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## **In-House Counsel: Same Issues, Different Perspective**

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Over the past year, I have had several colleagues move in-house. What they report back is that they deal with the same set of professional issues they did in private practice, but from a different perspective. In this column, we'll 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.<sup>1</sup> Those lawyers face the same set of multiple client conflict issues that outside lawyers do under RPC 1.7 (current client conflicts) and RPC 1.9 (former client conflicts).

Most in-house counsel, though, work solely for one corporation or integrated corporate group. In that sense, conflict issues are easier: under new RPC 1.13(a), they only have one client, the corporation.<sup>2</sup> Even in this more common situation, however, conflict issues can arise. For example, a corporate "constituent," such as an officer or director, might seek corporate counsel's advice on a personal employment matter in which the interests of the corporation and the officer are adverse. In that situation, RPC 1.13(f) requires in-house lawyers to explain their role to corporate constituents. Similarly, 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.

Another aspect of conflicts that periodically lands on corporate counsels' desks are conflict waivers, with the question switched from private practice's "how should I ask" to in-house counsels' "should I grant." The decision to grant or deny a waiver will turn on the particular circumstances involved. Although the new rules shift the term of art from "full disclosure" to "informed consent," the essence of the standard remains the same: you should be given adequate information about the conflict you are being asked to waive and the potential consequences of a waiver. Just as under the old rules, conflict waivers under the new rules must be confirmed in writing—although email will now suffice in most situations.<sup>3</sup> The Supreme Court did not adopt proposed Comment 22 to RPC 1.7 that discussed advance waivers. The failure to adopt that comment, however, should not prohibit their use in appropriate situations with sophisticated clients such as those with in-house counsel available to advise them.

### ***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 and the work product doctrine.<sup>4</sup> A potential exception occurs when a lawyer performs both legal and business roles for a corporation. The advice rendered in a legal capacity will generally be protected by the attorney-

client privilege. For example, if an 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. Similarly, simply passing an otherwise non-privileged business document such as a sales report through a lawyer or copying the lawyer on such a document does not automatically cloak the document in the attorney-client privilege. As the federal court in Seattle put it in a comparatively recent case: “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.” *Valve Corp. v. Sierra Entertainment, Inc.*, 2004 WL 3780346 at \*3 (W.D. Wash. Dec. 6, 2004) (unpublished).

New RPC 1.13(b)-(e) deal with another aspect of corporate confidentiality: reporting violations of the law “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. On reporting “out,” RPC 1.13(c) allows a lawyer to do this in

appropriate circumstances regardless of whether the disclosure would be permitted by RPC 1.6, but does not require disclosure.<sup>5</sup> Further, RPC 1.13(d) makes clear that the disclosure provision does not apply when the lawyer obtained the information as a part of conducting an investigation for the corporation or in defending the corporation.

**“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?” Comments 7 and 10 to new RPC 4.2 note that *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), remains the touchstone for analysis in this area. Mirroring *Wright*, Comment 7 observes: “In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter.” Again like *Wright*, Comment 7 notes that former corporate employees (regardless of their position) are “fair game” for direct contact unless they have their own counsel in the matter involved.

The new rules also mirror *Wright* in another related respect. *Wright* prohibited a corporation from instructing employees who fall outside the circle of

corporate representation to refuse to speak to a litigation opponent's lawyer: "Since we hold an adverse attorney may . . . interview ex parte nonspeaking/managing agent employees, it was improper for Group Health to advise its employees not to speak with plaintiffs' attorneys. An attorney's right to interview corporate employees would be a hollow one if corporations were permitted to instruct their employees not to meet with adverse counsel. This opinion shall not be construed in any manner, however, so as to *require* an employee of a corporation to meet ex parte with adverse counsel. We hold only that a corporate party, or its counsel, may not *prohibit* its nonspeaking/managing agent employees from meeting with adverse counsel." 103 Wn.2d at 202-03 (emphasis in original). Comment 5 to new RPC 3.4, which deals generally with evidence and evidence gathering, notes that *Wright* controls in this regard, too.

### ***Multi-State 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 Washington, have been updated to reflect that modern corporate reality. Washington Admission Rule to Practice Rule 18, for example, permits broad reciprocal admission with an increasing number of jurisdictions. Further, newly amended RPC 5.5(d)(1) now allows in-house counsel licensed elsewhere to provide legal services to their corporate employers in Washington (except for litigation matters otherwise subject to *pro*

*hac vice* admission). In doing so, this new rule replaces the house counsel admission process under former APR 8(f). At the same time, many states around the country (including in the Northwest, Oregon and Idaho) have moved to similar versions of RPC 5.5 and allow temporary “in state” practice by corporate counsel licensed out of state who are there on behalf of their corporate employers.<sup>6</sup>

### ***Summing Up***

Corporate counsel play a vital role in advising their client-employers and in coordinating the work of outside counsel. Although their dual role as both lawyers and clients creates a different perspective, the ethical issues they confront share much common ground with those their counterparts in private practice encounter.

### **ABOUT THE AUTHOR**

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<sup>1</sup> WSBA Informal Ethics Opinion 1594 (1995) addresses simultaneous in-house counsel positions at unrelated corporations.

<sup>2</sup> RPC 1.13 is new. Although the ABA Model Rules have had a similar provision since 1983, Washington did not adopt it when it moved to the RPCs in 1985. See also Cmt. 3 to RPC 1.0(c) including law departments within the definition of a law "firm" and discussing the representation of subsidiaries and affiliates.

<sup>3</sup> Investments in clients under RPC 1.8(a) require the conflict waiver to be signed by the client.

<sup>4</sup> See, e.g., *Seneca Foods Corp. v. Starbucks Corp.*, 2005 WL 256594 at \*15-18 (Wn. App. Feb. 3, 2005) (unpublished); *Gray v. Morgan Stanley DW, Inc.*, 2005 WL 3462783 at \*3 (Wn. App. Dec. 19, 2005) (unpublished).

<sup>5</sup> New RPC 1.6(b)(3) expands the scope of permitted disclosure where a client has committed fraud resulting in substantial financial injury to third persons where the fraud was furthered through the use of the lawyer's services.

<sup>6</sup> Other states, such as Oregon and Idaho, have retained their house counsel licensing procedures for corporate counsel who are officed there even though they have adopted versions of RPC 5.5 substantially similar to Washington.