Affinity Programs

IN PRACTICE…with CNA™

A Practitioner's Perspective on Emerging Legal Trends | 2020 Issue 2

"Relax. I Will Represent You at the Hearing. Just Tell the Truth, and You Will Be OK."

Conflict of Interest Issues in Representing the Company and an Employee

Times arise, particularly in litigation, where a lawyer for an entity might find it useful to represent an employee, or other constituent of the entity for some limited purpose. This dual representation of an entity and its constituent raises a number of practice issues. As shown in the examples below, a careless handling of these issues can result in professional discipline or malpractice liability, or both. Although the following examples do not involve disqualification, they easily could have. And, in the rare case, a lawyer may face criminal exposure. In *United States v. Gellene*, 182 F.3d 578 (7th Cir. 1999), a partner in a prestigious New York City law firm went to prison because he failed to disclose a conflict of interest to a bankruptcy judge.

A. Role of Ethics Rules

Below, you will see references to several ABA Model Rules. All states have versions of those rules – in many cases the state rules are identical to the Model Rules.

Model Rule 1.13 deserves special mention relative to entity representation. Rule 1.13(a) makes clear that in an entity representation the client is the entity by stating "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Rule 1.13(g) recognizes that a lawyer for an entity might also represent a constituent (such as an employee) provided that the lawyer complies with conflict-of-interest rules. In Scenarios C. and D. below, the lawyer clearly failed to comply with Rule 1.7, relating to conflicts among current clients.

B. Compliant Scenario

Lawyer is defending Railroad in an accident case. Plaintiff had driven his car into the path of a train and was injured in the collision. Plaintiff's lawyer seeks the engineer's deposition. The engineer is not a party in the case.

Lawyer reviews the file Railroad's investigator put together immediately after the collision, including the engineer's written statement. Everything is in order. The engineer blew the horn when he should have, was traveling the correct speed, and attempted to stop when he should have. No record of alcohol or drugs, and the engineer had not "timed out."

Lawyer schedules a meeting with the engineer prior to the deposition. Lawyer reviews the investigation file with the engineer, including the engineer's written statement. All is in order. Lawyer then asks the engineer if Lawyer could represent the engineer in the deposition. The engineer says "sure, if I don't have to pay a fee." The deposition goes without a hitch. The only remaining issue in the case is whether the crossing signal was working.

The above is a common scenario, or at least was when the author of this paper was trying cases. Now, if you want to know how not to handle an employer/employee situation, read on.

C. Non-Compliant Scenario

Yanez v. Plummer, 164 Cal. Rptr. 3d 309 (Ct. App. 2013). This case involves a malpractice suit by a Union Pacific ("UP") employee, Michael Yanez, against a UP in-house lawyer, Brian Plummer.

Yanez had been working in a UP locomotive shop with another UP employee, Robert Garcia. They were removing parts of a locomotive using a "drop table," that involved working near a pit under the locomotive. While Yanez was operating the drop table, Garcia said he had dropped a tool in the pit and went into the pit to get the tool. He slipped and fell and was injured.

Because of the injury, Garcia brought a Federal Employers Liability Act (FELA) case against UP. FELA is a federal law, not unlike state workers compensation laws, enabling railroad workers to sue their employer when they are injured on the job. The big difference between the two laws is that the employee, to recover, must show the railroad was guilty of some negligence. In this case Garcia was claiming that the pit floor was covered with grease and oil, a faulty condition causing him to fall.

Garcia's lawyer requested Yanez' deposition. On the morning of the deposition Yanez met with Brian Plummer, UP's in-house lawyer. Plummer was defending the case for UP. Yanez told Plummer that he was concerned that he would have to testify about the condition of the drop table pit. Plummer responded that Yanez should not be concerned and that he, Plummer, would be representing Yanez as a UP employee. He further said that if Yanez just told the truth, his job would be safe.

The deposition did not go well. Garcia's lawyer asked Yanez whether he had seen Garcia fall. Yanez said he did not see the actual fall, although it was nearby and that he was at Garcia's side immediately after the fall. Plummer then had a statement Yanez had written, shortly after the accident, marked as an exhibit. That statement said Yanez had seen Garcia fall. Yanez had given an earlier statement the same day that said he had not seen the fall. Plummer did not have that statement marked as an exhibit, and Plummer did not attempt to rehabilitate Yanez regarding the discrepancies.

Yanez' boss was at the deposition, and after the boss had obtained the transcript and the inconsistent statement, UP instituted disciplinary proceedings against Yanez. As a result, UP terminated Yanez for dishonesty.

Yanez brought this suit for malpractice against Plummer. The trial court granted summary judgment to Plummer because Yanez could not prove causation – could not show that Plummer's behavior caused Yanez to be fired. The appellate court reversed, saying that causation was a triable issue in this case. The following expression of the appellate court describes better that we could the nature of Plummer's conduct:

> As for Plummer's conduct, it is true Yanez wrote in his second statement that he "saw" Garcia slip and fall, and it is true Yanez first admitted to Garcia's counsel in the deposition that he did not "witness" Garcia's "accident." But it was Plummer who highlighted Yanez's deposition testimony that he did not "see" Garcia slip; it was Plummer who presented the second statement at the deposition; it was Plummer who got Yanez, *under oath at the deposition*, to effectively admit that his deposition testimony conflicted with the second statement; it was Plummer who did not offer Yanez a chance to explain this discrepancy; and it [*15] was Plummer who failed to present the first statement as an exhibit at Yanez's deposition.

We do not know what happened to Plummer's malpractice case after remand to the trial court. It may have settled. What we do know is that Plummer was also disciplined. In a decision of the State Bar Court of California, Hearing Department – San Francisco, *In re Brian Wayne Plummer*, No. 13-0-17515-PEM, dated June 4, 2015, Plummer was privately reproved.

D. Another Non-Compliant Scenario

Office of Disciplinary Counsel v. Baldwin, No. 151 DB 2017, 2020 WL 808757 (Pa. Feb. 19, 2020). Cynthia Baldwin served on the Pennsylvania Supreme Court from 2006 until 2008. For sixteen years prior to that she was a judge in Allegheny Common Pleas Court. She was admitted to practice in 1980, and until the events described here, she had an unblemished disciplinary record.

It was, however, Baldwin's misfortune to be General Counsel at Penn State when the Jerry Sandusky/child molestation matter blew up.

In 2009 the Pennsylvania Attorney General ("AG") was conducting an investigation of allegations of misconduct of Sandusky, a former Penn State assistant football coach. He had been using Penn State facilities for a boys' athletic program and had been seen twice taking showers with two different young boys and behaving inappropriately with them. The AG convened a grand jury and subpoenaed the following Penn State officials: the Penn State athletic

director; the Penn State CFO; and, the Penn State President. They each met with Baldwin – she was General Counsel, after all. She interviewed each of them, told them to tell the truth, and said she would accompany them to the grand jury. They all testified, and so did Baldwin. She related to the Grand Jury what her conversations were with the officials and even told the grand jury that the Penn State President had lied to her. The three officials were indicted.

Pennsylvania disciplinary officials brought ethics charges against Baldwin. These included violation of Pa. Rules 1.1 (Competence), 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients), and 8.4(d) (Misconduct, prejudice to administration of justice). The Disciplinary Board of the Supreme Court of Pennsylvania found Baldwin had violated those rules and recommended she be publicly reprimanded. This opinion of the Pennsylvania Supreme Court adopted the Board's recommendation.

"They Were Clients." A key finding was that Baldwin represented the three officials as individuals, and not in some indefinite role as employees of Penn State. During her meetings with them she did a lousy job of differentiating her role as General Counsel of Penn State versus her possible role as their counsel. To clear up any uncertainty, the judge at the Grand Jury asked each official if they were represented. They all responded unambiguously that Baldwin, who was sitting with them, was their lawyer. Baldwin said nothing to contradict these identifications.

Baldwin Was Incompetent. The court noted, among other things, that Baldwin had never handled criminal matters and had never represented a grand jury witness. Her pre-hearing interviews were cursory and her requests for the files and other documents of the officials were half-hearted. On balance, she did not understand "the magnitude of the challenge she was facing." She violated Rule 1.1.

Conflicts of Interest. From her cursory pre-hearing investigations, she had plenty of clues that the officials were telling different stories, that they were adverse to each other, and that their interests were adverse to her other client, Penn State. By continuing to represent all of them she was violating Rule 1.7(a).

Confidentiality. By testifying to the Grand Jury about her conversations and interactions with her "clients," she was violating Rule 1.6 – the obligation not to reveal information relating to the representation.

Prejudice to Administration of Justice – Rule 8.4(d). The three officials were charged with multiple crimes relating to Sandusky's conduct. Because of Baldwins incompetence and ethics violations, a lower court quashed a number of these charges.

E. Lessons Learned

In the opening scenario ("Compliant Scenario") of this paper Lawyer determined that the interests of Railroad and the engineer were aligned. Thus, the lawyer correctly saw no conflict of interest, and his representation of both complied with Model Rule 1.13(g).

Contrast the UP case. Yanez, Plummer's client, told Plummer that the pit had oil and grease on the floor. That testimony hurts Plummer's other client, UP. Plummer should have told Yanez to get another lawyer for Yanez' deposition. Making matters worse, Plummer cross-examined Yanez, Plummer's client, about the discrepancies between Yanez' written statement and his deposition. Rule 1.7 provides in certain situations the lawyer may obtain the parties' consents to the joint representation. There was no way that Yanez could have consented to Plummer's conflict. So, Plummer was disciplined and most likely paid a settlement in Yanez' malpractice case.

Contrast the Penn State case. Baldwin knew that her three individual clients were contradicting each other and were adverse to Baldwin's other client, Penn State. Instead of telling them to get other representation – including competent criminal representation – she allowed them to testify before the Grand Jury. She even testified herself, calling one of her individual clients a liar.

Conclusion

Bottom line, if you tell an employee of a client that you will represent him or her, you owe that person all the protections of the ethics rules, including Rule 1.1 (Competence), Rule 1.6 (Confidentiality), and Rule 1.13 (g) (Organization as Client, along with Rule 1.7, Conflict of Interest: Current Client). There is no middle ground. If you cannot comply with those rules, you have no business jointly representing the employee and the employer.

This article was authored for the benefit of CNA by:

William Freivogel www.freivogel.com

Bill Freivogel is a consultant to law firms and corporate legal departments on ethics and professional liability issues. He is a member of the Editorial Board of the ABA/BNA Lawyers' Manual on Professional Conduct, member of the Association of Professional Responsibility Lawyers (APRL), a member of the ABA Center for Professional Responsibility, and a member of the American Law Institute. He is the author of Freivogel on Conflicts, a comprehensive online guide to conflicts of interest. He wrote *A Short History of Conflicts of Interest. The Future?,* 20 Professional Lawyer No. 2, p. 3 (September 2010). In January 2018 Bill received from the New York State Bar Association, Committee on Professional Ethics, the Sanford D. Levy Memorial Award for his "Contribution to the Field of Legal Ethics, 2017." Bill received his LL.B. (1965) and his B.S. (1962) from the University of Illinois.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com