25TH ANNIVERSARY
MCLE SPECTACULAR!
Friday, November 22, 2019

The CCCBA Employment Law Section proudly presents...

#8 Anatomy of an Employment Lawsuit

Part I: Intake and Response

Anjuli M. Cargain - Duane Morris LLP
Yen Chau - Donahue Fitzgerald, LLP
David S. Ratner - David Ratner Law Firm, LLP
Marta R. Vanegas - Martin & Vanegas, APC
Moderator: Lindsey Pace - Legal Aid at Work

AGENDA

Synopsis: An employee of Dunder Mifflin was allegedly harassed and discriminated against by the supervisor, Michael Scott. The intrepid plaintiff's attorney discovers several me-too witnesses. When Dunder Mifflin's astute defense counsel is presented with a demand letter, they must explain the case to Dunder's baffled management. Their internal investigation reveals that Michael scheduled office meetings at employees' lunch breaks – a potential wage-and-hour violation. In this informative and entertaining session, we will discuss the intake process for plaintiff's and defense counsel, including some ethical pitfalls to avoid and how to investigate a matter.

The Plaintiff, The Claim, Potential Witnesses - In Plaintiff's Counsel's Office

- Intake sheet
- Understand all claims presented by Plaintiff
- Social Media Advice
- Mediation Disclosure
- Authorization for employment records; HIPAA Authorization
- Mitigation Advice
- Witnesses
- Which client to take?
- Letters to Defendant/Opposing Counsel
- Contacting Employee Witnesses

The Defendant, Investigation of the Claim - In Defense Counsel's Office

- Letter to Client re Document Retention and Litigation Hold
- Investigate Claims
- Interview Key Witnesses and HR
- Additional Potential Claims, if any?
- Ascertain Insurance Coverage
- Advise Client of Immediate Options
- Litigation Budget

In future 2020 sessions we will follow this case from discovery through trial and posttrial practice.

SPEAKER BIOGRAPHIES

Anjuli M. Cargain

Anjuli practices in the area of employment and labor law, representing employers in all aspects of employment litigation involving claims for wrongful termination, discrimination and harassment, and wage and hour violations. She also provides advice and counsel on personnel policies and practices, employment and severance agreements, and a variety of other employment issues. In addition, Anjuli has experience in employee benefits and ERISA litigation involving benefit claims by participants, claims for breach of fiduciary duty, ERISA Section 510 claims, stock drop claims, Department of Labor lawsuits, and delinquent contribution and withdrawal liability claims related to Taft Hartley multiemployer plans.

Yen Chau

A seasoned employment law litigator, Yen handles claims involving alleged FEHA/Title VII violations of discrimination, harassment, retaliation, failure to accommodate, and wrongful termination. She also represents her clients in cases involving trade secret misappropriation and wage and hour violations. She litigates in state and federal courts, as well as before administrative boards and the appellate courts. She has significant experience advising clients on performance management, disability accommodation, non-competes, and other issues associated with the terms and conditions of employment. A guiding force and advocate for her employer clients, Yen provides advice and guidance to avoid potential pitfalls, drafts employment handbooks, and designs processes to ensure legal compliance while minimizing risk and expense. As a knowledgeable author and speaker, Yen presents and writes on a variety of labor and employment topics.

David S. Ratner

David is a new California lawyer (admitted in 2017) but an old lawyer (admitted in New York in 1974). David is a trial lawyer who has been involved in approximately 300 jury trials, most as first chair. He was the managing partner of Morelli Ratner, PLLC in New York a plaintiffs' litigation firm handling personal injury, medical malpractice, employment and mass tort pharmaceutical cases. David's California firm, David Ratner Law Firm, LLP litigates employment and civil rights cases. Although David's firm is small enough to provide his clients with his personal attention, he has the experience and tenacity to take on any adversary no matter how big and powerful.

Marta R. Vanegas

Marta's main areas of practice are labor and employment law, business law, social security disability law, civil rights law, and pension rights. She is a zealous and compassionate advocate for her clients, unafraid to go the extra mile for a successful resolution of their complaints. Marta approaches each case with a keen sense of justice and with her immense knowledge of California's exacting labor and employment statutes. A native of Budapest, Hungary, Marta calls California home for the past twenty years. Prior to establishing her private practice, Marta served as Deputy Legislative Counsel in Sacramento, California, drafting legislative proposals and providing counsel to legislators on labor, employment, and business law issues. She also has over eight years of experience as Intellectual Property Paralegal at two large San Francisco law firms.

Lindsey Pace is the Lead Employment Attorney at Open Door Legal where she works to advance the rights of low-wage workers who have been victim to illegal discrimination or unlawful wage and hour violations. Ms. Pace began her public interest career as the Joseph Grodin Public Interest Fellow at Legal Aid at Work. Since then, she has practiced plaintiff-side employment litigation in non-profit and private settings. She graduated from the University of California Hastings College of the Law in 2016. During law school, she served as an extern for the Honorable Judge Donna Ryu at the U.S. District Court in the Northern District, published an article with Constitutional Law Quarterly and competed on the Alternative Dispute Resolution team.

[EMPLOYER'S LETTERHEAD]

[DATE]

ATTORNEY CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT

[Name]
[Address]

Re: Notice of Duty to Preserve Information (Including Electronically Stored Information)

Dear _____:

[EMPLOYER] has a [CURRENT/FORMER] employee who [MAY/HAS] assert an employment-related claim against [EMPLOYER]. In anticipation of that possibility, [EMPLOYER] needs your help to preserve all potentially relevant information and documentation. [EMPLOYER] requests that you take reasonable steps to preserve all information, such as hard copy documents and electronically stored information that is or may be relevant to a possible complaint. Failure to properly preserve relevant information can result in sanctions against [EMPLOYER] and could otherwise impair our position in the litigation. It is important to follow all of the instructions set forth below.

1. Categories of Relevant Information. All "Documents" (as defined in paragraph 2 below) that contain information relating, directly or indirectly, to any of the following individual(s) or topics must be preserved. [LIST APPROPRIATE DOCUMENT CATEGORIES ACCORDING TO THE LEGAL ISSUES, E.G., PERSONNEL FILE, PAYROLL RECORDS, COMPLAINTS, ETC.]

2. Preserve Relevant Documents. Until further notice, [EMPLOYER] and all persons receiving this letter must preserve, in their original form and without making any alterations or modifications to them, all relevant "Documents." For purposes of this instruction, "Documents" are defined broadly to include all of the following:

(a) Hard Copy Documents – Memos, notes, reports, letters, faxes and other written, printed or photocopied documents.

(b) Electronically Stored Information ("ESI") – E-mail, calendars, contacts, task lists, journals, word processing files, text messages, instant messages, Internet and intranet sites, Internet usage logs, spreadsheets, electronic databases, telephone logs, voice mail, software, image files, network access information, computer generated or system logs, other proprietary applications and corresponding data, etc.

(c) Hardware – Workstation PCs, home (personal) PCs, laptops, PDA devices, cell phones, digital camera storage, etc.

(d) Media –Floppy disks, CDs, DVDs, USB Drives (memory sticks), software needed to reconstruct the data on the media, etc.

Until further notice, you are instructed not to destroy, modify or alter any potentially relevant Documents (as defined in paragraph 2 above). This matter should be kept confidential and not discussed with others outside of the presence of legal counsel. Please refrain from discussing the nature or merits of this matter with anyone other than me.

If you have doubts as to the application of this directive to any particular Document, you should err on the side of assuming that the Document is relevant, and preserve it. Please contact me with any questions.

Sincerely,

Human Resources

SEXUAL HARASSMENT INCLUDES MANY FORMS OF OFFENSIVE BEHAVIORS

BEHAVIORS THAT MAY BE SEXUAL HARASSMENT:

1. *Unwanted sexual advances*
2. *Offering employment benefits in exchange for sexual favors*
3. *Leering; gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters*
4. *Derogatory comments, epithets, slurs, or jokes*
5. *Graphic comments, sexually degrading words, or suggestive or obscene messages or invitations*
6. *Physical touching or assault, as well as impeding or blocking movements*

Actual or threatened retaliation for rejecting advances or complaining about harassment is also unlawful.

Employees or job applicants who believe that they have been sexually harassed or retaliated against may file a complaint of discrimination with DFEH within one year of the last act of harassment or retaliation. DFEH serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes. If DFEH finds sufficient evidence to establish that discrimination occurred and settlement efforts fail, the Department may file a civil complaint in state or federal court to address the causes of the discrimination and on behalf of the complaining party. DFEH may seek court orders changing the employer's policies and practices, punitive damages, and attorney's fees and costs if it prevails in litigation. Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right-to-Sue Notice has been issued.

THE MISSION OF THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING IS TO PROTECT THE PEOPLE OF CALIFORNIA FROM UNLAWFUL DISCRIMINATION IN EMPLOYMENT, HOUSING AND PUBLIC ACCOMMODATIONS, AND FROM THE PERPETRATION OF ACTS OF HATE VIOLENCE AND HUMAN TRAFFICKING.

FOR MORE INFORMATION

Department of Fair Employment and Housing
Toll Free: (800) 884-1684
TTY: (800) 700-2320
Online: www.dfeh.ca.gov

Also find us on:

If you have a disability that prevents you from submitting a written intake form on-line, by mail, or email, the DFEH can assist you by scribing your intake by phone or, for individuals who are Deaf or Hard of Hearing or have speech disabilities, through the California Relay Service (711), or call us through your VRS at (800) 884-1684 (voice).

To schedule an appointment, contact the Communication Center at (800) 884-1684 (voice or via relay operator 711) or (800) 700-2320 (TTY) or by email at contact.center@dfeh.ca.gov.

The DFEH is committed to providing access to our materials in an alternative format as a reasonable accommodation for people with disabilities when requested.

Contact the DFEH at (800) 884-1684 (voice or via relay operator 711), TTY (800) 700-2320, or contact.center@dfeh.ca.gov to discuss your preferred format to access our materials or webpages.

DFEH-185-ENG / December 2018

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

SEXUAL HARASSMENT

THE FACTS

Sexual harassment is a form of discrimination based on sex/gender (including pregnancy, childbirth, or related medical conditions), gender identity, gender expression, or sexual orientation. Individuals of any gender can be the target of sexual harassment. Unlawful sexual harassment does not have to be motivated by sexual desire. Sexual harassment may involve harassment of a person of the same gender as the harasser, regardless of either person's sexual orientation or gender identity.

THERE ARE TWO TYPES OF SEXUAL HARASSMENT

1. *"Quid pro quo"* (Latin for "this for that") sexual harassment is when someone conditions a job, promotion, or other work benefit on your submission to sexual advances or other conduct based on sex.

2. *"Hostile work environment"* sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with your work performance or create an intimidating, hostile, or offensive work environment. You may experience sexual harassment even if the offensive conduct was not aimed directly at you.

The harassment must be severe or pervasive to be unlawful. That means that it alters the conditions of your employment and creates an abusive work environment. A single act of harassment may be sufficiently severe to be unlawful.

CIVIL REMEDIES:

1. *Damages for emotional distress from each employer or person in violation of the law*
2. *Hiring or reinstatement*
3. *Back pay or promotion*
4. *Changes in the policies or practices of the employer*

EMPLOYER RESPONSIBILITY & LIABILITY

All employers, regardless of the number of employees, are covered by the harassment provisions of California law. Employers are liable for harassment by their supervisors or agents. All harassers, including both supervisory and non-supervisory personnel, may be held personally liable for harassment or for aiding and abetting harassment. The law requires employers to take reasonable steps to prevent harassment. If an employer fails to take such steps, that employer can be held liable for the harassment. In addition, an employer may be liable for the harassment by a non-employee (for example, a client or customer) of an employee, applicant, or person providing services for the employer. An employer will only be liable for this form of harassment if it knew or should have known of the harassment, and failed to take immediate and appropriate corrective action.

Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct, and to create a workplace free of harassment.

A program to eliminate sexual harassment from the workplace is not only required by law, but it is the most practical way for an employer to avoid or limit liability if harassment occurs.

ALL EMPLOYERS MUST TAKE THE FOLLOWING ACTIONS TO PREVENT HARASSMENT AND CORRECT IT WHEN IT OCCURS:

① Distribute copies of this brochure or an alternative writing that complies with Government Code 12950. This pamphlet may be duplicated in any quantity.

② Post a copy of the Department's employment poster entitled "California Law Prohibits Workplace Discrimination and Harassment."

③ Develop a harassment, discrimination, and retaliation prevention policy in accordance with 2 CCR 11023. The policy must:

- Be in writing.
- List all protected groups under the FEHA.
- Indicate that the law prohibits coworkers and third parties, as well as supervisors and managers with whom the employee comes into contact, from engaging in prohibited harassment.
- Create a complaint process that ensures confidentiality to the extent possible; a timely response; an impartial and timely investigation by qualified personnel; documentation and tracking for reasonable progress; appropriate options for remedial actions and resolutions; and timely closures.
- Provide a complaint mechanism that does not require an employee to complain directly to their immediate supervisor. That complaint mechanism must include, but is not limited to including: provisions for direct communication, either orally or in writing, with a designated company representative; and/or a complaint hotline; and/or access to an ombudsperson; and/or identification of DFEH and the United States Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints.
- Instruct supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so that the company can try to resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training (see 2 CCR 11024).
- Indicate that when the employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.
- Make clear that employees shall not be retaliated against as a result of making a complaint or participating in an investigation.

④ Distribute its harassment, discrimination, and retaliation prevention policy by doing one or more of the following:

- Printing the policy and providing a copy to employees with an acknowledgement form for employees to sign and return.
- Sending the policy via email with an acknowledgment return form.
- Posting the current version of the policy on a company intranet with a tracking system to ensure all employees have read and acknowledged receipt of the policy.
- Discussing policies upon hire and/or during a new hire orientation session.
- Using any other method that ensures employees received and understand the policy.

⑤ If the employer's workforce at any facility or establishment contains ten percent or more of persons who speak a language other than English as their spoken language, that employer shall translate the harassment, discrimination, and retaliation policy into every language spoken by at least ten percent of the workforce.

⑥ In addition, employers who do business in California and employ 5 or more part-time or full-time employees must provide at least one hour of training regarding the prevention of sexual harassment, including harassment based on gender identity, gender expression, and sexual orientation, to each non-supervisory employee; and two hours of such training to each supervisory employee. Training must be provided within six months of assumption of employment. Employees must be trained during calendar year 2019, and, after January 1, 2020, training must be provided again every two years. Please see Gov. Code 12950.1 and 2 CCR 11024 for further information.

David S. Ratner

DAVID RATNER LAW FIRM, LLP

33 JULIANNE COURT
WALNUT CREEK, CA 94595
415.817.12009

Please print and fill out the form below. Feel free to attach additional pages if needed. For clarity, please label continuations with the appropriate section and item numbers

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

GENERAL INFORMATION

Client's Name: _____

Home Address: _____

Telephone (Home):_____Mobile:_____E-Mail:_____

Social Security Number.:_____

Employer/Defendant:_____

How were you referred to this law firm? _____

EMPLOYMENT INFORMATION

Name:_____

Address: _____

Position:_____

Duties: _____

State Date (month/year): _____
Still working for employer? ( ) Yes or ( ) No If not, end date (month/year): _____
Union Member: ( ) Yes or ( ) No Number of Employees?_____

Manager/Supervisor: ( ) Yes or ( ) No; If you were a manager/supervisor, answer the following:

Did you have the power to hire, fire, or recommend the same: ( ) Yes or ( ) No

Did you direct/supervise two or more employees at any time: ( ) Yes or ( ) No

ADDITIONAL INFORMATION

Name of owner(s) of company if known: Name of manager(s)/supervisor(s)?

1._____ 1._____

2._____ 2._____

3._____ 3._____

SALARY AND HOURS

Work Schedule: (ex Mon-Sat, 9am to 7pm):_____
_____

Average number of hours per week? _____

Weekly Pay: $_____ Hourly Rate: $_____

(*If your pay or schedule/hours changed from the date you were hired please fill out a PAY/SCHEDULE HOURS ADDENDUM ON NEXT PAGE 3)

How are you paid? ( ) Cash or ( ) Check
Did your employer record your hours worked? ( ) Yes or ( ) No
Did your company issue paystubs? ( ) Yes or ( ) No
Were other employees underpaid? ( ) Yes or ( ) No

Length of your lunch break? _____
Was your lunch break paid/unpaid? _____

Did you take sick days? ( ) Yes or ( ) No

If so, how many sick days? _____

Did you take leave or vacation time? ( ) Yes or ( ) No

If so, indicate the date(s) or amount of time out of work: _____

PAY/SCHEDULE/HOURS ADDENDUM

Date (Month/Year)	**Paid Per Hour / Weekly**	**Hours** (9am – 7 pm) (Monday -Friday)	**Hours Per Week**

I. REASON FOR CONTACTING

____ Breach of Contract

____ Non-Compete Agreement

____ Termination of Employment (date of termination: _____)

____ Severance Agreement (deadline to sign: _____)

____ Failure to Promote (date of denile of promotion: _____)

____ Denial of Benefits (e.g., wages, pension, health insurance) (date of denial: _____)

____ Failure to Hire (date if rejection: _____)

____ Violation of Employer's policies and procedures (date violation occurred: _____)

____ Sexual Harassment

____ Racial Harassment

____ Discrimination (check all that apply below)

□ Race □ Sex □ National Origin □ Age □ Disability □ Religion

□ Sexual Orientation □ Pregnancy □ Illness/Injury □ Marital Status

□ Pension/Other Benefit Status □ Retaliation □ Worker's Compensation Claim □ Unpaid Wage

□ Other: _____

II. TERMS OF EMPLOYMENT

1. Are you a member of a union with this employer? If yes, what is the union's name?

_____

2. Are you a party to a contract? ( ) Yes ( ) No

3. Did you receive a letter at the time of your hire that set out the terms of your employment? If so, please attach a copy. ( ) Yes ( ) No

4. Did you receive an employee handbook or personnel manual when you were hired or at some time during your employment? ( ) Yes ( ) No If you did not receive one, does the company use a manual or set of policies? How do you know?

_____

_____

5. Do you have copies of your performance evaluations? ( ) Yes ( ) No What ratings have you received over the past five years? Please explain rating scale:

_____

III. PREVIOUS ACTIVITY

1. Have you filed a charge with the Equal Employment Opportunity Commission ( ) Yes ( ) No
If yes: When did you file the Charge? _____
Did you receive a right-to-sue letter? ( ) Yes ( ) No; if so, when? _____

2. Have you filed a charge with the California Workforce and Development Agency? ( ) Yes ( ) No
If yes: When did you file the Charge? _____
Did you receive a right-to-sue letter? ( ) Yes ( ) No; if so, when? _____

3. Have you filed a lawsuit about this claim? ( ) Yes ( ) No **If so, attach a copy of the complaint.**

Discrimination/Harrassment Claims

1. During what period of time were you subjected to harassment and/or discrimination?

_____

_____

2. Who is/was harassing you and/or discriminating against you? Include name(s) and job title(s):

_____

_____

3. What happened to you to prompt this complaint? (Be specific as possible in describing the harassment/discrimination. Include names, date and locations. Try to describe "who, what, when, where, why and how" of the incident(s). Attach extra pages if necessary.)

_____

_____

_____

4. What was your immediate reaction to the harassment/discrimination? Did you have any immediate physical reaction? If so, describe:

_____

_____

_____

5. Who was the first person that you spoke to about the harassment/discrimination? What did you say?

_____

_____

6. Did you ever protest this treatment? To whom? When? Under what circumstances? What actions were taken, if any?

_____

_____

_____

_____

7. What were the reasons given to you for your treatment?

_____

_____

8. Do you feel that the reasons given to you were false or insufficient? Why?

_____

_____

9. What do you think is the real reason for the treatment? What evidence do you have to support your belief?

_____

_____

_____

_____

10. Did anyone witness the incident(s) described above? If so, state the name of the individual who witnessed each incident.

_____

_____

_____

_____

11.With whom have you discussed the incident?

_____

_____

_____

_____

12.Describe how you informed your spouse and family of the harassment/discrimination. Did you tell the immediately?

_____

_____

_____

_____

13.How many of your co-workers do you believe knew about your situation? How did they find out?

_____

_____

_____

_____

14.Have you previously been subjected to harassment or discrimination by the individual(s) identified in your response to the about question number 2? If so, please describe each prior incident in detail. (Include names, date and locations. Try to describe "who, what, when, where, why and how" of the incident(s). Attach extra pages if necessary.)

_____

_____

_____

_____

15. Do you have any written documentation relevant to your complaint? If so, describe the document(s).

_____

_____

16. Are you aware of other employees who have experienced harassment or discrimination by the person harassing or discriminating against you? If so, state the employee's name and details of his or her experiences, if known to you.

_____

_____

_____

_____

17. When/if you were discharged, did you sign a resignation letter, waiver or release? If so, please attach a copy and describe the circumstances under which you signed.

_____

_____

18. Do you believe the employer's actions violated its own procedures or policies? If so, explain.

_____

_____

Injuries/Damages

1. Are you current;y working? ( ) Yes ( ) No; if no, what was the last date you worked? _____;

And why did you stop working?	□ Medical Leave/Disability	□ Termination
	□ Other: _____	

2.If you are on disability, who is the medical provider who placed you on leave?

Name: _____

Address:_____

Phone Number:_____

3. Have you been prescribed any medication(s)? If so, list each medication and the date it was prescribed.

_____

_____

_____

_____

4. If you are no longer employed, what efforts have you made to obtain new employment? (Include the date of application, position and salary sought and the results of the application. Begin with your most recent efforts.)

Company/Organization Name:		Date:
Position:	Salary Sought:	Interviewed: □ Yes □ No
Status/Result:_____		

Company/Organization Name:		Date:
Position:	Salary Sought:	Interviewed: □ Yes □ No
Status/Result:_____		

Company/Organization Name:		Date:
Position:	Salary Sought:	Interviewed: □ Yes □ No
Status/Result:_____		

5. How has this employment action affected you emotional health?

_____

_____

_____

_____

a. In thinking about or talking about the harassment/discrimination, did you ever cry? How often?

b. If applicable, describe how you feel (or felt) looking for other employment. Do you discuss your previous employment with prospectyive employers?

c. Since the harassment/discrimination, how frequently do you think about it? How do you feel when you remember the incident(s)?

d. How have your family members reacted to the incident?

e. How have your personal friends reacted to the harassment/discrimination? Describe any effect this incident has had on your personal relationship?

f. What are your present feelings about your dealings with your former employer?

_____

g. Have you undergone psychiatric or psychological treatment? ( ) Yes ( ) No
If yes, then identify providers below:

Name:	Date/Date Range:
Organization/Facility:	Phone Number:
Address:_____	

Name:	Date/Date Range:
Organization/Facility:	Phone Number:
Address:_____	

Name:	Date/Date Range:
Organization/Facility:	Phone Number:
Address:_____	

h. Were you required to take medication for emotional problems related to the incident? If so please describe:

_____

_____

_____

_____

6. Has this employment action affected your physical health? ( ) Yes ( ) No If yes, describe the nature of these problems.

_____

_____

_____

_____

Did you consult a medical doctor or medical professional? ( ) Yes ( ) No
If yes, then identify providers below (include suffixes, e.g. M.D., N.P., etc., if known) :

Name:	Date/Date Range:
Organization/Facility:	Phone Number:
Address:_____	

Name:	Date/Date Range:
Organization/Facility:	Phone Number:
Address:_____	

Name:	Date/Date Range:
Organization/Facility:	Phone Number:
Address:_____	

Were you required to take medication? ( ) Yes ( ) No
If yes, then describe:

_____

_____

_____

7.Have you incurred any medical expenses, as a result of the employment dispute, that were not covered by insurance? ( ) Yes ( ) No
If yes, then describe, include approximated out of pocket costs of the medication if possible:

_____

_____

_____

_____

8. What is you wage loss at the present time?

_____

9. What nonfinancial losses or injuries have you and your family suffered as a result of the employer's actions?

_____

_____

_____

_____

10. Have you received all the salary, bonuses, vacation pay, commissions or any other compensation that was due to you? ( ) Yes ( ) No
If no, then describe:

_____

_____

_____

11. What other economic losses have you suffered in relation to the employment dispute (e.g., stock options, profit sharing, lost and/or reduced wages, etc.)?

_____

_____

_____

_____ _____

Print Name Client Signature

Dated:_____

Investigation of Plaintiff's Case

1) Investigation
    a. How much can you do?
    b. Witness spectrum
        i. Who to interview?
            1. Colleagues
            2. Confidentiality
        ii. Declarations now?
    c. Investigation-only retainer if not?
    d. Skeletons now
    e. Fast no, slow yes
2) Ethics
    a. When to start giving specific advice ("as a general matter"
    b. Successive clients/simultaneous clients
3) Documents
    a. Conflict waiver
    b. Mediation disclosure acknowledgment
    c. Incremental retainers
    d. Personnel file request
4) Demand letter
    a. Extortion
    b. $$?
    c. Tone
    d. Document retention
5) Get them involved
    a. Witness matrix
    b. Mitigation journal

CAMPINS BENHAM-BAKER, PC
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LAFAYETTE, CALIFORNIA 94549
PHONE: (415) 373-5333 • FAX: (415) 373-5334
julia@campinsbenhambaker.com

September 13, 2018

BY US Mail and Facsimile []

[Address]

Re: Mediation Disclosure Acknowledgement

Dear []:

We provide this document pursuant to California law. Although we do not anticipate mediating your case in the near future, we want to make sure we are on the same page at the outset. To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
- A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

Regards,

CAMPINS BENHAM-BAKER, PC

By 
Julia Campins

I, _____ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

_____ _____
Date [Name]

Contents of Letter to Newly Retained Client (Plaintiff's Case)

1) Litigation hold – preserve all of your documents. Do not delete things from your phone. Keep a phone even if it dies
2) Confidentiality
3) Privileges
    a. Attorney-client
    b. Spousal
    c. Physician or therapist
4) Witnesses – careful!
5) Mitigation obligations
6) Social media – careful! But don't delete!
7) Specifics to your firm
    a. How you staff
    b. Disclosures about your cloud server
8) Bankruptcy – notify us
9) Social security benefits – notify us
10) Company property – give to us. Don't use the company email or phone to communicate with us
11) Communications from others relating to the case – send to us!
12) Tell us everything
13) Don't break any laws to get back at your employer
14) Disclose prior lawsuits
15) Let's cooperate!

CAMPINS BENHAM-BAKER, PC
935 MORAGA ROAD, SUITE 200
LAFAYETTE, CALIFORNIA 94549
PHONE: (415) 373-5333 • FAX: (415) 373-5334
julia@campinsbenhambaker.com

October 3, 2019

BY U.S. Mail

[address]

Re: Personnel File of [name]

Dear []:

On behalf of [], we are writing to request copies of his employee records, as described below.

California Labor Code section 1198.5 requires that employees be given access to their personnel files. Employees like [] also have the right to obtain copies of documents which bear their signature pursuant to Labor Code section 432.

Accordingly, please provide copies of records containing the following information for [] for the period during which you employed him: copies of any documents in []'s personnel file and all documents that bear []'s signature.

Please be informed that Labor Code Section 226(f) entitles our client to recover a penalty of $750 and potential injunctive relief in a court action if you fail to make some of these records available within 21 days. If for any reason you are unable to provide these records within the required time, please contact me at (415) 373-5333. We look forward to your response.

Regards,

CAMPINS BENHAM-BAKER, PC

By 
Julia Campins

CONFIDENTIAL ATTORNEY WORK PRODUCT

INSTRUCTIONS TO CLIENTS ON ATTORNEY CLIENT COMMUNICATIONS AND THE USE OF SOCIAL MEDIA

The law gives very special protection to communications between a lawyer and his/her client. Conversations and writings (including notes, letters and emails) between us are highly protected and consider confidential. As long as you honor the confidentiality of those communications, you cannot be forced to reveal in a deposition or trial the substance of communications between us. On the other hand, if you violate the confidentiality by sharing our communications with any 3rd party, you will forever lose the protections of that confidentiality. For that reason, it is very important that you do not share the substance of our discussions (whether verbal or written) with any other person.

At the same time, your discussions with friends, family, and the outside world about this case, including why you have brought the case, how it is proceeding or your experiences may not be entitled to any protections. As a general rule, you could be forced to testify about those discussions at any deposition or trial in this case. Please make sure you consult with us before discussing this case with any friends, family, or third parties.

Finally, please exhibit discretion in your on-line conduct, as all future posts (e.g. Facebook, Instagram, Twitter) may be the subject of scrutiny by opposing party or their representatives. Even if you limit those posts to "friends" only, you may have to disclose them in this case. Therefore, please consider carefully what you produce, message, or publish as we move forward with this litigation.

I acknowledge receipt of these instructions.

_____ _____

Date **[Client Name]**

MARTIN & VANEGAS
A Professional Corporation
STATION PLAZA
3100 OAK ROAD, SUITE 230
POST OFFICE BOX 5331
WALNUT CREEK, CALIFORNIA 94597

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CONFIDENTIAL SETTLEMENT COMMUNICATION
Evidence Code § 1152

November 4, 2019

VIA CERTIFIED MAIL

Private Company, Inc.
Attn: Anthony Lawyer, Esq.
General Counsel
3030 Warren Parkway
Kennebunkport, IL 60532

Re: **Employee Paul Green**

Dear Mr. Lawyer:

This is to inform you that Paul Green has retained our offices to handle his potential employment-related claims including, but not limited to, retaliation and sexual harassment against his employer, Private Company, Inc. ("Private Co."). We ask that you direct all communications regarding Mr. Green's employment at Private Co. to our law offices at the contact information indicated above.

It is our intent, on behalf of Mr. Green, to pursue his above-described legal claim. This letter serves as formal notice that Private Co. must preserve all electronic files and hard-copy documents potentially related to Mr. Green's claim.

DOCUMENT AND ESI PRESERVATION

Because we do not have information about all the electronically stored information (ESI) and hard-copy documents that might exist, we obviously cannot state with specificity each file and document that must be preserved. Private Co. has a legal duty to preserve all potentially relevant documents (electronic and hard-copy) related to Mr. Green's employment and potential claims. Under discovery rules, a potential defendant has an obligation to begin preserving potentially relevant evidence when litigation is reasonably foreseeable. In this case, that duty includes documents related to Mr. Green's potential claim as outlined above. By this letter, we are requesting that Private Co. preserve all ESI and hard copy documents related to Mr. Green's employment and his potential claims. Those include, but are not limited to the following:

all ESI and hard-copy documents related to Mr. Green's hiring and employment at Private Co.;

1) all ESI and documents that constitute or relate to the work she has performed at Private Co.;
2) all ESI and documents that relate to timekeeping, punctuality, tardiness, absenteeism of Mr. Green's and of all employees in comparable positions to Mr. Green during his tenure with Private Co.;
3) all ESI and documents that constitute or relate to pay scales, performance evaluations, commendations, warnings, performance improvement plans, selection or deselection for layoff, terminations, etc. for all employees in comparable positions during Mr. Green's tenure with Private Co.;
4) all ESI, including text messages, and documents related to Mr. Green's performance of his duties at Private Co.;
5) all e-mail, memos, and other documentation to, from, or about Mr. Green;
6) all ESI and documents related to the status or proposed assignments or re-assignments of Mr. Green from any Private Co. location to any other Private Co. facility;
7) all ESI and documents related to any communications by any Private Co. managers concerning Mr. Green;
8) all ESI and documents related to any formal or informal complaints by any coworkers or clients about Mr. Green;
9) all ESI and documents that constitute or are related to claims or concerns about workplace discrimination, at any California Private Co. within the past ten years.

I want to emphasize that the foregoing categories are by no means exhaustive. Even apart from this letter and the categories of documents identified, the company is under an obligation to preserve all ESI, including emails and text messages, documents, and information that are even potentially relevant to Mr. Green's claim(s).

As you know, special steps generally need to be taken with regard to electronically stored information (ESI), particularly because such stored information may become an important and irreplaceable source of discovery or evidence related to the claims and concerns, we believe are raised in this instance. Because of its format, electronically stored information is easily deleted, modified or corrupted. Despite this type of information's pliable nature, the laws and rules prohibiting destruction of other forms of evidence apply with equal effect to electronically stored information. While the destruction of documents may occur routinely in the regular course of business, selective destruction of documents may generate suspicion and may – depending on the circumstances – constitute spoliation of evidence. Monetary fines, as well as "adverse inference" jury instructions are just two of the potential sanctions for destruction of such evidence. In order to ensure that this information is available for later use and review, I respectfully remind you of the importance of preserving all such electronic evidence.

We are eager to work with you to agree upon an acceptable protocol for forensically sound preservation and can supply a suitable protocol if you will furnish an inventory and description of the systems and media to be preserved. Alternatively, if you promptly disclose the preservation protocol you intend to employ, perhaps we can identify any points of disagreement and resolve

them. We would like to work cooperatively to secure a balance between evidence preservation and burden that is fair to both sides and would ultimately be acceptable to a court.

I am available to discuss reasonable preservation steps; however, you should not defer preservation steps pending such discussions if ESI may be lost or corrupted as a consequence of delay. Should your failure to preserve potentially relevant evidence result in the corruption, loss or delay in production of evidence to which we are entitled, such failure would constitute spoliation of evidence, and we will not hesitate to seek sanctions.

Please confirm by **November 18, 2019** that Private Co. has taken the steps outlined in this letter to preserve ESI and tangible documents potentially relevant to Mr. Green's employment and claim. If you have not undertaken the steps outlined above, or have taken other actions, please describe what you have done to preserve potentially relevant evidence.

REQUEST FOR PERSONNEL RECORDS

Under California law, employees and former employees have the right to access, view, or copy personnel records regarding the employee's performance or to any grievance concerning the employee (Lab. Code § 1198.5) and payroll records (Lab. Code § 226(b)). An employee is also entitled to receive a copy of any instrument bearing the employee's signature upon his or his request (Lab. Code §432). I have enclosed an authorization form in which Mr. Green authorizes our office to collect his records on his behalf. At your earliest convenience, and no later than **December 4, 2019**, please fax, email, or mail our office a copy of Mr. Green's payroll and personnel records as outlined above. Please include an invoice if you request that we reimburse you for the reasonable copying and mailing expenses of these records.

If you have any questions concerning this letter, please contact me.

Very truly yours,

MARTIN & VANEGAS
A Professional Corporation

Marta R. Vanegas, Esq.

Ethical issues in developing a class or collective case

Common questions in the early stages of class cases and the applicable ethical rules

By William C. Jhaveri-Weeks and Megan E. Ryan

When we were starting out as plaintiffs' attorneys working on class and collective action employment cases in private practice, we felt the need for a primer on the ethical rules that were likely to come into play. Here are a few common questions facing plaintiffs' lawyers in the early stages of class cases, and what the ethical rules have to say about them.

Contacting potential class members

My firm is investigating a potential wage and hour case. Can I call potential class members and ask if they want to join? Email them? Send a letter?

In broad strokes, attorneys are free to solicit potential clients in writing, provided that the solicitations comply with certain requirements, but attorneys are not permitted to solicit by telephone or in person. One purpose of prohibiting telephone solicitations is, as the ABA Model Rules put it, to address the concern that a person "who may already feel overwhelmed by the circumstances giving rise to the need for legal services [] may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately." This concern is largely absent if the potential client has received a letter, had an opportunity to consider his or her options, and then affirmatively made a telephone call to you. In addition, if a person is contacting you for legal advice after receiving a letter from you, the contents of the conversation are likely privileged, even if the call does not lead to representation. (See Cal. Evid. Code, §§ 951, 954.

The California Rule of Professional Conduct ("CRPC") dealing with advertising and solicitation is rule 1-400. Under this Rule, "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" is defined as a "communication." The rules define a subset of communications as "solicitations," which consist of communications "[c]oncerning the availability for professional employment of a member [of the Bar] or a law firm in which a significant motive is pecuniary gain" and which are "(a) delivered in person or by telephone, or (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication." Solicitations – i.e., advertisements communicated in person or by telephone – "shall not be made by or on behalf of a member," unless the attorney has a "family or prior professional relationship" with the prospective client, or the solicitation is to a "former or present client in the discharge of a member's or law firm's professional duties." (CRPC 1-400.) The rule also notes that solicitations are permitted to the extent that they are protected by the U.S. or California Constitutions, but an attorney in private practice who relies on that exception to engage in conduct otherwise prohibited by the rule would seem to be taking a risk.

To be permissible, written solicitations (including letters, emails, and statements on Websites or social media) must comply with the requirements set forth in rule 1-400. The rule contains a general prohibition on false, deceptive, or misleading statements. It also requires that a copy of any communication be retained for two years (presumably to enable the Bar to verify compliance). The rule incorporates a long list of "standards" governing the contents of written solicitations. Before sending any written communication to a prospective client, an attorney should re-read rule 1-400 and its standards. Among other things, communications that are "transmitted by mail or equivalent means" must "bear the word 'Advertisement,' 'Newsletter' or words of similar import in 12 point print on the first page," and if the communication is transmitted in an envelope, the same word(s) must appear on the envelope. The standards forbid giving "guarantees, warranties, or predictions regarding the result of the representation," conveying any "testimonials" about the attorney (unless accompanied by a specific disclaimer), and stating or implying "no fee without recovery" absent an express disclosure of whether the client will be liable for costs.

Whenever an attorney makes a written statement about his or her law practice, he or she should consider whether the advertising rules apply. For an

instructive discussion of whether certain Facebook posts constitute "communications" subject to the advertising rule, see Cal. Bar Formal Opin. 2012-186 (concluding, for example, that a Facebook post stating "Another great victory in court today!" is not a communication, but the addition of the phrase "Who wants to be next?" would bring the post within the advertising rules).

Geography and the rules

Does the answer change depending on where the potential clients are located?

Yes. If you plan to contact potential plaintiffs in another state, as is often necessary in large class or collective actions, the ethical rules of the state where the recipient is located will likely apply. This is in addition to the California Rules, which govern California lawyers' activities "in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow Rules of Professional Conduct different from these rules." (See CRPC Rule 1-100(D)(1).) Note: the State Bar's Rules Commission has proposed a revision to this rule which, if adopted, states conduct connected to a pending matter before a tribunal would be governed by the rules where the tribunal is located, while other conduct will be governed either by the rules where the conduct occurred or where the conduct had its predominant effect.

(See http://ethics.calbar.ca.gov/Committees/RulesCommission2014/ProposedRules.aspx. Even under the proposed new rule, a lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct. (*Ibid.*).)

The solicitation rules of other states have significant differences from California's. Many states have adopted variations of the ABA Model Rule governing advertising and solicitation. Model Rule 7.3(a) states that a "lawyer shall not by in-person, live telephone or real-time electronic [i.e., live chatting, not email – see rule 7.3 cmt. 2] contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain," unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. Similar to the California Rule, Model Rule 7.3(c) states: "Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words, 'Advertising Material,' on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication…." The comment to rule 7.3 explains that "[a] solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public…, or if it is in response to a request for information or is automatically generated in response to Internet searches."

It is important to review the ethics rules of each state to which you plan to send a solicitation letter. Certain states impose unusual burdens. For example, the New York Rules require that when an out-of-state attorney sends a solicitation to someone in New York, "[a] copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial department where the solicitation is targeted." (N.Y. Rule of Prof. Conduct.) Other states include surprising requirements, with a few states making it quite difficult to send solicitations. (See, e.g., Texas Discipl. Rule of Prof. Conduct 7.07 (requiring attorney to send copy of written solicitation to the Advertising Review Committee of the Texas Bar, along with a "completed lawyer advertising and solicitation communication application form" and a check or money order payable to the State Bar of Texas).)

Can I call potential class members with questions?

Can I call potential class members or opt-in plaintiffs to ask them questions about the case? Lawyers have a duty to represent their clients competently and zealously, and contacting potential witnesses to investigate and develop a case is often necessary to fulfill that duty.

In many cases, witnesses are not potential clients, so it will be clear that an investigatory communication to them does not "concern[] the availability [of the attorney] for professional employment." However, when the potential witnesses are also potential plaintiffs in the case, caution is warranted to avoid the possibility of engaging in solicitation. For example, in a collective action under the FLSA, an attorney who has just filed a case and is preparing a motion for "conditional certification" may be more likely to succeed if a number of other employees opt into the case. (See, e.g., *Harris v. Vector Mkt'g Corp.* (N.D. Cal. 2010) 716 F. Supp. 2d 835.) Therefore, if an attorney calls potential class members in an effort to identify supportive witnesses and obtain declarations, the attorney may wish to guard against a suggestion that he or she solicited the potential class member during the call. Attorneys should also note that once a Court takes steps to exercise control over the FLSA notice process under 29 U.S.C. § 216(b), the Court may look unfavorably on certain further communications with potential opt-in class members during the opt-in process.

One option that some plaintiffs' firms use when there is a potential for unethical solicitation in the context of outreach to potential class members is to create a script that will be used for any telephone contacts. Doing this enables the attorney to plan his or her (and his or her subordinates') statements in advance to ensure that they are accurate and ethically compliant, and also to demonstrate after the fact, should the need arise, that

the communications were proper. (See, e.g., *Piper v. RGIS Inventory Specialists, Inc.*, 2007 WL 1690887 (N.D. Cal. June 11, 2007) (evaluating such a script and concluding based upon it that plaintiffs' counsel did not act improperly). A script can include the answer that the lawyer will give if the potential witness expresses an interest in opting into the case – for example, the lawyer might state that the present call is for investigative purposes only, but if the potential witness is interested in opting into the case, he or she is free to call back at another time to discuss the possibility of joining the case, or the attorney may offer to send something to the potential witness in writing, at which point the attorney can assess whether the written communication needs to comply with the solicitation rules. (See, e.g., *Rose v. State Bar* (1989) 49 Cal.3d 646, 659 (finding that an attorney who directly contacts individuals for legitimate investigative reasons is not barred from representing those individuals if requested to do so, but "it is misconduct to directly solicit such employment" (citing additional cases).)

Interesting questions can arise concerning whether particular communications have as a "significant motive" the attorney's "pecuniary gain" such that they are solicitations under rule 1-400. Such motives are presumably lacking in the context of non-profit legal work. In addition, there is little guidance about when communications that are otherwise forbidden by the Rule are nonetheless protected by the California and U.S. Constitutions. (See, e.g., *Shapero v. Ky. Bar Assoc.* (1988) 486 U.S. 466. Such questions are beyond the scope of this article.

Confidentiality

What *can* or *should* I tell such employees about whether the things they tell me will be kept confidential?

Lawyers have an ethical duty not to reveal confidential client information without informed consent. (See CRPC 3-100.) The same applies to potential clients. (See State Bar Ethics Op. 2003-161.) "This duty is broader than the attorney-client privilege, and extends to "virtually everything the lawyer knows about the client's matter regardless of the source of the information." (*Elijah W. v. Super. Court* (2013) 216 Cal.App.4th 140, 151); see also State Bar Ethics Op. 2003-161. An attorney can inform a client or potential client about these rules, although an attorney should be careful not to mislead a potential client about whether certain information provided to the attorney might ultimately be discoverable.

Plaintiffs' class-action attorneys are often separately representing, and receiving confidential information from, a number of different clients in a single case. Without the client's consent, the rules indicate that such confidential information may not be disclosed to other clients. To ensure that attorneys can freely discuss the facts of a case with their various clients, attorneys sometimes include a provision in their representation agreements in which the client agrees to permit the sharing of confidential information with other clients of the firm in the same case, with any exceptions to that general permission to be stated in writing by the client.

When a potential client contacts an attorney about the possibility of representation or to seek legal advice but does not ultimately become a client, the attorney should be careful to consider the ethical rules before disclosing any information learned from the client, or sharing the fact that the potential client contacted the attorney. Thus, in a collective action, if a potential class member calls and provides information that would be useful to the case, the attorney may need to consider whether to seek the potential class member's informed consent before using the information.

Ethics and limited representation agreements

Are there any ethical issues to be aware of when using a limited representation agreement (e.g., for investigation only)?

Yes. As limited-scope representation has become more prevalent in recent years, the State Bar's Committee on Professional Responsibility and Conduct has sought to shed light on ethical issues relating to it. See *An Ethics Primer on Limited Scope Representation* (2004) (available on State Bar's Website). A "limited scope" agreement may refer to investigating or negotiating on the client's behalf without agreeing to file a lawsuit; it may refer to performing only a particular task within an existing case; and it may refer to filing a suit advancing specified claims without filing or investigating other potential claims. Several ethical (and other) rules come into play when ensuring that your limited scope representation is proper.

First, as a statutory requirement, most representation agreements in California must be in writing. (See Bus. & Prof. Code, § 6147 (contingency fee agreements) and § 6148 (non-contingency fee agreements).)

Second, when an attorney is agreeing to perform only limited tasks, it is important to describe in the representation agreement the services that he or she is – and is not – agreeing to perform. In part, this is important because an attorney has an ethical duty to perform competently under CRPC 3-110, so the parameters of what the attorney is agreeing to do must be precisely stated. In addition, the attorney owes a legal duty of care to the client, which may be violated if the attorney fails adequately to describe the limited nature of the representation and to advise the client to guard against certain risks arising from that limitation.

For example, in *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1686-87, a former client with a limited representation agreement sued his worker's compensation attorney for malpractice, claiming that the attorney should have informed him of the possibility of seeking civil damages from a third-party general contractor with potential liability. The Court held that the attorney could be found liable because the limited representation agreement failed to advise the client that (i) there might be other

remedies which the attorney would not investigate, and (ii) other counsel should be consulted. The Court further stated that "even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention." The Court explained that attorneys have greater legal knowledge than lay clients, and thus may have a duty to advise of certain apparent potentially adverse consequences of the limited representation. (*Id*. at 1684-86; see also *Janik v. Rudy, Exelrod & Zieff* (July 22, 2004) 119 Cal.App.4th 930, *as modified on denial of reh'g* (attorneys have a duty of care to consider and assert, as appropriate, all related class claims arising from the facts at issue). For additional discussion of limited representation agreements, see Los Angeles Bar Association Formal Opinion 502 (Nov. 4, 1999).

Third, just as in full scope representation, an attorney seeking to withdraw from a limited scope representation should determine what steps may be necessary to comply with California Rule of Professional Conduct 3-700. That rule requires withdrawing attorneys to take:

> …reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) [i.e., returning client papers and unearned fees], and complying with all applicable laws and rules.

(Cal. Rule of Prof. Conduct 3-700 (A)(2).) The steps an attorney must take will likely depend on the specific circumstances and the nature of representation agreement.

The duties of loyalty (CRPC 3-310, *Flatt v. Super. Ct.* (1994) 9 Cal.4th 275, 282), and confidentiality (CRPC 3-100) also attach to limited scope representation, requiring attorneys to ensure that such representations do not create a conflict of interest or otherwise violate the rules. Note: for limited representations in the context of legal services programs, see CRPC 1-650; see also General Civil Limited Scope Representation – Risk Management Materials, *available at* http://www.courts.ca.gov/partners/documents/Risk_Management_Materials_Civil.pdf. It is important to establish procedures to make sure you are ethically representing clients when using a limited scope representation model.

Speaking to defendants' managers

In developing the case, can I speak to managers (current or former) at the Company to identify potential witnesses?

An important rule to keep in mind when communicating with managers is CRPC 2-100, which restricts attorney communications with "represented parties." For purposes of the rule, a "party" includes:

> (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
>
> (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(Cal. Rule of Prof. Conduct 2-100(b).)

Critically, the foregoing portion of the rule applies only to *current* employees, not former, as the commentary to the rule explicitly states. (A proposed revision to the rule, if adopted, would make this distinction part of the language of the rule itself. (See http:// ethics.calbar.ca.gov/Committees/RulesCommission2014/ProposedRules.aspx.) The ABA Model Rules likewise provide that communications with former employees do not constitute communications with a represented organization. (See Model Rule 4.2 cmt. 7.) Thus, attorneys should first ask themselves whether the employee with whom they wish to speak is a current or former employee. If the latter, the employee is not deemed to be represented by the organization's attorneys. (See *United States v. Sierra Pac. Indus.* (E.D. Cal. 2011) 857 F.Supp. 2d 975, 981.) Federal courts have explained that a general rationale behind the current / former distinction is that statements by former employees are not generally considered corporate admissions under the Federal Rules of Evidence. (See, e.g., *Bryant v. Yorktowne Cabinetry, Inc*. (W.D. Va. 2008) 538 F.Supp. 2d 948, 955.)

If a potential witness is a current employee, an attorney deciding whether contact with the employee is permissible under rule 2-100 will have to determine whether the employee falls within one of the restricted categories quoted above. (The afore-mentioned proposed revisions to rule 2-100 would also define "managing agent" as someone with "substantial discretionary authority over decisions that determine organizational policy.") Interestingly, under the current rule, the outcome of that determination may differ depending on whether the case is pending in state or federal court, due to differences between state and federal evidence rules.

For example, in a California state case, a court held that an attorney did not violate rule 2-100 when contacting the defendant's manager, because the manager's statements would not constitute admissions on behalf of the defendant under California evidence rules. *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1193.) The Court held that rule 2-100 applied only to high-ranking company agents with actual authority to speak for the company.

A subsequent California federal case, however, distinguished *Snider*, noting that because the Federal Rules of Evidence make even lower-level managers' statements party admissions, communications with such employees were impermissible. (*Sierra Pac. Indus.*, 857 F. Supp. 2d at 981.)

Thus, attorneys should consider rule 2-100 carefully before communicating with current Company managers, and when relying on case law, should be sensitive to the difference between state and federal evidence rules. But whether one is in federal or state court, former employees do not count as "represented parties" under the rule.


Jhaveri-Weeks

William C. Jhaveri-Weeks is a partner and Megan E. Ryan is an associate at Goldstein, Borgen, Dardarian & Ho, *a civil rights and workers' rights class action firm in Oakland, California. Their practice focuses on employment issues, including discrimination and wage-and-hour violations, as well as disability rights and consumer protection. www.gbdhlegal.com.*


Ryan

Avoiding legal malpractice: Pitfalls of problem clients

The plaintiff's attorney is the most likely to commit legal malpractice. Proper evaluation of the case and client can help avoid this pitfall.

Geraldine Lewis

Beginning in law school, eager students are warned about the pitfalls of legal malpractice. New associates worry that their lack of experience can lead to that fatal mistake and the end of a promising career. But guess what? Fresh from law school attorneys are not the ones most likely to commit the egregious errors that result in a client filing a complaint with the bar association or filing suit for malpractice. Still "wet-behind-the-ears," newbie lawyers go to great lengths not to make mistakes. They still hit the books when they feel uncertain. They ask questions of mentors. They are still smart enough to know they don't know everything.

In reality, it is the more seasoned attorney that is the most likely to commit legal malpractice. And, among all attorneys, it is the plaintiff's attorney who, statistically, commits legal malpractice more often than attorneys in other fields. For the attorney who is still willing to learn, there are steps to take that can prevent him or her from receiving that dreaded notice that begins with "a client of yours has filed a complaint . . ."

The cause of action for legal malpractice is traditionally one of professional negligence asserting that the attorney has failed to use the skill, care and diligence commonly possessed by members of the legal profession. That lack of skill must result in injury to the plaintiff that is actual, not speculative. In other words, if the attorney's incompetence resulted in the client losing the case, the attorney can be liable for monetary damages that may include punitive damages in rare cases.

Malpractice complaints in California

In California, a client may file a complaint with the State Bar and sue for legal malpractice. A client has an absolute right to file a complaint with the State Bar and that complaint will be evaluated by the Intake Unit. Almost all of the annual dues paid by attorneys go to fund the regulatory and discipline functions of the bar. In the most recent statistics, the Intake Unit received 73,259 calls in 2007 and 73,288 complaint forms were downloaded. An attorney can lose the right to practice for a period of time or be forced to submit a resignation, depending on the nature of the complaint and what the investigation reveals. This can be far more damaging than the average malpractice suit, which might result only in monetary damages. The double whammy, of course, is when the malpractice suit results in further disciplinary actions by the State Bar.

While State Bar complaints may involve Code of Ethics violations, many of these violations can translate into viable causes of action in a malpractice lawsuit. Some of these include misrepresentations to clients, representation of interests adverse to the client's interests, unconscionable fees, failure to perform and failure to communicate with the client.

Evaluate, evaluate, evaluate

First of all, you must develop the skill to evaluate a case. This generally takes more time than the half-hour some attorneys set aside to meet with a new client. You need to determine if the case has merit, and even if it does, if the likely recovery makes the case economically viable. Are there statute of limitation problems? What will it cost you to do the work? Will you need expert witnesses?

Analyzing a case takes time. You may need to confer with someone more experienced to determine whether the case has merits. Taking shortcuts here will only lead to problems down the road.

Next, you have to evaluate the client. While the case may have merit and the recovery might be substantial, you have to be able to work with the client for some time. You have to be willing to walk away from a case when a client signals to you that they may present the following problems:

• *The client has unrealistic expectations*. If you cannot manage the client's expectations at the start of the case, then you are just asking for trouble thinking it will get better with time.

• *The client is "needy" and requires more than handholding at times*. This can often

translate into emotional demands on your time that you may not be able or willing to meet.

• *The client's primary goal is seeking revenge.* This is a client who, no matter what result you achieve, will never be satisfied. Read: a client who will file a complaint with the State Bar or file a malpractice lawsuit.

• *The client has fired other attorneys and ends up in your office*. You need to ask yourself why your experience with this client will be any different.

• *The client has previously sued other attorneys for malpractice or has filed complaints with the State Bar*. It is interesting to note that 36 percent of the clients who filed complaints with the State Bar filed subsequent complaints against other attorneys.

You may pride yourself on your ability to manage clients and maintain appropriate boundaries, but too few attorneys actually understand the difference between maintaining appropriate boundaries and showing appropriate empathy in the face of the client's real emotional pain. While this is the subject that deserves more discussion, for purposes of evaluating a client, be aware of the red flags – at the very least. Use an abundance of caution with clients who signal these tendencies.

Pitfalls

Finally, you must be able to honestly evaluate your ability to handle the potential case. Phil Feldman, a board-certified specialist in legal malpractice and an expert witness in malpractice cases for the past 23 years, cites the following "pitfalls" for attorneys that often lead to malpractice claims:

• Representing friends, lovers or the boss's family;

• Unwillingness to hurt a client's feelings by maintaining legal objectivity over internal empathy;

• Unwillingness to challenge a supervisor's view of the law, the case or the client;

STATE BAR ALLEGATION CATEGORIES BY PERCENT FOR 2007

Duties to Client	15%
Fees	13%
Handling of Funds	12%
Interference with Justice	10%
Performance	35%
Personal Behavior	10%

• Undertaking any case with minimal damages;

• Assuming the client has told you all the relevant facts accurately;

• Waiting until trial to hire expert witnesses;

• Avoiding settlement talks in favor of going to trial;

• Failing to recommend accepting a fair settlement before going to trial;

• Failing to evaluate your lack of expertise and failing to timely associate or consult with more knowledgeable colleagues; and

• Failing to refer a case out when you lack the expertise and experience to handle the matter effectively.

Plaintiffs' lawyers consistently rank at the top of the list of lawyers who are sued for malpractice. Feldman says there is good reason for this. Each case, from fender-benders to products liability to medical malpractice, requires a special subset of skills and knowledge. Just because you have mastered the fender-bender doesn't mean you are ready to jump into products liability. Does this mean you are forever relegated to handling a narrow range of cases? "No," says Feldman. "But," he cautions, "You must be willing to hit the books, stretch yourself and seek competent advice when you need to."

Some daily *do's*

There are things that you can do every day that will help insure that you avoid the pitfalls of legal malpractice and clients who feel the need to lodge complaints with the State Bar.

• **Do** return phone calls every day. If you cannot return the call, have a member of your staff return the call, explaining to the client when you will be able to speak with him or her.

• **Do** keep accurate track of your time on a case. Include necessary details such as the nature of the phone call or the research that you performed. This information will enable the client to be adequately informed about the work you are doing for them.

• **Do** document your file. Keep an accurate log of all phone calls and summarize them, particularly calls to and from the client. Keep copies of all letters and other communications. Writing notes on the inside of the file cover is not going to impress the judge or jury.

• **Do** turn down cases you feel you cannot adequately handle and document your referral with letters to the referring attorney and potential client.

• **Do** trust your gut. Even if you cannot articulate the reason, stay away from potential clients and cases that make you uneasy.

• Finally, if you make a mistake in handling a case, **do** own up to it right away. The client may not be happy about it, but if the client understands what happened and what you have done to address the matter, you are less likely to face the possibility of a lawsuit.

Some *don'ts* to note

• **Don't** give advice in a social setting.

• **Don't** take on work beyond your expertise.

• **Don't** take on cases that overload you.

• **Don't** ignore client phone calls.

• **Don't** take on the "emergency case" before you have adequate time to investigate the facts.

• **Don't** agree to represent a client who makes you uncomfortable. Even if you can't articulate the reasons, the feeling probably won't go away and you will be left with a case you don't want to work on and a client you don't want to represent.

Conclusion

Like it or not, law is a business as well as a profession. You have to manage both aspects well. And you need to make a commitment to not get complacent – to keep learning – to stretch yourself. In that way you won't fall victim to your own complacency and you will find that the act of continually sharpening your pencil keeps you out of the pitfalls of malpractice and gives you greater satisfaction in the quality of the work you do.

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