

# Inside Ethics

## Even in-house lawyers must wrestle with conflicts of interest

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It is the reverie of many a private firm lawyer: taking an in-house position to avoid ever again having to deal with a conflict of interest. An in-house lawyer has a single client, the company employing him, or so the reasoning goes. As a result, he need not trouble himself with the horrors of conflicts analysis.

But nothing could be farther from the truth. In-house lawyers frequently are asked to advise more than one entity on a matter. As a result, they must learn to

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apply the same conflict of interest rules their outside counsel brethren apply. They must be alert in identifying potential conflicts, avoid inadvertently taking on new clients, and be prepared to obtain conflict waivers where necessary.

Ignoring these responsibilities potentially could lead to an ethics violation or force a lawyer to withdraw from representing his corporate employer.

This article aims to help in-house lawyers identify potential conflicts and decide what to do about them.

### The basics

Rule 1.13(a) of the ABA Model Rules of Professional Conduct provides that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

This means, in the absence of other arrangements, an in-house lawyer represents a single corporate entity. He does not represent any of the company’s constituents (its directors, officers, or employees) or corporate affiliates (parents, subsidiaries, or sister corporations).

An in-house lawyer is not, however, precluded from advising corporate constituents or affiliates at the same time he represents his employer corporation. To the contrary, Model Rule 1.13(g) expressly allows a lawyer representing an organization to represent at the same time any of its directors, officers, employees, members, shareholders, or other constituents, subject

to the provisions of Model Rule 1.7, which governs conflicts of interest.

Model Rule 1.7 prohibits a joint representation of two clients where a “concurrent conflict of interest” would exist. The rule states that a concurrent conflict of interest exists where (1) the representation of one client will be directly adverse to another client, or (2) there is a significant risk that the representation of one client will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

The rule further states that, notwithstanding the existence of a concurrent conflict of interest, a lawyer may represent multiple clients if (1) the lawyer reasonably believes he will be able to provide competent and diligent representation to each client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another in a proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

Under these rules, an in-house lawyer who represents a corporate constituent or affiliate at the same time he represents his employer corporation must satisfy the same conflicts rules that apply to outside counsel.

Although the principles embodied in the Models Rules have been adopted into the ethics rules of most states, there are variations among the states’ rules.

Accordingly, every in-house lawyer should become familiar with his own state's rules, and should diligently apply them whenever he provides legal advice to any person or entity other than his corporate employer.

### Common conflicts

Common scenarios giving rise to potential conflicts for in-house counsel are described below.

**Affiliate transactions.** As part of the negotiation of business transactions between corporate affiliates, in-house lawyers are sometimes asked to prepare legal documents and advise both companies about them. The interests of affiliated companies doing deals with each other are not always aligned.

For example, where one company is leasing space to another, the two entities have divergent interests in the terms of the lease. Problems are more likely to materialize when the two entities are not under at least majority common ownership. *Cf. United States v. AT&T*, 86 F.R.D. 603, 616-17 (D.D.C. 1980) (treating affiliates under whole or majority common ownership, but not those under only minority common ownership, as a single client for purposes of the attorney-client privilege).

**Insolvency situations.** Corporate managers typically run a company for the benefit of its equity owners. When a company approaches insolvency, however, its man-

agers become fiduciaries of its corporate assets for the benefit of its creditors. *See, e.g., Poth v. Russey*, 281 F. Supp. 2d 814, 826 (E.D. Va. 2003). In-house counsel advising multiple entities in a corporate family tree, some of which are solvent and others of which are insolvent, should exercise care when providing advice that would benefit their solvent clients (or their shareholders), but might harm their insolvent clients (or their creditors), or vice versa.

**Investigations.** In a governmental or corporate investigation, in-house lawyers are sometimes asked to advise both the company and one or more of its constituents whose interests may not be aligned. In certain circumstances a company may want to fire an employee after an investigating lawyer uncovers information about misdeeds, placing the lawyer in a bind if he represents both the company and the employee.

**Benefits advice.** Corporate executives sometimes ask in-house lawyers for advice about their employment contracts and benefits packages. These situations are common because corporate executives grow accustomed to consulting in-house lawyers on corporate matters and may not think to distinguish personal matters.

**Personal interest.** In-house lawyers are occasionally asked to provide legal advice on matters in which they have a personal economic stake. For example, a lawyer may be asked to give advice

about an employee benefit plan in which he participates, or about dealings with an outside entity in which he has an ownership interest.

### Inadvertent clients

In addition to being aware of the potential conflicts that might arise when in-house lawyers intentionally give advice to their employers' constituents or affiliates, in-house lawyers must take care to avoid inadvertently taking on new clients.

This danger is very real under the law governing the establishment of the attorney-client relationship in some states, which provides that a person may become a lawyer's client where the lawyer leads the client reasonably to believe that he is a client, even if the lawyer does not intend to make him one. *See, e.g., Oregon Formal Opinion No. 2005-85; Bohm v. Cody*, 832 P.2d 71, 75 (Wash. 1992).

An in-house lawyer must be sensitive to the likely perceptions of his employer's constituents and subsidiaries, and must promptly correct any potential misunderstanding about whom the lawyer represents. A failure to do so can lead to long and costly litigation, even where the lawyer prevails in the end. *See, e.g., Robertson v. Gaston Snow & Ely Bartlett*, 536 N.E.2d 344, 348-49 (Mass. 1989) (resolving a constituent's claim that outside counsel for the company represented him individually).