

**Teacher's Manual**  
**Developing Professional Skills: Workplace Law**  
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**Chapter 1: Foundational Workplace Law Skills**

**Problem:** Terminated canine trainer seeks legal assistance in challenging his/her termination.

**Legal Rules:** Employment at will, oral/implied contract, noncompetition, employee/contractor status, workers' compensation, FMLA and ADA

**Skill:** Counseling

**Assignment:** Prepare to conduct initial consultation with prospective client.

**Practice Norms:** Client intake and case assessment; formation of the attorney/client relationship

**Professionalism Concepts:** MRCP 1.18: Duties to Prospective Client; MRCP 1.5: Fees

**Optional Extension Assignment(s):** Role-play client interview; assess case; prepare follow up correspondence to client.

### **Legal Rules**

This problem implicates multiple legal issues and can be used either as an initial introduction to the course or as a capstone, depending on the structure and focus of the course. Smith's description of the situation on the intake form is like a miniature exam hypothetical from which students can identify potential issues under implied contract theory, workers compensation, ADA/FMLA, employee/contractor status and non-competition law. Even if students have not yet studied all of these bodies of law, they generally have enough background (combined with personal experience and lay knowledge) to identify potential legal issues and relevant factual questions. This can be enhanced by assigning background reading, such as a substantive introduction from any casebook. In addition (or instead), the professor can choose and assign reading on one or two selected doctrinal areas of focus, or, in a small class, assign different doctrinal areas/substantive readings to different students.

#### Employment at Will and Implied Contract Theory

It is not the first thing that will spring to students' minds, so if this is the first problem for the course, it is good to begin with the concept of employment at will and the idea that Smith can be terminated for any or no reason, provided the employer does not violate statutory law or its own contractual promises. Of relevance here is the assertion that Smith's supervisor promised to accommodate his/her inability to drive as long as needed. The attorney will want to know more about the circumstances under which this assurance was made and what Smith understood it to mean.

As a matter of course, employee-side lawyers will also want to probe whether the employer made any other express or implied promises, either directly to the client or through its personnel policies. Employee-side lawyers will often ask potential clients to bring relevant documents, such as the company's employee handbook, to the initial consultation. For the problem, students can develop a list of documents that they would like to ask the client about and request the client to supply.

On the flip side, it is important to get information about the quality of the potential client's employment (raises, promotions, performance evaluations, disciplinary actions, etc.), and the alleged

basis for discharge. These facts will provide insight into the employer's likely defense and help the attorney assess the potential client's likelihood of success.

### Smith's Injury and Employment Status

The fact that the client was injured (seemingly on the job) and is suffering health consequences affecting his/her ability to work implicates three different statutory/regulatory areas: Workers Compensation, Family/Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA). Under Workers Compensation, Smith might be entitled to compensation for his/her injury and lost work time; under the FMLA, Smith might be entitled to job protected leave; and under the ADA, Smith might be entitled to an accommodation allowing him/her to avoid driving during the recovery period.

Protection under all three statutes is available only if Smith was an employee as opposed to an independent contractor. Depending on the jurisdiction and which statute is at issue, courts generally apply some combination of the traditional, multi-factored "control" test (under which employment status turns on the extent to which the company exercises control over the worker's job and performance) and the emerging "economic realities" test (which considers the degree to which the worker is economically dependent on the company). To make a preliminary assessment, the attorney will want to obtain as much information as possible about how Smith receives assignments, who supervises Smith and how supervision is conducted, how Smith is paid and whether the company provides benefits or covers expenses, whether Smith or the company owns the vehicle Smith was driving, whether and to what extent Smith works for other companies, how and whether Smith received training for the position, etc.

Similarly, for purposes of the FMLA and ADA, Smith's company must qualify as a statutory employer determined by the number of employees it employs: fifty for purposes of the FMLA and fifteen for purposes of the ADA (though many states have lesser thresholds under their state discrimination laws). Thus it is always critical to ask potential clients the approximate number of employees at their company, bearing in mind that the potential client is unlikely to know whether a particular worker is actually an employee as opposed to an independent contractor. For purposes of the FMLA it is also relevant how long Smith was employed and for how many hours per week. FMLA benefits are available only if the employee worked 1250 hours or more over the past year.

Assuming an argument can be made for employee/employer coverage under any of these statutes, the attorney must obtain enough facts to preliminarily assess the viability of substantive claims under each. For Smith to receive Workers' Compensation, his/her injury must (1) occur "in the course of" employment and (2) "arise out of" employment. Regarding the former, the question is whether the injury occurred while Smith was on the clock, so the attorney must find out where Smith was coming from and driving to when the accident occurred, as well as whether Smith made any stops along the way. Injuries sustained during a work-related drive are considered "in the course of" employment even if the employee deviates slightly from the route for personal reasons (i.e., took a so-called "detour"), but the worker loses protection if engaged in a significant deviation (i.e., a "frolic").

The "arising out of" element requires a causal analysis (i.e., did the work cause the accident?) and jurisdictions vary on the appropriate standard. The historical rule required that the employee's job be the "but for" cause of the injury, precluding coverage for many injuries that could have been sustained by anyone who happened to be in the position of the employee regardless of the work (e.g.,

so-called “street risks”). Many modern courts have migrated toward causal standards more generous to employees such as the “heightened risk” test (i.e., did the employee’s job contribute to the likelihood of the sustained injury) or basic proximate cause analysis (likely the most generous of the three). For purposes of the exercise, and regardless of jurisdiction, the important thing is that students must get as much factual information as possible about how the accident happened and what Smith was doing at the time.

It seems unlikely that a canine training academy would employ the fifty or more employees needed for FMLA coverage, particularly if some of their trainers are correctly classified as independent contractors. If K9 Academy is covered, however, the issue will be whether Smith’s injury constitutes a “serious health condition.” According to the FMLA regulations, a serious health condition is one that requires either in-patient care or “continuing treatment” by a health care provider. The regulations include a multi-pronged definition of “continuing treatment,” to which students will be exposed in greater detail in Chapter 9. For purposes of the exercise, the key again is to obtain as much factual information as possible about the treatment Smith received immediately following the car accident (e.g., Did Smith go to the hospital? If so, was Smith admitted? If not, did Smith see a doctor or other professional?) and to what extent treatment continued thereafter (e.g., How many follow up visits did Smith have? Is Smith still receiving treatment?).

For purposes of the ADA, the issue is whether Smith’s condition constitutes a disability -- an impairment that “substantially limits” a “major life activity.” For this inquiry, the focus is not on the treatment Smith received, but rather the way in which the injury affects him/her. The attorney must determine how the injury impacted and currently impacts Smith’s ability to perform daily tasks in order to be in a position to assess how debilitating the injury is. Also relevant is Smith’s prospects for full recovery. Since the Americans with Disabilities Act Amendment Act (ADAAA) went into effect in 2009, temporary impairments are no longer exempted from coverage. However, the duration of the impairment remains a factor to be considered in determining whether the impairment is substantially limiting. Similarly unclear is whether driving is a major life activity post-ADAAA (prior to the ADAAA, most courts had held that it was not). For this reason, it’s important for the attorney to obtain information about all of the ways in which Smith’s injury affects his/her life and ability to work.

Finally, it is important to explore how and whether Smith’s accident-related limitations might be accommodated. It appears that the employer accommodated Smith’s inability to drive for at least some period of time, and the attorney will want to learn how that accommodation was achieved, why it was suspended, and whether it is sustainable. Overall, the attorney will want to find out as much as possible about how work is assigned within the company, whether there differences in the skills needed to perform various job assignments, and the degree of flexibility in the company’s assignment system.

### Noncompetition Issues

The explanation for Smith’s inability to obtain a new position at Greenwood raises questions about whether some type of non-competition agreement is at play, either a formal contract signed by Smith or an explicit or implicit agreement between the two employers. As will be explored in greater detail in Chapter 5, employee noncompetes are enforceable, if at all, only if they are reasonable in scope in relation to a legitimate employer interest. To some extent, the attorney can develop a sense of whether K9 Academy has a legitimate basis for a noncompete from how Smith describes his/her work. For purposes of the exercise, however, the immediate question is whether Smith recalls signing such an

agreement and whether Smith retained a copy. If not, this will be an item to have in mind in any potential document request that might be made in the course of discovery if the matter proceeds to litigation.

As for any agreement K9 Academy may have with other employers, students should realize that Smith is unlikely to have any relevant knowledge. Again, it is something the attorney should keep in mind in the event the matter proceeds to discovery. Although “no poaching” agreements between companies are not subject to the same doctrines that apply to employee noncompetes, they have been challenged on anti-trust grounds, most notably in the California tech sector where employees are highly mobile and state law precludes the use of noncompetes. It is also possible that there is no such agreement, and the Greenwood representative who told Smith he/she could not hire from a competitor is simply misinformed or making an incorrect assumption about the law. As an introduction to practice, it is useful for students to learn right away that both clients and witnesses often do not have a full or accurate picture of either the facts or the law.

### Wage Issues

Smith’s intake form does not raise any wage-related issues, but screening for possible Fair Labor Standards Act or state wage law claims is a standard part of client intake, which the professor may wish to mention. Much of the factual information that one should obtain regarding these claims overlaps with information that the attorney will seek in assessing the worker’s employment status and any also any legitimate bases for a noncompete -- whether Smith was paid by the hour or by the job, whether Smith was paid for driving time and/or mileage and expenses, the type of training required for Smith’s job, and how that training was received and paid for. At a minimum, the attorney should ask whether Smith received overtime pay and how it was calculated.

## **Practice Norms**

### Client Intake and Initial Consultation

The exercise exposes students to a bedrock component of employee-side work – vetting clients. Intake forms like the one presented in the exercise might be completed by a potential client electronically or filled out by a secretary or paralegal during a phone call inquiry. The factual information provided by the client is modest and often highly contextual; it is up to the attorney to figure out what factual information is needed and how to get it.

This is in part a cognitive task. The attorney must identify the basic elements of each potential cause of action in order to know what facts are important. In doing this, students should discover the core facts that are likely to be relevant to a variety of workplace law claims: facts bearing on statutory coverage, the circumstances surrounding termination itself (reasons provided, employment history, etc.), how the employee is paid and scheduled, whether the potential client has received or is receiving any benefits or compensation, etc. Employee-side attorneys may use a standard form or checklist in conducting initial consultations, and the preparation students do for this problem can form the basis for the form or list they will develop in practice.

At the same time, it is an exercise in communication. Students must translate the list of facts they wish to obtain into open-ended questions that are accessible to the potential client. They must

also be mindful of the interpersonal dimensions of the interaction. The attorney wants to lay the groundwork for a successful lawyer/client relationship in the event the representation goes forward. Students should be encouraged to draft opening questions and comments that reflect an understanding of the potential client's personal situation and begin the process of gaining his/her trust and confidence. They must also consider how to close the consultation. The attorney will want to take time following the consultation to consider the facts, check for conflicts, and assess the potential for recovery. The potential client, however, will be looking for guidance and eager for answers. The students should consider what legal information, if any, they will give to the potential client at the consultation and how they will manage the potential client's expectations. Engaging students in a role-play or staging a simulated interview can illustrate these points and help students to begin developing these important professional skills.

#### Formation of the Lawyer/Client Relationship

Ultimately the attorney must make a decision about whether to take on the representation. Students should understand that this is as much a question of potential recovery as it is the merits of the case. This is an opportunity to discuss the absence of a universal right to attorneys' fees and the importance of federal and state employment protection legislation that grants fees to successful litigants. As discussed more below, one might also talk about the various forms of fee arrangements used in employee-side practice.

Finally, students should consider how to convey their decision to the prospective client. If the representation will be accepted, a formal letter and fee agreement should be sent to the client. In practice, these are likely to be separate documents, but a simplified amalgam is provided for illustration purposes in the posted forms. It is also important to send a follow up letter in the event the attorney wishes to decline representation. This is both a matter of courtesy and best practices. The existence of an attorney/client relationship is determined based on the reasonable expectations of the client. Lest there be any misunderstanding, a decline representation letter should make clear to the potential client that no such relationship has formed.

### **Professional Ethics**

#### MRPC 1.18 - Duties To Prospective Client

MRPC 1.18 describes the attorney's obligations in dealing with a prospective client. For purposes of the exercise, students should observe that the duty of confidentiality that applies in the course of representation (see MRPC 1.9) also applies in the context of a prospective relationship, irrespective of whether an attorney/client relationship ultimately forms. An attorney can therefore reassure the potential client that any information shared during the initial consultation will be treated as confidential.

MRPC 1.18 also discusses what an attorney should do in the event that a prospective client reveals information adverse to an existing client. Such situations may arise, for instance, where the prospective client is or was a co-worker or friend of an existing client. As a practical matter, this is often the way that individual employees without any pre-existing connection to the legal community find a lawyer. There are no facts in the exercise suggesting this risk, and students will be exposed in greater detail to MRPC 1.7-1.9 (regarding conflicts of interest) in a referral situation in Chapter 5. However, the

professor should at a minimum remind students that a conflicts check must be performed before agreeing to accept representation.

### MRPC 1.5 - Fees

MRPC 1.5 discusses client fees. Section (b) provides that the “scope of the representation and the basis or rate of the fee and expenses...shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.” Section (c) addresses contingency fees and requires a written agreement, containing specific disclosures, as well as a post-mortem accounting.

Class discussion can cover pros and cons of various fee arrangements from the perspective of the client and the lawyer. Students are generally familiar with the concepts of contingent fee arrangements and hourly rates. They may not be aware of fixed-fee representation or hybrid structures, in which the client pays a fixed fee or hourly rate for certain initial tasks and agrees to a contingency fee for the remainder of the representation. Thus, for instance, an attorney might request a fixed fee for representing an employee in a settlement negotiation, which will convert to a contingency arrangement in the event negotiation fails and litigation ensues. It is both interesting and important for students to think about the business model that underlies private employee-side practice and the ways in which different fee arrangements contribute to its sustainability. Students should be pleased to learn that they can make a living working for the “right side,” if that is their orientation.

### MRPC 1.2 – Scope of Representation

Related to fees is the question of the scope of any potential representation. MRPC 1.2 permits an attorney to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” There may be ways to help Smith short of taking on full-blown litigation against the employer. Depending on the facts, an attorney might limit representation to a particular claim or issue (e.g., obtaining Workers Compensation benefits for Smith or negotiating a release from any noncompete agreement), or representation might be limited to pre-litigation matters. An attorney can agree to file administrative charges and pursue settlement, but not accept the case for litigation. Whatever the scope of the representation, it should be clearly delineated in the client engagement letter and explained to the client orally.

### **Add-on Exercise**

After completing their list of questions, students can be placed in role (attorney or prospective client) to practice conducting the initial consultation in pairs. Another option is for the professor or guest practitioner to conduct the interview while students take notes. Students can be asked to self-assess following the role play (“What went well during the interview?” “What went less well?”) or identify effective and less effective moments in the simulation they observed. The professor can circle back to the doctrine, asking students whether they think Smith has any viable claims based on the information obtained in the role-play or simulation. Ultimately students should be prompted to make a decision as to whether to accept representation. They can then be asked to prepare an appropriate letter to the client, using the posted forms.