclosures to public relations specialists;

(7) disclosure to third party litigation funders;

(8) disclosure by revealing privileged information during trial or deposition testimony

(9) use of privileged information by a witness to refresh recollection before or during testimony;

(10) failure to timely and properly assert the attorney-client privilege and provide a proper privilege log when confidential information was sought through the discovery process or otherwise;

(11) disclosure of privileged information in court or administrative filings;

(12) disclosure to an opposing counsel, adversary or a 3rd party

Waiver – Let me count the Ways

(13) it confidential discussions in public settings where privacy is not ensured; or

(14) affirmative defenses in the answer/assertions that otherwise that put the protected information "at issue"



OOPS, They did it Again!

The Attorney-client privilege rests with the City and "is normally exercised by its current officers and directors.

"[A] mere employee cannot waive the corporation's privilege." *Weintraub*, 471 U.S. at 348-49; *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1371 (10th Cir. 1997). *See also In re Grand Jury Subpoena, JK-15-029*, 828 F.3d 1083 (9th Cir. 2016)



Summary

- Remember who you are (The City Attorney and thus Whom you represent)
- Watch for your Blind Side
- “Who was that Masked Man/Woman?”




"I think everybody will wear masks in the near future. They're terribly comfortable."

Roberta “Robin” Cross
Township Attorney
The Woodlands Township
2801 Technology Forest Blvd.
The Woodlands, Texas 77381
(281)210-3800

rcross@thewoodlandstownship-tx.gov
DIRECT:281-210-3484
CELL: 832-791-6424
FAX: 281-210-3499

