

March 2006 *Multnomah Lawyer Ethics Focus*

In-House Counsel: Same Issues, Different Perspective

**By Mark J. Fucile
Fucile & Reising LLP**

Over the past few months, I have had several colleagues move in-house. What they report back is that they deal with the same set of professional issues, but from a different perspective. Let's look at four: conflicts, confidentiality, the "no contact" rule and multistate licensing.

Conflicts. A few lawyers who become corporate counsel do so for more than one unrelated corporation or maintain their position with their law firm. Those lawyers face the same set of multiple client conflict issues that outside lawyers do. Most in-house counsel, however, work solely for one corporation (or integrated corporate group). In that sense, conflict issues are easier: under RPC 1.13(a) they only have one client, the corporation. Even in this more common situation, though, conflict issues remain. For example, a corporate "constituent," such as an officer or director, might seek out the corporate counsel's advice on a personal employment matter in which the interests of the corporation and the officer are adverse. RPC 1.13(f) requires in-house lawyers to explain their role to corporate constituents in that situation and RPC 1.13(g) only permits representation of corporate constituents where their interests either do not conflict with the corporation or where both have given their consent to a waivable conflict.

Confidentiality. In-house counsel are subject to RPC 1.6's confidentiality rule and, in turn, their legal advice to their corporate clients is generally subject to the attorney-client privilege. A potential exception to the latter arises when the lawyer performs both legal and business roles for the corporation. The advice rendered in a legal capacity will generally be protected by the attorney-client privilege. For example, if in-house counsel is consulted confidentially during contract negotiations on the legal effect of a provision being considered, that advice should be protected by the attorney-client privilege. By contrast, if the in-house counsel also "wears the hat" of the company's director of administration and is a fact witness in a contract dispute involving that role, the attorney-client privilege may not apply where the lawyer's role doesn't involve providing legal advice. RPC 1.13(b)-(e) deal with another aspect of corporate confidentiality: reporting legal violations "up" the organizational ladder and in some serious instances "out" of the corporation if the highest authorities within the organization fail to take action and the violation will result in substantial injury to the corporation. These provisions were adopted by the ABA in 2003 in the wake of various corporate scandals and became part of the Oregon rules last year when Oregon moved to the RPCs.

"No Contact" Rule. Outside lawyers usually approach "no contact" questions under RPC 4.2 from the perspective of "can I contact" a current or former employee of a litigation opponent. With in-house counsel, the frame of

reference more often becomes “which corporate members are my clients for purposes of the rule?” Oregon State Bar Formal Ethics Opinion 2005-80 answers both sides of the question in the corporate context and Formal Opinion 2005-152 does the same (and with the same answers) in the governmental context. Under those two opinions, officers, directors and senior managers fall within corporate counsel’s representation and are “off limits.” Line-level employees for whom the corporation will be held responsible also fall within corporate counsel’s representation and are “off limits.” Line-level employees who are simply occurrence witnesses, however, are generally outside corporate counsel’s representation and are “fair game.” Finally, former employees are generally “fair game.”

Multistate Licensing. Corporate counsel travel across jurisdictional boundaries as often—if not more often—than do their counterparts in private practice. In recent years, the lawyer licensing rules in many states, including Oregon, have been updated to reflect that modern corporate reality. In 2001, the Supreme Court adopted Admission Rule 16.05, which permits corporate counsel licensed elsewhere to practice for their corporate employers in Oregon without taking the Oregon bar exam. In 2005, the Supreme Court adopted RPC 5.5(c)(5), which permits practice here by out-of-state corporate counsel who are working temporarily in Oregon for their corporate employers.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.