

Legal Ethics Considerations for Civil Rights Compliance in Education

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Of Counsel

Education Practice Group

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Disclaimers

We can't help ourselves. We're Lawyers.

- This presentation assumes participants have foundational knowledge of civil rights compliance functions in education.
- This presentation is not legal advice.
- There are no one-size-fits-all answers.
- Consult with legal counsel regarding specific situations.
- Slides and written materials are available for all participants.

Presenter Biography

As relevant to the topic:

- Current private practice attorney with Bricker Graydon Wyatt LLP; consultant for INCompliance.
- Former government attorney for state and federal government.
- Prior non-practicing administrator roles overseeing civil rights compliance for universities.
- Prior non-practicing administrator role in student affairs for universities.

Discussion Topics

ABA Model Rules of Professional Conduct

- Preamble and Scope
- Rule 1.13. Organization as Client
- Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer
- Rule 1.6. Confidentiality of Information
- Rule 2.4. Lawyer Serving as Third-Party Neutral
- Rule 1.12 Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral
- Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

Implied Attorney-Client Relationships

Attorney-Client Privilege & Work Product Doctrine

Title IX Regulations

Roles in the Civil Rights Compliance Process

Takeaways

ABA Model Rules of Professional Conduct

Rules of Professional Conduct (1 of 7)

Preamble and Scope

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. **Some of these Rules apply directly to lawyers who are or have served as third-party neutrals.** See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers **who are not active in the practice of law** or to practicing lawyers even when they are acting in a **nonprofessional capacity.**

Rules of Professional Conduct (2 of 7)

Rule 1.13 - Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Rules of Professional Conduct (3 of 7)

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

- (a) Subject to paragraphs (c) and (d), a lawyer shall **abide by a client's decisions concerning the objectives of representation** and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued...
- (b) [representation as lawyer is not endorsement of client's views or actions]
- (c) [may reasonably limit scope of representation with informed consent]
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer **may discuss the legal consequences** of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rules of Professional Conduct (4 of 7)

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).
- (b) [Exceptions]
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rules of Professional Conduct (5 of 7)

Rule 2.4. Lawyer Serving as Third-Party Neutral.

- (a) A lawyer serves as a **third-party neutral** when the lawyer **assists two or more persons who are not clients of the lawyer to reach a resolution** of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party **neutral shall inform unrepresented parties that the lawyer is not representing them**. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Rules of Professional Conduct (6 of 7)

Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

- (a) Except as stated in paragraph (d), **a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially** as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.
- (b) A lawyer **shall not negotiate for employment with any person who is involved as a party or as lawyer for a party** in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. [...]
- (c) [Applicability to firm]
- (d) [Selection as partisan of a party in multimember arbitration panel]

Rules of Professional Conduct (7 of 7)

Rule 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.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Implied Attorney-Client Relationships

Implied Attorney-Client Relationship

- The Rules of Professional Conduct do not explicitly describe which action(s) might create an attorney-client relationship.
- *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991)
 - “An attorney-client relationship is ‘established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions.’ *People v. Morley*, 725 P.2d 510, 517 (Colo.1986). The relationship may be inferred from the conduct of the parties. *Id.* The proper test is a subjective one, and **an important factor is whether the client believes that the relationship existed.** *In re Petrie*, 154 Ariz. 295, 299–300, 742 P.2d 796, 800–01 (1987).”

Practical Considerations

What might inform a person's understanding of whether they are creating an attorney-client relationship?

- Personal relationships
- Degrees, licensure
- Public biographies (school website, social media)
- Email signature
- Letterhead

Privilege & Work Product

Confidentiality vs. Privilege

“The duty of **confidentiality is broader than the attorney-client privilege** and prohibits disclosure of any ‘information relating to the representation of a client’ unless the client consents or an exception applies. Colo. RPC 1.6(a), (b).”

In re Est. of Rabin, 2020 CO 77, ¶ 31, 474 P.3d 1211, 1219

Attorney-Client Privilege (1 of 4)

Federal Rule of Evidence 501. Privilege in General

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Attorney-Client Privilege (2 of 4)

Under federal common law, the attorney-client privilege arises

- (1) where legal advice of any kind is sought;
- (2) from a professional legal advisor(s) in [their] capacity as such;
- (3) the communications relating to that purpose;
- (4) made in confidence;
- (5) by the client;
- (6) are at [client's] insistence permanently protected;
- (7) from disclosure by [the client] or by the legal advisor;
- (8) unless the protection is waived.

Roe v. Cath. Health Initiatives Colorado, 281 F.R.D. 632, 636 (D. Colo. 2012).

Work Product Doctrine

Protects materials prepared in anticipation of litigation from discovery.

Intended to protect attorney mental impressions, conclusions, opinions, and legal theories, but not underlying facts.

Federal
“Reasonably foreseeable”
litigation
FRCP 26(b)(3)

Colorado
“Imminent” litigation
CRCP 26(b)(3)

See *Lazar v. Riggs*, 79 P.3d 105, 107 (Colo. 2003)

Attorney-Client Privilege (3 of 4)

“Where communications at issue were **made by corporate employees** to counsel for corporation acting as such, **at direction of corporate superiors in order to secure legal advice from counsel**, and employees were aware that they were being **questioned so that corporation could obtain legal advice**, such communications, consistently with underlying purposes of attorney–client privilege, were **protected against compelled disclosure.**”

Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)

Attorney-Client Privilege (4 of 4)

The privilege only protects **disclosure of communications**; it does not protect disclosure of the underlying facts by those who communicated with the attorney.

Upjohn Co. v. United States, 449 U.S. 383, 395, 101 S. Ct. 677, 685, 66 L. Ed. 2d 584 (1981)

Title IX Regulations

Title IX 2020 Regulations (1 of 3)

34 CFR 106.45(b)(1). *Basic requirements for grievance process.* A recipient's grievance process must—

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest** or bias for or against complainants or respondents generally or an individual complainant or respondent...

- Preamble (85 FR 30251): Several commenters indicated that this provision seems reasonable but requested **clarity as to what might in practice constitute a conflict of interest** under § 106.45(b)(1)(iii), with one commenter noting that this issue often arises when a school district hires their **legal counsel**, insurance carrier, or risk pool to complete an investigation or respond to a formal complaint.

Title IX 2020 Regulations (2 of 3)

34 CFR 106.45(b)(1). *Basic requirements for grievance process.* A recipient's grievance process must—

(ii) Require an **objective** evaluation of all relevant evidence—including both inculpatory and exculpatory evidence;

34 CFR 106.45(b)(5)-- When investigating a formal complaint and throughout the grievance process, a recipient must... (vi) Provide both parties an equal opportunity to **inspect and review** any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint...”

Title IX 2020 Regulations (3 of 3)

34 CFR 106.45(b)(6)

- Decision-maker may not be investigator or Title IX Coordinator;
- must make determinations of relevance;
- must issue written determination regarding responsibility

Differences between Title IX Regulations and Other Compliance Norms

- 2020 Title IX regulations set out specific grievance procedures.
- Many institutions have adopted these procedures to resolve other civil rights complaints as a matter of policy.
- Departure from historical approach to workplace investigations under Title VII.
- Different implications for the ability to conduct privileged investigations for the purpose of obtaining legal advice.
- Shifts the role of the lawyers involved—whether internal or external to the organization.

Roles in the Civil Rights Compliance Process

Roles in the Civil Rights Compliance Process



General Counsel



Coordinator



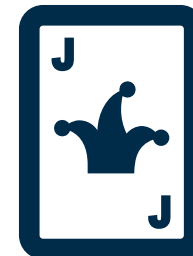
Investigator



Party or Witness



Hearing Officer



External Contractor

General Counsel (1 of 3)

- In house?
- External?
- Government?
- Multiple roles within the institution?
 - Relationship to civil rights compliance staff?
 - Cabinet member participating in non-legal administrative decisions?
 - Secretary to the board?

General Counsel (2 of 3)

- Rule 1.13 (Org as Client): How are you defining the role for others when interacting with the civil rights process?
- Rule 1.2 (Authority): Is client dictating the goals of representation? Discussion about the means?
- Rule 1.6 (Confidentiality): How are you managing communications?
- Rule 1.7 (Conflicts): How are you screening for conflicts? How are you separating duties?

General Counsel (3 of 3)

Case of note:

Doe v. Yeshiva Univ., 703 F. Supp. 3d 473, 508 (S.D.N.Y. 2023) [On motion to dismiss]

- “Doe has plausibly alleged “a showing of direct, purposeful participation” by [Title IX Coordinator] in Yeshiva's discrimination toward her... The question is closer as to Lauer, Yeshiva's general counsel, but Doe alleges that Nissel directly told her that he and [GC] had “coordinated [Yeshiva's] response to her formal Title IX Complaint.” (Id. ¶ 152.)

Civil Rights Compliance Staff (1 of 3)

- [Roman Numeral] Coordinator
- Investigators?
- Case Managers?
- Hearing Panel members?
- Appellate Officers?
- Others?

Civil Rights Compliance Staff (2 of 3)

- Might be performing multiple roles, both within civil rights compliance and at the institution.
- Supervision and position in the organizational chart can vary.
- Staff members often hold a J.D. and may be former practicing lawyers.
- Interacting with parties
 - Students and Employees
- Interacting with external actors
 - Lawyers, advisors, support persons, law enforcement, vendors, outside counsel?
 - Others?

Civil Rights Compliance Staff (3 of 3)

- Rule 1.13 (Org as Client): Are these staff members acting as legal counsel to the organization? Or acting on behalf of the organization as client?
 - Do the various actors that they interact with understand their role?
- Rule 1.6 (Confidentiality): How are they interacting with legal counsel? How are they managing privileged communications?
- Rule 2.4 (Third-party Neutral): Are they clearly communicating their role to parties who may be adverse to one another?
- Rule 1.2 (Authority): Are they in control of the goal of representation? Or reporting to someone who is?

External Contractors (1 of 2)

What is the role?

- Legal Counsel? Investigator? Hearing Panel Member? Facilitator? Appellate Officer?
- What does the engagement letter or agreement say about the role?
 - Does the agreement address tasks that create an attorney-client privilege? Is the purpose to obtain legal advice? In anticipation of litigation?

External Contractors (2 of 2)

Cases:

- Doe 1 v. Baylor Univ., 335 F.R.D. 476 (W.D. Tex. 2020)
 - University client of external law firm waived privilege by using privileged materials in court filings.
- United States Equal Emp. Opportunity Comm'n v. George Washington Univ., 342 F.R.D. 161 (D.D.C. 2022)
 - Work product by external firm for the purpose of obtaining legal advice was privileged; investigation notes by employees were not.

Takeaways

Takeaways (cont.)

- Be clear about each person's role in the process.
 - Who is a lawyer?
 - Who is a client?
 - Who is a third-party neutral?
 - Are there individuals trying to play multiple roles?
- Think carefully about the context of each communication, whether spoken or written.
- Carefully define the purpose of the task at hand.
- Is your process bound by a policy or regulation beyond the Rules of Professional Conduct?

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