ABA Employee Benefits Committee
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ETHICS FOR
EMPLOYEE BENEFITS LAWYERS

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ETHICS FOR THE EMPLOYEE BENEFITS LAWYER

- Legal Privileges
- Engagement Letters
- Sexual Harassment, Gender Bias
- Social Media
- Advertising
Legal Privileges for Employee Benefits Lawyers

I. Attorney-Client Privilege
   A. Internal Investigations
   B. Fiduciary Exception

II. Accountant-Client Privilege

III. Governmental Privileges
   A. Deliberative Process
   B. Informant Privilege
   C. Presidential Communications
   D. FOIA Exemptions
Attorney-Client Privilege
Internal Investigations

An internal investigation – after being informed of potential misconduct – conducted by and for in-house legal department to gather facts and ensure compliance with the law is protected by the attorney-client privilege.

Attorney-Client Privilege
Fiduciary Exception – Divergence of Interests

When do interests of a fiduciary engaged in a fiduciary function, such as deciding claims, diverge from a participant’s interests?

Many courts have held no divergence of interests until final denial of benefits.

Fiduciary Exception – Divergence of Interests (cont.)

One 2018 court took a fact intensive approach to conclude that a sufficiently adversarial relationship arose before the final decision denying benefits, considering factors such as:

1) the threat of litigation was more than a remote possibility;

2) the interests of the beneficiary and ERISA fiduciary had diverged significantly;
Fiduciary Exception – Divergence of Interest (cont.)

... 

3) the communications were not necessary to or relied upon in the administrative claim process; and

4) the documents relate to a settlor function and were not considered in evaluating the claim.

Fiduciary Exception – Insurers and Third Party Administrators

Most courts have held the fiduciary exception applies to attorney-client communications by an ERISA plan insurer that administers claims.

*Christoff v. Unum Life Ins. Co. of Am.*, 2018 WL 1327112, at *5 (D. Minn. Mar. 15, 2018) (following *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 931 n.6 (9th Cir. 2012), and rejecting *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007)).
Fiduciary Exception – Insurers and Third Party Administrators (cont.)

Fiduciary exception applies to communications related to an insurer’s decisions regarding eligibility for benefits.  

Communications between an insurer and third party entity are privileged and not subject to the fiduciary exception if the third party entity does not perform a fiduciary function.  
Accountant-Client Privilege

No accountant-client privilege in ERISA cases in federal court (even if the federal court sits in a state that recognizes such a privilege).

Accountant-Client Privilege (cont.)

The attorney-client privilege may attach to communications with an accountant (or other third party professional such as an actuary) retained by a client or attorney for the purpose of obtaining or providing legal advice, if the third party served some specialized purpose facilitating the attorney-client communications and was essentially indispensable in that regard.

Governmental Privileges
Deliberative Process Privilege

The deliberative process privilege protects documents that reflect advisory opinions, recommendations, and deliberations during process by which governmental decisions and polices are formulated.

Considerations include:
(see next slide)
Governmental Privileges
Deliberative Process Privilege (cont.)

Considerations include:
• the relevance of the evidence;
• the availability of other evidence;
• the government's role in the litigation; and
• whether disclosure would hinder frank and independent discussion regarding contemplated policies and decisions

Informant Privilege

• Protects identity of persons who furnish information of violations of law to officers charged with enforcing that law
• Protects employees who precipitated lawsuit by filing complaints with the government agency
• Protects government employees as well as employees of company who communicated with government agency
• Is not absolute; requires balancing of the public’s interest in enforcement of the statute, an informant’s right to be protected from retaliation, and defendant’s need to prepare for trial
• Does not apply to those known to be in contact with the agency

Kazu, 2017 WL 628455, at *4-7 (quoting Roviaro v. United States, 353 U.S. 53, 59 (1957))
Presidential Communications Privilege

• to “guarantee the candor of presidential advisers and to provide ‘a President and those who assist him ... with freedom to explore alternatives in the process of shaping policies and making decisions ... in a way many would be unwilling to express except privately.’”

• Confidentiality ensures “that presidential decisionmaking is of the highest caliber, informed by honest advice and full knowledge.”

• Construed narrowly

• Application “depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure ....”

FOIA Exemptions

FOIA Exemption 4 protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential” matters from disclosure. 5 U.S.C. § 552(b)(4).

In non-trade secret cases, the “agency must establish that the withheld records are
‘(1) commercial or financial,
(2) obtained from a person, and
(3) privileged or confidential.”’

FOIA Exemptions

FOIA's Exemption 5 protects “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5).

To qualify for withholding under this exemption:
[1] its source must be a Government agency, and
[2] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.”

Engagement Letters

• Define Engagement Letter
• Model Rules Requirements
• Identify the Client
• Limit Engagement Scope
• Consent to Conflicts
• Multiple Representations
• Client Responsibilities
• Engagement Letters – Misc.
Define Engagement Letter

Lawyer’s writing to client confirming
• Who is and is not client
• Engagement’s scope
• Payment of fees and expenses

3 types of engagement letter terms:
• Required by ethical rules
• Lawyer wants for client relationships
• Specific to that representation
Model Rules Requirements

All states but Cal. use version of Model Rules

• MR 1.5(b) - lawyer must tell client
  ▪ Scope of engagement
  ▪ Basis or rate of fee
  ▪ Client’s responsibility for expenses
  Above “preferably” in writing

• MR 1.5(c) – contingency fee in writing

• MR 1.5(e) – fee divided by firms in writing
Identify the Client

• Plan? Sponsor? Fiduciaries? Participants?
• EBL 4th, Chap. 20, Ethics, to spot issues
• Plan-fiduciary conflict on funding issues
• Schiffli – law firm disqualified because
  ▪ trustee misunderstood and
  ▪ no engagement letter
• Send “not your lawyer” letter?
Limit Engagement Scope

Model Rule 1.2 requires:

• Limits must be reasonable
• Client must give informed consent
• Some states – limits in writing

Special considerations:

• Client updates – no implied duty
• Local or special counsel
• Have client sign
Consent to Conflicts

Model Rule 1.7(b) prohibits representation if:

• Could not provide competent and diligent representation to each client
• Law prohibits joint representation
• Client has claim against co-client in same litigation

Otherwise, clients can waive concurrent conflicts

Can client give informed consent to future conflict?
Multiple Representations

Signed engagement letter should address:

• Existing and future conflicts and waivers
• Sharing confidential information
• Dividing fees and expenses
• Making client decisions
• Lawyer’s possibly having to withdraw
• Funding/distributing judgment or settlement
Client Responsibilities

• Be truthful and provide all available information
• If litigation anticipated, preserve evidence, including ESI
• If litigation, put insurers on notice
• Cooperate and be available when needed
• Update if contact information changes
• Inform lawyer of change material to representation
Engagement Letters – Misc.

• If lawyer-client dispute: arbitration, venue, choice of law?
• Termination and file retention
• Some states (inc. Cal.) have sample forms
• Matter-specific engagement terms
  ▪ Address risks of specific engagement
  ▪ Often most important terms
  ▪ Edit into lawyer’s preferred form
Maintaining the Integrity of the Legal Profession

Sexual Harassment, Gender Bias, and the Law
The Rule

- New Model Rule 8.4(g) bars attorneys from engaging in conduct that one should “reasonably know” is harassment or discrimination.

- It is a 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. This Paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This Paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”
Is 8.4(g) really new?

The Model Rules have had this concept as Comment [3] to Rule 8.4 since 1998:

“A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice ....”
What Substantive Changes With New Model Rule 8.4(g)?

Important differences between old Comment [3] and new Rule 8.4(g) include:

• Substitutes the more specific phrase “harassment or discrimination” for “bias or prejudice”
• eliminates “knowingly manifests by words or conduct” and uses clearer and stricter standard “engage in conduct that the lawyer knows or reasonably should know,” which are defined
• adds to preexisting 8 prohibited bases new ones: ethnicity, gender identity, and marital status in accord with recent developments in the law
ABA Addresses Common Concerns Amid Backlash

Q - What is “conduct related to the practice of law”?
A - The following relate to the practice of law:
• representing clients
• interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law
• operating and managing a law firm or law practice
• participating in bar association, business, or social activities in connection with the practice of law
ABA Addresses Common Concerns Amid Backlash (cont.)

Q - Does New Model Rule 8.4(g) affect fees?
A - No, discrimination against persons based on their source of income, or based on their acceptance of free or low-cost legal services, are examples of discrimination based on socioeconomic status.

- Comment [5] of Model Rule 8.4 makes it clear that the rule would not limit a lawyer’s ability to charge and collect a reasonable fee and reimbursement of expenses, nor would it affect a lawyer’s ability to limit the scope of his or her practice.
ABA Addresses Common Concerns Amid Backlash (cont.)

Q - Does New Model Rule 8.4(g) limit advocacy?

A - No, not in any way not already in the Model Rules and other applicable laws and court rules

- New (g) would not limit a lawyer’s ability to represent a client or argue a client’s position
- New (g) does not prohibit “legitimate advice or advocacy” consistent with the Model Rules
Law and the Media

The #MeToo Movement

Harassment and Bias Statistics

One in Three

35%

About 35 percent – or more than one in three – female lawyers have been sexually harassed at work.

Source: Acritas

Bloomberg Law
Effects of Harassment

- Decreased job satisfaction
- Lower organizational commitment
- Withdrawing from work
- Reduced levels of physical and mental health
- Talent drain
Employer’s Duty

• ABA’s Commission on Women in the Profession’s manual, “Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession,” contains practical advice for legal employers and employees, including sample policies for prohibiting harassment and for progressive discipline

• ABA House of Delegates expanded Resolution 302, which sets forth new components for enforcing policies and procedures prohibiting harassment and retaliation in the workplace based on gender, gender identity and sexual orientation
Social Media

To reach potential clients, lawyers are
• ditching traditional methods
• instead using electronic methods
• focusing on having an effective online presence
• not considering social media ethical issues
• With possible ethical violations concerns growing
Ethical Rules for Social Media

Rule 1.1 (Competence)
Rule 1.6 (Confidentiality of Information)
Rule 1.7 (Conflict of Interest: General)
Rule 1.18 (Duties to Prospective Client)
Rule 3.3 (Candor to Tribunal)
Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
Rule 5.3 (Responsibilities Regarding Non-Lawyer Assistants)
Rule 7.1 (Communications Concerning a Lawyer’s Services)
Rule 8.4 (Misconduct)
Rule 8.5 (Disciplinary Authority; Choice of Law)
We’re attorneys, so there are rules:

- **Model Rule 1.1, Comment 8** - lawyers should “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology ....”
  - For social media, “should” should be “must”
    - Step one: think before you hit “post”

- **Model Rule 8.4 - Misconduct** - don’t:
  - “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”
  - engage in conduct that a lawyer knows or should know is harassment or discrimination
Social Media - More Rules

• The “DUH” rule - Don’t talk about your cases, clients, opposing counsel, or judges on social media. Links to firm or organizational-approved PR is probably OK, but read the link’s content before posting
• The Mom rule: “If you don’t have anything nice to say …”
• The Washington Post rule for 2018: Don’t post anything you don’t want to see on the cover of the Post (hard copy or online) tomorrow
• The Google rule: Google is like the eye of Sauron. It knows all, it sees all, it archives all
The location of our Bat Cave is meant to be secret, so STOP CHECKING IN!
Social Media - What Does Your Local Bar Association Say?

Know your jurisdiction’s bar association guidance. Examples:

• New York has social media ethics guidelines: http://www.nysba.org/workarea/DownloadAsset.aspx?id=66585

• California has at least one formal opinion (No. 2012-186): http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CA%202012-186%20%2812-21-12%29.pdf

LinkedIn Is Your Friend! (Maybe)

LinkedIn - Is it “social media”?

• Maybe not, but LinkedIn is electronic networking and used for business purposes, so be careful and deliberate
• Know the media: LinkedIn is “cleaner,” more serious, and more content-driven; no politics, no squabbling, no memes
• Know what your content - LinkedIn may “know” more about your education and professional life than other SMPs
Final Thoughts on Social Media

• Consider removing work information from personal-use accounts (government attorneys - two words: Hatch Act)
• Comments and retweets can be just as dangerous as posts
• If still you’re curious but cautious: a picture is worth a thousand words - try Instagram
• Sometimes, it’s better not to post ...
Ethical Obligations for Using the Internet to Communicate

• ABA Formal Op. 477 states that a lawyer “generally may transmit information relating to the representation of a client over the internet without violating the Model Rules where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access”

• Securing protected client information requires
  • Reasonable efforts (safeguards), weighing sensitivity, likelihood, cost, difficulty, use
  • Following any special precautions by agreement, law, or circumstances
Lawyer Advertising
Changes in Advertising Rules

ABA’s Standing Committee on Ethics and Professional Responsibility proposed in 2018 amendments to the advertising rules in Model Rules 7.1 - 7.3, to address:

• Differences in advertising rules in various states impeding lawyers’ efforts to expand practices and thwarting clients’ interests in securing legal services

• Ubiquity of social media and the Internet, which cross state lines
ABA House of Delegates passed Resolution 101, adopting amendments to the lawyer advertising rules:

- **Model Rule 7.1:** All communications concerning a lawyer’s services, including advertising and solicitation, shall not be false and misleading; applies to misleading, but truthful statements
- **Model Rule 7.2:** Lawyer shall not state or imply that he or she is certified as a specialist in a particular field of law unless has been so certified
Model Rule 7.3: Prohibits live person-to-person solicitation, unless with another lawyer, family, close personal or prior business relationship

• Permits solicitation by Internet banner ad or by email, so long as individuals not subject to persuasion that may overwhelm them
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