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In-House Counsel: Things Look Different Here

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> "The evolution in legal practice has uniquely affected the in-house attorney-employee and generated unique legal and ethical questions unlike anything contemplated by our Rules of Professional Conduct[.]"
> ~*Karstetter v. King County Corrections Guild*, 193 Wn.2d 672, 675 (2019)

The specific question before the Supreme Court in *Karstetter* was whether an in-house counsel could sue a former employer for wrongful discharge. In concluding that such claims are permitted, the Supreme Court majority opinion from which our opening quote is drawn discussed contemporary in-house practice generally.[1] The Supreme Court majority noted that the Rules of Professional Conduct were developed largely from the perspective of traditional law firm practice. The majority then went on to distinguish modern in-house positions from private practice: "The duties of today's corporate attorneys have grown increasingly complex, often including advisory and compliance roles as well as the more general aim of ensuring a successful business."[2]

In this column, we'll survey three areas where the view from in-house is often different than private practice: licensing, confidentiality and conflicts. By focusing on these, it is important to stress that this is not either an exclusive list or an exhaustive catalog of issues that all in-house counsel encounter.[3] They are, however, among the most frequently recurring.

Licensing

In-house counsel may, of course, become members of the WSBA by passing the Washington bar exam or through reciprocal admission.[4] Washington's licensing rules, however, effectively acknowledge that in-house counsel relocate with their corporate employers more frequently than their counterparts in private practice. Admission and Practice Rule 8(f) permits in-house corporate[5] counsel relocating to Washington to be admitted without either taking the bar exam or going through the more time-consuming route of reciprocal admission.[6] APR 8(f) offers a truncated process available to in-house counsel who are actively licensed in another jurisdiction (domestic or foreign) and who work exclusively for their corporate employer or its affiliates.[7] The license granted under APR 8(f) is limited to practicing for the corporate group involved[8] and terminates when the lawyer leaves the employer. While licensed under APR 8(f), an in-house counsel must also maintain an active license in at least one other jurisdiction. If a court appearance is required, in-house counsel with this limited license need to be separately admitted *pro hac vice* under APR 8(b).

APR 8(f) addresses in-house counsel who have relocated to Washington. RPC 5.5(d)(1), in turn, provides authorization for in-house counsel who are

actively licensed in another jurisdiction to provide legal services to their corporate employers in Washington when they are only here temporarily.[9] For example, an in-house counsel based in San Francisco working temporarily on a project for the lawyer's employer at its Seattle office would be covered by RPC 5.5(d)(1). Like APR 8(f), temporary authorization under RPC 5.5(d)(1) includes work for affiliates within a corporate group. Also like APR 8(f), RPC 5.5(d)(1) includes foreign lawyers—although with the caveat that when the services provided by a foreign lawyer include advice on American law "such advice shall be based on the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice." Finally, if a court appearance is required, out-of-state in-house counsel need to be admitted *pro hac vice* under APR 8(b).

Confidentiality

Federal and state law have long recognized that corporations and other entities hold their own attorney-client privilege with in-house counsel.[10] Similarly, in-house counsel are subject to the confidentiality rule, RPC 1.6.[11] Generally, the privilege extends to legal advice provided to both management and other corporate employees acting on behalf of the corporation.[12] The privilege also extends to communications by both management and corporate employees

supplying in-house counsel with information necessary for the latter to render legal advice.[13]

Two areas, however, can be particularly difficult in applying these general precepts. First, although legal advice falls within the privilege, business advice generally does not. The federal district court in Seattle put it this way: "[I]n-house counsel often act in both a legal and non-legal business capacity, and communications made in this latter capacity are not privileged."[14] Second, simply passing a document through in-house counsel or copying in-house counsel on an email generally does not confer privilege if the communication does not otherwise meet the standard for privilege. Again, the federal district court in Seattle summarized this point: "Business advice is not protected merely because a copy is sent to in-house counsel. Only if the attorney is 'acting as a lawyer,' and giving advice with respect to the legal implications of a proposed course of conduct may the attorney-client privilege be properly invoked."[15]

Conflicts

Most in-house counsel work for one corporation or integrated corporate group. In that sense, conflict issues are usually more straightforward than for lawyers in private practice. Under RPC 1.13(a), a lawyer representing an entity generally has only one client: the entity.

At the same time, in-house counsel can encounter conflict issues with corporate constituents and when managing outside counsel.

On the former, RPC 1.13(f), counsels that "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." In other words, in-house counsel need to ensure that corporate employees understand that the lawyer represents the corporation and not the employee personally when, for example, interviewing an employee during an internal investigation. Sometimes referred to as "*Upjohn* warnings" or "corporate *Miranda* warnings," their intent is to avoid inadvertently creating a conflicting attorney-client relationship with the individual employee involved.[16]

On the latter, in-house counsel may need to parse difficult conflict and related relationship management issues arising from law firm engagement agreements containing proposed advance waivers of future conflicts or determine whether law firms are acting consistent with conflict provisions in outside counsel guidelines.[17] For in-house counsel, the perspective from the

"client side" of conflict management can be considerably more nuanced than the "law firm side."

Summing Up

Although the holding in *Karstetter* was specific, its broader discussion reflects the evolving scope and unique perspective of in-house practice today.

ABOUT THE AUTHOR

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[1] Proposed amendments to the comments to RPCs 1.13 (organizational clients) and 1.16 (withdrawal) are pending before the Supreme Court to specifically reference *Karstetter*. *See also*

ABA Formal Op. 01-424 (2001) (discussing wrongful discharge claims by former in-house counsel).

[2] 193 Wn.2d at 679.

[3] Other areas include, for example, the contours of the "no contact" rule as applied to in-house counsel (*see generally* ABA Formal Op. 06-443 (2006)), supervision in the in-house counsel context (*see generally* WSBA Advisory Op. 2219 (rev. 2017)) and compensation disputes (*see, e.g., Chism v. Tri-State Construction, Inc.*, 193 Wn. App. 818, 374 P.3d 193 (2016)).

[4] APR 3 also addresses admission through Uniform Bar Examination score transfer and Washington's law clerk program.

[5] APR 8(f) is also available for lawyers employed by nonprofits. It is not, however, available for lawyers working for a governmental entity. On the latter, RPC 5.5(d)(2) generally permits lawyers licensed out-of-state who are federal employees to practice here if "authorized by federal law[.]"

[6] APR 8(f) also affords an avenue when reciprocal admission is not available, such as with California.

[7] *See also* ABA Formal Op. 95-390 at 9 (1995) (discussing common legal affairs management across a corporate group).

[8] APR 8(f)(8) allows an in-house counsel admitted in another American jurisdiction to provide *pro bono* services through a qualified legal services provider.

[9] This temporary authorization extends to governmental lawyers as well. *See* RPC 5.5, cmt. 16.

[10] *See generally Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed.2d 584 (1981); *Newman v. Highland School District No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2016) (describing *Upjohn* as the leading case nationally on this point and noting that Washington had adopted its principles).

[11] *See Karstetter v. King County Corrections Guild*, *supra*, 193 Wn.2d at 682 (discussing the interplay between suits by in-house counsel against their former employers and the continuing duty of confidentiality); ABA Formal Op. 01-424, *supra*, at 3-4 (same).

[12] *Upjohn Co. v. United States*, *supra*, 449 U.S. at 394-95.

[13] *Id*.

[14] *Chandola v. Seattle Housing Authority*, 2014 WL 5023518 at *1 (W.D. Wash. Oct. 7, 2014) (unpublished); *accord Thomas v. Kellogg Company*, 2016 WL 2939099 at *1 (W.D. Wash. May 20, 2016) (unpublished).

[15] *Valve Corp. v. Sierra Entertainment Inc.*, 2004 WL 3780346 at *3 (W.D. Wash. 2004) (unpublished); *accord Seneca Foods Corp. v. Starbucks Corp.*, 2005 WL 256594 at *16 (Wn. App. Feb. 3, 2005) (unpublished).

[16] *See Youngs v. Peacehealth*, 179 Wn.2d 645, 676, 316 P.3d 1035 (2014) (Stephens, J., concurring in part and dissenting in part) (describing these terms and their intent).

[17] *See, e.g., Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp.2d 1000, 1006 (W.D. Wash. 2007) (advance waiver); *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 at *2 (W.D. Wash. Apr. 22, 2016) (unpublished) (outside counsel guidelines).