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In-House Counsel: Same Issues, Different Perspective

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In-house counsel face many of the same professional issues as their private practice counterparts—but from a decidedly different perspective. In this column, we'll look at three: conflicts; privilege; and licensing.

Conflicts

Conflict issues for in-house counsel are deceptively nuanced.

On one hand, RPC 1.13(a) defines the client of entity counsel as the entity itself: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Oregon State Bar Formal Opinion 2005-85 (rev 2016) applies this principle to corporations and OSB Formal Opinion 2005-67 (rev 2016) does the same for government agencies. Oregon courts have also cited RPC 1.13(a) on this point, including the Oregon Supreme Court in *In re Campbell*, 345 Or 670, 681, 202 P3d 871 (2009).

On the other hand, RPC 1.13(f) cautions 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." It is not uncommon for directors, officers or employees to claim later that they thought that an

organization's lawyer was also representing them individually—with potentially disqualifying conflict and privilege constraints. Examples include *Quatama Park Owners Association v. RBC Real Estate Finance, Inc.*, 365 F Supp3d 1129 (D Or 2019) (directors), *Wenzel v. Klamath County Fire District No. 1*, 2017 WL 8948595 (D Or Aug 29, 2017) (unpublished) (officer), and *Larmanger v. Kaiser Foundation Health Plan of the Northwest*, 805 F Supp2d 1050 (D Or 2011) (employee). To address the risk of inadvertently creating attorney-client relationships with organizational constituents—especially in circumstances like internal investigations where the interests of the organization and the individuals being interviewed may diverge—prudent counsel will give what are sometimes called "corporate *Miranda*" or "*Upjohn*" warnings (and preferably documenting them) before beginning an interview. The Ninth Circuit in *U.S. v. Ruehle*, 583 F3d 600, 604 n. 3 (9th Cir 2009) described these warnings named after their United States Supreme Court case namesakes: "Such warnings make clear that the corporate lawyers do not represent the individual employee; that anything said by the employee to the lawyers will be protected by the company's attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and that the individual may wish to consult with his own attorney if he has any concerns about his own potential legal exposure." This is also in line

with Oregon's standard for assessing whether an attorney-client relationship exists as articulated by *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990), that looks to both the subjective belief of a putative client and whether that subjective belief is objectively reasonable under the circumstances.

Privilege

Both state (*see, e.g., State ex rel OHSU v. Haas*, 325 Or 492, 942 P2d 261 (1997)) and federal (*see, e.g., Upjohn Co. v. U.S.*, 449 US 383, 101 S Ct 677, 66 L Ed2d 584 (1981)) law have long recognized that corporations and other entities hold their own attorney-client privilege with in-house counsel. This approach is also consistent with Comment 2 to ABA Model Rule 1.13, on which Oregon's corresponding RPC is patterned: "When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6 [the confidentiality rule]."

Two areas, however, can be particularly problematic in applying these general concepts. First, although legal advice falls within the privilege, business advice does not. Professor Kirkpatrick in his *Oregon Evidence* treatise puts it this way (at 336): "If the client consults with a lawyer as a friend, counselor, business advisor, executor, investigator, tax preparer, attesting witness, or

scrivener, the privilege will not arise." Second, simply passing a document through in-house counsel or copying in-house counsel does not confer privilege if the communication does not otherwise meet the standard for privilege. The federal district court in Seattle, for example, noted in this regard in *Valve Corp. v. Sierra Entertainment Inc.*, 2004 WL 3780346 (WD Wash Dec 6, 2004) (unpublished) at *3 that "[b]usiness advice is not protected merely because a copy is sent to in-house counsel."

Licensing

Oregon facilitates in-house counsel licensing in two primary ways.

First, RPC 5.5(c)(5) allows an in-house counsel actively licensed elsewhere to provide temporary legal services to a corporate employer in Oregon. Under this provision, for example, an in-house counsel based in California could handle a temporary project in Oregon for the lawyer's corporate employer. Last year, the Oregon Supreme Court in *In re Harris*, 366 Or 475, 466 P3d 22 (2020), also relied on RPC 5.5(c)(5) in holding that an in-house counsel could practice here pending admission.

Second, Admission Rule 16.05 offers an expedited process for corporate in-house counsel to be admitted here as long as their work is generally limited to non-litigation matters for their employer and they maintain an active license in

another jurisdiction. The "house counsel" license terminates when the lawyer leaves the corporate employer involved. Although limited in some respects, the license under Admission Rule 16.05 offers an efficient path for in-house counsel who do not need full reciprocal admission and those for whom reciprocal admission is not available.

ABOUT THE AUTHOR

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