BLURRING THE BOUNDARIES OF THE PRACTICE OF LAW

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Introduction and Overview

- Panel Members
- Structure of Presentation
  - Presentations
    - Union representatives and the unauthorized practice of law
    - Multi-jurisdictional practice
    - Ethical considerations for lawyers at the bargaining table
    - Attorney-Client Privilege and lawyers as witnesses
  - Scenarios & Panel Discussion
    1. Go to www.cali.org/instapoll
    2. Moderator Creates Poll
    3. Participants Join Poll by Entering Poll # (supplied by moderator)
    4. Participants Click on correct lettered answer for each question

Non-Lawyers and the Unauthorized Practice of Law in Labor Venues

- Practice of law is defined as "the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill. " Grafner v. IDES, 393 Ill.App.3d 791, 914 N.E.2d 520 (1st Dist. 2009).
- Practice of law Includes:
  1) appearing in court or before tribunals representing one of the parties;
  2) counseling, advising such parties and preparing evidence, documents and pleadings to be presented;
  3) preparing documents the legal effect of which must be carefully determined according to law;
  4) Referring to attorneys for service;
  5) advising or filling out of forms;
  6) negotiations with third parties; and,
  7) in short, engaging in any activities which require the skill, knowledge, training and responsibility of an attorney.

Non-Lawyers and the Unauthorized Practice of Law in Labor Relations

- Application
  - Representation of parties in Grievance Arbitration
    - Wisconsin S.Ct. Rule 23.02
    - In re Town of Little Compton, 37 A.3d 85 (RI S.Ct. 2012)
    - Ohio S. Ct. Board on UPL, Op. 2008-01 (www.supremecourt.ohio.gov)
    - Grafner v. IDES, 393 Ill.App.3d 791, 914 N.E.2d 520 (1st Dist. 2009).
    - Colmar, Ltd. v. Fremantlemedia North America, Inc., 344 Ill.App.3d 977, 801 N.E.2d 1017
  - Representation of parties before Administrative Agencies
    - Illinois Attorney Statute (705 ILCS 205/1 et seq.)
  - Representation of parties in collective bargaining
    - Ohio State Bar Associatation v. Burdzinski et al., 112 Ohio St.3d 107, 858 N.E.2d 372 (2006)
    - In Re: Leon Scroggins, 94 SH 638 (ARDC Review Board 1996)

Multi-jurisdictional Practice

IL Supreme Court Rule on Professional Conduct No. 5.5:

Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. . . .

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Multi-jurisdictional Practice (cont.)

ISBA Adv. Op. 12-17 (July 2012)

Representatives in Labor Arbitration

"FACTS

A lawyer licensed in a jurisdiction other than Illinois seeks to represent employers in union grievance arbitration proceedings in Illinois. The grievance arbitration proceedings usually arise from collective bargaining agreements to settle contract disputes by use of third-party arbitrators. The arbitrators are not judges and frequently are not lawyers. The arbitration takes place at a hearing where the formal rules of evidence do not apply. The collective bargaining agreements provide that either party may choose a representative, who may or may not be a lawyer, to present their arguments.

QUESTIONS

1. Is representation of a party in a grievance arbitration in Illinois considered the practice of law?
2. May a lawyer licensed in another state serve as representative of a party at a grievance arbitration without being admitted to practice in Illinois?

Although it is undetermined whether representing a party in a grievance arbitration constitutes the practice of law in Illinois, the committee concludes that Rule 5.5 provides that an attorney licensed in another United States jurisdiction who is not disbarred or suspended may provide legal services in connection with the grievance arbitration, so long as the services are: 1) temporary; 2) are reasonably related to the lawyer's practice in another jurisdiction; and 3) are not in a forum which requires pro hac vice admission."

Multi-jurisdictional Practice (cont.)

Wisconsin Supreme Court Rule 23.02: License required to practice law

(1) RIGHT OF A PERSON TO PRACTICE LAW IN WISCONSIN. A person who is duly licensed to practice law in this state by the Wisconsin Supreme Court and who is an active member of the State Bar of Wisconsin may practice law in Wisconsin. No person may engage in the practice of law in Wisconsin, or attempt to do so, or make a representation that he or she is authorized to do so, unless the person is currently licensed to practice law in Wisconsin by the Wisconsin Supreme Court and is an active member of the State Bar of Wisconsin.

(2) EXCEPTIONS AND EXCLUSIONS. A license to practice law and active membership in the State Bar of Wisconsin are not required for a person engaged in any of the following activities in Wisconsin, regardless of whether these activities constitute the practice of law: . . .

(c) Appearing in a representative capacity before an administrative tribunal or agency to the extent permitted by such tribunal or agency.

(d) Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.

(e) Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.

Multi-jurisdictional Practice (cont.)

Colmar, Ltd. v. Fremantlemedia North America, Inc., 344 Ill.App.3d 977, 801 N.E.2d 1017 (1st Dist. 2003), appeal denied 284 Ill. Dec. 339, 208 Ill.2d 535, 809 N.E.2d 1285.

"We are called upon to determine for the first time what effect, if any, an out-of-state attorney's representation of an out-of-state client during arbitration in Illinois has on an arbitration award. We find that, for the reasons that follow, [the attorney's] representation has no effect on the arbitration award in this case."

"As noted by [defendant] the AAA rules, to which the parties contractually agreed to be bound, do not require that the party's representative be an attorney. American Arbitration Association, Commercial Dispute Resolution Procedure, Commercial Arbitration Rule R-26 (Jan. 1, 2003) ("Any party may be represented by counsel or other authorized representative")."

Out of state attorney who represented client in commercial arbitration did not engage in unauthorized practice of law in Illinois.

Ethical Considerations for Lawyers at the Bargaining Table

Transactions With Persons Other Than Clients

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Ethical Considerations for Lawyers at the Bargaining Table (cont.)

Comments to Rule 4.1, Misrepresentation

1. A lawyer is required to be truthful when dealing with others on a client's behalf***, but generally has no affirmative duty to inform an opposing party of relevant facts.*** A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

Ethical Considerations for Lawyers at the Bargaining Table (cont.)

Comments to Rule 4.1, Statements of Fact

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation***, certain types of statements ordinarily are not taken as statements of material fact.*** Estimates of price or value placed on the subject of a transaction ***and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category***, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Attorney-Client Privilege

Rule 1.6 – Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

Attorney-Client Privilege (con't)

- 1.6 Golden Rule – Absent informed consent, an attorney must not reveal confidential information relating to the representation. Limited exceptions outlined in Rule 1.6(b) and (c).

- Rule 1.18 – Lawyer's duty related to prospective clients
- Rule 1.9 (c)(2) – Lawyer's duty not to reveal confidential information about prior client
- Rules 1.8(b) and 1.9(c)(1) Lawyer's duty of the use of confidential information to the disadvantage of clients and former clients.

Lawyer as a Witness

Rule 3.7 – Lawyer as a Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

- *Beneficial Devel. Corp. v. City of Highland Park et al.*, 239 Ill.App.3d 414 (1992). Second Appellate District Court found no violation of Rule 3.7 when attorney who was a witness in a trial was member of same firm as municipality's trial attorney.

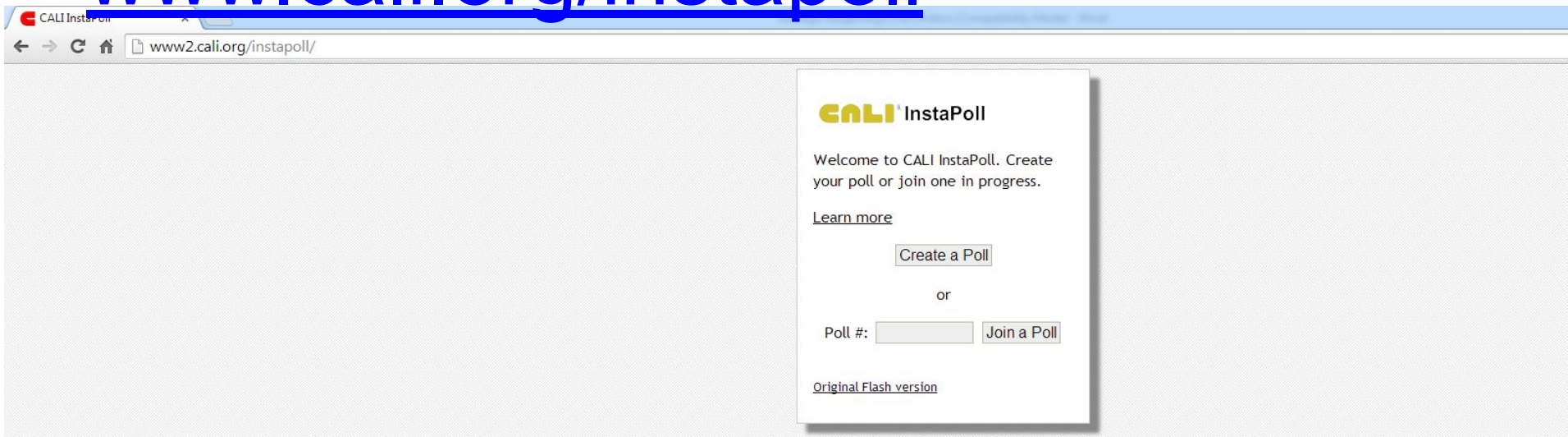
- *People v. Rivera, 369, Ill Dec.321 (Il. Sup. Ct., 2013).* Illinois Supreme Court upheld trial court's decision to disqualify defense counsel pursuant to Rule 1.7 finding attorney acted as a witness in that he intended to testify as a material witness at defendant's suppression hearing. Attorney argued that he was not likely to be called at the trail and in fact was not called at the trial. Court ruled that the fact that attorney was not called by the State as a witness during trial is irrelevant to the trial court's decision to disqualify prior to the actual trial.

- *People v. Koen*, 379 Ill.Dec.277 (Ill. App. 2d, 2014). The court disqualified the Defendant's son from acting as his father's counsel of choice finding that the attorney should have known he would likely be called as a witness by the State due to his involvement regarding correspondence to tenants in the underlying matter. The court found irrelevant that the attorney was never actually called as a witness and found the relevant inquiry is whether the attorney had a professional obligation to withdraw as defense counsel under Rule 1.7 as he should have reasonably known it was likely he could be called as a witness.

SCENARIOS FOR DISCUSSION

1. Go to www.cali.org/instapoll
2. Moderator Creates Poll
3. Participants Join Poll by Entering Poll # (supplied by moderator)
4. Participants Click on correct lettered answer for each question

CALIInstaPoll – www.cali.org/instapoll



Rules of Professional Conduct Relevant To Discussion Scenarios

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by the attorney-client privilege or by law or information gained by a lawyer or judge while participating in an approved lawyers' assistance program or an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred.

(d) A lawyer who has been disciplined as a result of a lawyer disciplinary action brought before any body other than the Illinois Attorney Registration and Disciplinary Commission shall report that fact to the Commission.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Remainder of 8.4 omitted

Rules of Professional Conduct Relevant To Discussion Scenarios (cont.)

Rule 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.3. Dealing With Unrepresented Persons

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

Scenario 1 – Lawyers' Duty to Be Honest

- Union and City-employer negotiated a comprehensive successor contract that was ratified by both the union and the City Council.
- Approximately 2 months after the contract was ratified and signed, a City attorney (Attorney 1) who was not a part of the successor contract negotiations was responsible for responding to a FOIA request for an employee's disciplinary file who is covered under the successor contract terms.
- Attorney 1 requested an extension of time to review the requested documents and respond to the FOIA. During the extension period, Attorney 1 approaches the union and enters into a MOU with the union to modify a provision of the contract allowing disciplinary documents to be expunged in a shorter duration of time than stated in the contract.
- Due to the negotiated shorter time frame in the MOU, the requested disciplinary file was destroyed and Attorney 1 responds to the FOIA requester that the documents do not exist.
- Management's chief negotiator who negotiated the successor contract, also an attorney (Attorney 2), finds out about the MOU modifying the contract to reduce time periods for disciplinary files after the MOU had been signed and the requested documents had been destroyed.

Does Attorney 1's conduct violate the Rules of Professional Conduct?

- A) Yes
- B) No

Does Attorney 2 have an obligation to report the conduct of Attorney 1?

- A) Yes
- B) No

Scenario 2 – Lawyers Duty to be Honest

- A non-lawyer city manager is bargaining a contract with a non-lawyer business agent for a union. The city manager indicates the city is “broke” and cannot afford a raise for the represented employees. While not the spokesperson but at the table, the city attorney hears this statement.

- The city is not broke, but has significantly reduced reserves.

- **Does the city attorney have an obligation to correct the statement?**
  - A. Yes
  - B. No.

Scenario 3 – Lawyers' Interactions with Represented Parties

- A public employer conducts a one-day layoff.
- Its attorney notifies the union in advance of the layoff and invites the union to contact its labor relations officer, a non-attorney, if it has questions or concerns.
- The Union's attorney files an unfair labor practice charge.
- A Union representative simultaneously calls the labor relations officer to demand impact bargaining. A meeting is scheduled.
- At the agreed upon time, the Union representative appears with the Union's attorney.
- The labor relations officer, the union representative and the union's counsel have met many times previously without the employer's counsel present.
- The Union's attorney refuses to participate in the meeting without the employer's counsel due to the pending ULP.
- The labor relations officer cannot locate counsel and meets with the Union representative without the Union's counsel, who says he cannot bargain over the layoff without Union counsel present.

In the unfair labor practice proceeding, the labor board should find:

A. The employer met its obligation to bargain over the impact of the layoff.
B. The union waived bargaining by not bargaining with the employer's labor relations officer at the meeting
C. The union cannot force an employer to have counsel present as a bargaining representative.
D. The employer committed an unfair labor practice by failing to have counsel present to participate in impact bargaining.

Scenario 4 – Lawyers' Interactions with Represented Parties

- A lawyer works as both counsel and as a business agent for a union. The lawyer is working to resolve a grievance with a state agency and the designated labor relations contact, who the lawyer knows is a non-lawyer.

- The labor relations representative agrees to resolve a grievance with the union.

Can the union lawyer/business enter into the agreement with the labor relations representative?

- A. Yes
- B. No

Does the lawyer/business agent have an obligation to advise the labor relations representative to check with the agency's legal counsel before executing the settlement?

- A. Yes
- B. No

Scenario 5 – Non-lawyer Advocates

- Labor Board issued complaint for hearing on *pro se* Charging Party's allegation that reassignment to a different work area was done in retaliation for filing previous ULP charge.
- No complaint was issued on the prior charge.
- A week before hearing, Charging Party requests continuance of hearing so that she can obtain counsel or convince union to represent her. Continuance is granted.
- On day of re-scheduled hearing, a union business agent appears as Charging Party's representative and has with him a box of "exhibits" that have not been previously tendered to the employer.
- Union business agent proceeds to present case. He calls two witnesses and fails to conduct any examination on or offer any of the "exhibits" into evidence.
- Union business agent's witness examination fails to present any evidence that Charging Party was reassigned, why she was reassigned, that reassignment created any adverse employment condition, or that the supervisor knew of the prior ULP charge.
- At the close of the Charging Party's evidence, the employer's counsel moves for directed finding and the motion is granted.
- **Did the Hearing Officer have a duty to ensure that the Union business agent was competent to represent the Charging Party?**
  - A. Yes
  - B. No
- **Did the employer's counsel commit professional misconduct in moving for directed finding?**
  - A. Yes
  - B. No

Scenario 6 -

- Out-of-state in-house union counsel has been representing the union and its members in grievance arbitrations, mediation sessions and collective bargaining negotiations in Illinois for many years.

- She and labor relations counsel for the employer have scheduled a large number of long-pending grievance arbitration cases for hearing, including several grievance mediation sessions, to be conducted over the course of two weeks at the union's downstate Illinois offices. Many hundreds of thousands of dollars in backpay are at stake, as well as the potential reinstatement of several discharged union members.

- Midway through the series of scheduled arbitration and mediation sessions a member of union counsel's immediate family is taken dangerously ill, requiring that she return home immediately to attend to the family medical emergency.

- Desiring that the arbitrations and mediations proceed and conclude expeditiously, given the time, expense and potential liability associated with the large number of scheduled cases, employer counsel demands that the union substitute its long-serving, knowledgeable and experienced second-chair union staff labor relations representatives -- many of them based out-of-state – and even several of the union's similarly knowledgeable law student-interns, to present the remaining arbitration and grievance mediation cases as scheduled.

- **What recourse does the union have in response to the employer's demand?**
  - A) No choice but to accede and proceed with the scheduled cases
  - B) File a ULP
  - C) Move that the agreed-upon arbitrators/mediators determine how the parties should best proceed under the circumstances
  - D) Settle the remaining cases forthwith