

**EEOC's 17th Annual EXCEL Training Conference**

***Ethical Issues Confronting Federal Government Attorneys***

***August 13, 2014***

***3:30-5:30 pm***

- I. Overview
  - A. EEOC Lawyers are bound by the ethics rules of the State in which they practice - Model Rule 8.5 (lawyers are subject to the disciplinary authorities of the jurisdictions in which they are admitted to practice and the jurisdictions in which they provide legal services); *cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 n.64 (1995) (concluding from the Department of Justice Appropriation Authorization Act requirement that attorneys "be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia" that lawyers representing the Federal Government are governed by state ethical rules).
  - B. Attorneys practicing on behalf of the Federal Government are also subject to the Civil Justice Reform Executive Order 12988
    - 1. Signed into law on February 5, 1996
    - 2. Provides guidelines for Federal Government attorneys with the purpose of promoting "just and efficient government civil litigation." The order, which revokes and replaces a 1991 executive order on the same subject, sets forth the litigation practices expected of attorneys litigating on behalf of the United States, including appropriate pre-suit and post-filing settlement efforts and use of Alternative Dispute Resolution, streamlining discovery, seeking sanctions for opposing counsel misconduct, and using litigation resources efficiently.
  - C. The McDade Amendment - Citizen Protection Act - 28 U.S.C. § 530B
    - 1. Makes DOJ lawyers subject to state ethics rules
    - 2. Not directly applicable to EEOC counsel, but should be considered because the McDade Amendment was enacted to control excesses in ex parte communications by DOJ lawyers.

## II. Outside Practice of Law

### A. Outside Employment Prohibited - *Standards of Ethical Conduct*, codified at 5 C.F.R. Part 2635 –

1. “Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.”
2. Exceptions
  - (a) An employee may provide behind-the-scenes help to an immediate family member in an EEOC matter or a matter in which the Federal government is a party.
  - (b) An employee may also represent “another EEOC employee in an administrative equal employment opportunity complaint against EEOC.”
  - (c) Both exceptions require prior approval and no compensation may be received.

## III. Recusal Requirements when spouse is practicing privately

### A. Based on criminal financial conflict of interest standards and *Standards of Ethical Conduct*,

1. The financial conflict of interest statute prohibits any federal employee from participating personally and substantially in any matter in which the employee or the employee’s spouse has a financial interest, if the matter will have a direct and predictable effect on that interest. 18 U.S.C. § 208(a).
2. *Standards of Ethical Conduct* contain a similar financial conflict of interest provision, 5 C.F.R. § 2635.401, and also, at 5 C.F.R. § 2635.502(a), contain a broader impartiality conflict of interest provision:

Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee . . .

3. Since EEOC attorneys have "covered relationships" with their spouses' employers and their spouses' clients, the *Standards of Ethical Conduct* provision require recusal under the following circumstances.
  - (a) EEOC attorneys must recuse themselves from any charge or lawsuit in which their spouse's law firm represents a party, regardless of whether the spouse is the attorney on the case.
  - (b) EEOC attorneys must recuse themselves from any case in which any client of the spouse is a party, whether or not the spouse's firm is representing the client in the EEOC case.
4. However, EEOC attorneys are not required to recuse themselves from cases involving a client of the spouse's firm (not the spouse's client), as long as the firm is not representing that client in the EEOC matter. If the EEOC attorney's spouse leaves the firm or no longer represents the client and does not plan to represent that client in the future, then the EEOC attorney's obligation to recuse himself or herself ends.
5. With respect to attorney referral programs, EEOC attorneys should not participate in decisions to add their spouses or their spouses' firms to a referral list or in decisions to refer charging parties to their spouses or their spouses' firms, unless the entire list is provided or referrals are made automatically and without the exercise of discretion.

#### IV. Ethical Issues Arising for EEOC Attorneys in Their Investigative Role

- A. Government attorneys represent the government, not individual claimants – although the interests of both may be closely aligned
  1. EEOC attorney statutory charge: “to prevent any person from engaging in any unlawful employment practice prohibit by the Act.” 42 U.S.C. § 2000e-5(a); serve respondent with copy of claim and “make an investigation thereof” 42 U.S.C. § 2000e-5(b)
  2. Potential conflicts and ethical duties may evolve as role of EEOC attorney evolves from neutral investigative role to litigant against respondent after finding of reasonable cause and failure of conciliation
  3. Ethical Limitations on Communications with Corporate Constituents
    - (a) Model Rule 4.2: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” California Rule 2-100 is the same, except the italicized language “or is authorized to do

so by law or a court order” is not present. This difference is significant in the context of EEOC investigations.

- (b) Comment 5 to Model Rule 4.2 opens the door to a significant exception to the prohibition against contacting representing parties by government attorneys conducting investigations:

“Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.”

However, the use of “may” in a rule comment does not necessarily mean Rule 4.2 may be disregarded even in Model Rules jurisdictions. In California, the “authorized by law” language is not present in Rule 2-100, so there is no basis for this potential exception for government lawyers conducting investigations.

- (c) Prohibition on communication extends to corporate “constituents” but does not include former employees of the entity (unless the former employee represented by an attorney individually). A “constituent” is a person:
  - (i) Who supervises, directs or regularly consults with the organization’s lawyer concerning the matter; or
  - (ii) Who has authority to obligate the organization with respect to the matter; or
  - (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability

[Model Rule 4.2, comment 7]

- (d) Prohibition applies only when “the lawyer *knows* that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.”

[Model Rule 4.2, comment 8 (emphasis added)]

- (e) “In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence

that violate the legal rights of the organization.” [Model Rule 4.2, comment 7]

4. Other Ethical Limitations on Communications

(a) Unrepresented parties – Model Rule 4.3:

“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”

(California does not have an equivalent Rule)

(b) Corporate counsel’s instructions not to employees not to communicate with government lawyers

(c) Ethical duties with respect to information or property received from claimant that was taken from employer without consent or authorization

(i) Rule of reason

(ii) Model Rule 4.2, comment 7; Model Rule 4.4

(d) Receipt of information inadvertently produced

(i) Rule of reason

(ii) Model Rule 4.4(b)

5. Inadvertent Creation of Attorney-Client Relationship with Claimant

(a) Clarify – and repeat – scope of role and representation. Existence of attorney-client privilege is analyzed from perspective of the putative client. If conclusion is reasonable, relationship will be found. *See Responsible Citizens v. Superior Court*, 16 Cal. App. 4th 1717, 1733 (1993) (“one of the most important facts involved in finding an attorney-client relationship is the expectation of the

client based on how the situation appears to a reasonable person in the client's position")

## V. Social Media

### A. Duty of Confidentiality

#### 1. B&P Code 6068(e)

It is the duty of an attorney to do all of the following:

....

(e)(1) to maintain inviolate the confident, and at every peril to himself or herself to preserve the secrets, of his or her client.

#### 2. Rule of Professional Conduct Rule 3-100

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

#### 3. Duty of Confidentiality is an Element of Duty of Competence

(a) State Bar Formal Opinion 2010-179

(b) Model Rule 1.1, Comment 8 – Duty of Competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice including the benefits and risks associated with technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

#### 4. Status updates can violate confidentiality

#### 5. Includes "secrets" and "privileged" information

#### 6. Includes publically available information

#### 7. No posts absent informed client consent

(a) Blog, Facebook, Tweets, etc.

### B. No Contact Rule

#### 1. Rule of Professional Conduct Rule 2-100

### C. Advertising Rules

1. Rule of Professional Conduct Rule 4-100
2. Cal. Formal Opinion No: 2012-186
  - (a) Material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a "communication" within the meaning of rule 1-400 or "advertising by electronic media" within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act. The restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting
  - (b) "communications" for purposes of that rule as: "any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client..."

D. Use of Social Media in Investigations

1. Attorneys may view public social media pages
  - (a) NYSBA Formal Opinion 843 (9/10/10)
    - (i) Lawyer representing a client in pending litigation may access the public pages of another party's social networking website for the purpose of obtaining possible impeachment material for use in the litigation.
  - (b) Massachusetts Bar Association Ethics Opinion 2014-5
    - (i) Lawyer may "friend" an unrepresented adversary to obtain information for a case so long as the lawyer first discloses who he or she is representing
  - (c) New Hampshire Bar Association Ethics Committee Advisory Op. 2012-13/05
    - (i) Must inform witness of lawyer's involvement in the disputed or litigated matter, disclose the lawyer by name as a lawyer, and identification of the client in the litigation,
  - (d) Oregon State Bar Association Formal Opinion 2013-189
    - (i) If person asks for information about additional information to identify the lawyer, or if lawyer has reason to believe the

person misunderstands her role, lawyer must provide additional information or withdraw friend request.

- (ii) Burden should be on the unrepresented party to ask about the inquirer's purpose rather than on the lawyer to disclose her identity and purpose
- (e) Pennsylvania Bar Association Formal Opinion 2009-02
  - (i) No deceptive friending permitted (i.e. to gain access to private social media account)
- (f) NYCity Bar Association Form Opinion 2010-2
  - (i) Friending an unrepresented party is ok if lawyer fully discloses who she is and why they are “friending” the person
  - (ii) No deceptive friending permitted (i.e. to gain access to private social media account)
- (g) San Diego County Bar Association Formal Opinion 2011-2
  - (i) "Friending" a represented party violates California Rule of Professional Conduct 2-100
  - (ii) Must disclose lawyer's affiliation and purpose for the request

## 2. Juror Investigation

- (a) ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 466
  - (i) Lawyers may look at what jurors post online, but only if it's available to the public
  - (ii) Lawyer should not send jurors or prospective jurors a request for access, either directly or indirectly, to their social media accounts because doing so would amount to a violation of the prohibition against ex parte communications with jurors that are not authorized by law or court order.
- (b) Cannot use surrogate to do what lawyer cannot do

## 3. Subpoenas to social media providers may violate Stored Communications Act

- (a) *Crispin v. Christian Audigier, Inc.*, 717 F.Supp.2d 965 (2010 C.D. Cal.)
  - 4. Subpoena to Juror directly was permissible and not a violation of the Stored Communications Act
    - (a) *Juror Number One v. Superior Court* (2012)
- E. "Cleaning Up" social media pages for evidentiary purposes
  - 1. *Lester v. Allied Concrete*
    - (a) Spoliation
      - (i) 5 year suspension for attorney
      - (ii) \$700K in sanctions against attorney and client
  - 2. *Gatto v. United Air Lines, Inc. et al.*, Case: 10-cv-1090-ES-SCM (D.Ct. N.J.), March 25, 2013
    - (a) Adverse jury instruction granted for deleting Facebook account

## VI. Inadvertent Disclosure

- A. *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644
  - 1. When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should [1] refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and [2] shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact.
- B. *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817-818
  - 1. extended the *State Fund* rule beyond materials protected by the attorney-client privilege to materials protected by the attorney work product doctrine, irrespective of whether the documents are marked as “confidential” or “work product.”

C. State Bar Formal Opinion Number 2013-188

1. If an attorney receives an unsolicited intentionally transmitted written communication between opposing counsel and opposing counsel's client under circumstances reasonably suggesting that it is a confidential communication apparently sent without the consent of its owner, the attorney may not ethically read the communication, even if she suspects the crime-fraud exception might apply. The attorney must notify opposing counsel as soon as possible that the attorney has possession of the communication. The two attorneys should try to resolve the privilege issue or, if that fails, obtain the assistance of a court. Attorney may not read, disseminate, or otherwise use the communication or its contents absent court approval or consent of its owner.
2. Obligations triggered where information:
  - (a) "obviously appears" to be subject to an attorney-client privilege; or
  - (b) "otherwise clearly appears" to be confidential and privilegedAND
  - (c) it is reasonably apparent that the materials were provided or made available through inadvertence
    - (i) by the privilege holder's counsel himself,OR
    - (ii) when a third party intentionally sends privileged materials to another attorney, and
    - (iii) it is reasonably apparent that those materials were sent without their owner's authorization.
3. Suspicions of crime-fraud does not abrogate the *State Fund/Rico* rule
  - (a) Must use non-privileged information to make a prima facie showing that opposing counsel's services were sought in order to assist the opposing party in committing that crime or fraud. *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240

VII. Negotiations

A. Communications of settlement offers

Lawyers have a duty of communication under Rule 1.4 and a duty to advise under Rule 2.1. The usual rule is that settlement offers in a civil case must be conveyed to the client because the client has a decision to make. See Rule 1.4(a)(1) (duty of communication when client's consent is needed) and Rule 1.2(a) (client has the right to decide whether to accept a settlement offer). Simply communicating the offer does not, however, discharge all of the attorney's responsibilities. Comment 2 to Rule 1.4 makes it clear that a settlement offer need not be conveyed if the client has previously indicated that the offer would be unacceptable.

#### B. Inadvertent Disclosures about case evaluation

Rule 4.4(b) requires attorneys to advise adversaries of misdirected communications. Comment 2 makes it clear that this rule applies to e-mail. As Comment 2 also notes, the purpose of the notification requirement is to enable the sender of the communication to take appropriate steps, if necessary, with the court to obtain the return of the document. Comment 3 gives attorneys the discretion to return inadvertently disclosed materials "as a matter of professional judgment reserved to the lawyer." Client consent to return it, therefore, is not required.

#### C. Threats Generally

No provision in the Model Rules of Professional Conduct directly forbids making threats to help a client in a negotiation. But, in some states it would be extortion to threaten to reveal negative information unless the client's adversary agrees to a favorable settlement. In a state where it is extortion, the attorney would be engaging in misconduct under Rule 8.4(b) by committing "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." That would be misconduct even if all of the statements are "true" (but extortionate). If it is not a crime, then the lawyer may make the threat. Under Rule 1.2(a), a lawyer must consult with the client about the means to be employed in obtaining a favorable settlement, but decisions on tactics do not belong solely to the client.

#### D. Abuse of Duty to Report Violations

Attorneys have an obligation under the Model Rules, subject to the client's permission to reveal confidential information, to report misconduct to the bar where the violations reflect adversely on the other lawyer's honesty, trustworthiness, or fitness as a lawyer. But a lawyer may not use a threat to comply with this mandatory reporting duty as a ploy in a negotiation. ABA Formal Opinion 94-383.

#### E. Puffing

Lawyers are not allowed under Rule 4.1 to make false statements of material fact to third persons. However, statements of value are not relied on in our culture as statements of fact. Instead, under generally accepted practices in negotiation, it is expected that each side will "puff" about value. See Comment 1 to Rule 4.1.

F. Compare False Statements

Under Rule 4.1(a), lawyers are prohibited from making false statements of law. Under Rule 8.4(a), that violation of Rule 4.1(a) is misconduct.

G. Distinction between Puffing and False Statements – really comes down to fact versus opinion

H. Caveat - You should also not overlook the possibility that a court might set aside or reform a negotiated agreement if you fail to be truthful or if you fail to disclose material information. (*Stare v. Tate* (1971) 21 Cal.App.3d 432; *Spaulding v. Zimmerman* (1962) 263 Minn. 346, 116 N.W.2d 704.)

VIII. EEOC Class Actions

A. EEOC Regularly Files Class Action Cases

1. Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) - authorizes the EEOC to sue in its own name to secure relief for individuals aggrieved by discriminatory practices forbidden by the Act. (See 42 U.S.C. § 2000e-5(f)(1).)
2. Sections 16(c) and 17 of the Fair Labor Standards Act authorize the Commission to bring enforcement actions for Age Discrimination in Employment Act ("ADEA") and Equal Pay Act ("EPA") violations.
3. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754 (2002) - "the EEOC is not merely a proxy for the victims of discrimination," it is equally true that the Commission "acts at the behest of and for the benefit of specific individuals."
4. EEOC may seek relief for groups of employees or applicants for employment without complying with the strictures of Rule 23. (*General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 326 (1980))

B. Governmental Interests are Paramount

1. EEOC counsel represents only the Commission, and counsel must so inform class clients.
2. Attorney-client relationship with class counsel still exists.
  - (a) A/C relationship does not exist with class merely when the EEOC has filed a case and identified the class. (See *EEOC v. Albertson's, Inc.*, No. CV-06-1273, 2006 U.S. Dist. LEXIS 72378, at \* 18 (D. Colo. October 4, 2006); *E.E.O.C. v. Collegeville/Imagineering Ent.*, Not Reported in F.Supp.2d, 2007 WL 158735, (D.Ariz., 2007).)

- (b) Nor is the relationship established after the EEOC mails a letter to potential class members, or calls potential class members when they failed to respond to the letter. (*E.E.O.C. v. ABM Industries Inc.*, 261 F.R.D. 503, (E.D.Cal., 2009); *E.E.O.C. v. CRST Van Expedited, Inc.*, Slip Copy, 2009 WL 136025, (N.D.Iowa, 2009).
- (c) An attorney-client relationship is established when the aggrieved individuals take action to manifest their intent to enter the relationship. (*E.E.O.C. v. Republic Services, Inc.*, Not Reported in F.Supp.2d, 2007 WL 465446, (D.Nev., 2007); *Gormin and EEOC v. Brown-Forman Corp.*, 133 F.R.D. 50, 53 (M.D. Fla. 1990).)
  - (i) Courts have found such a relationship to exist when an individual contacted the EEOC through questionnaires and phone calls, *EEOC v. Int'l Profit Associates, Inc.*, 206 F.R.D. 215 (N.D.Ill. 2002), consulted the EEOC with an intent to seek legal advice, *EEOC v. Johnson & Higgins, Inc.*, CV-93-5481, 1998 WL 778369, at \*5-6 (S.D.N.Y. Nov. 6, 1998), or signed an affidavit stating a belief that an attorney-client relationship existed, *EEOC v. Chemtech Int'l Corp.*, CV-94-2848, 1995 WL 608333, at \*2 (S.D.Tex. May 17, 1995); *EEOC v. HBE Corp.*, No. CV-93-722, 1994 WL 376273, at \*2 (E.D.Mo. May 19, 1994).

C. When can defense counsel ethically contact class members?

1. See Model Rule 4.2
2. When can Commission attorneys contact potential claimants to inform them about a pending lawsuit, to determine whether they were affected by the discriminatory conduct, and to find out whether they want the EEOC to seek individual relief for them? (See *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S. Ct. 2193 (1981).)