

# Conflict of Interest Issues for In-House Counsel

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# Conflict of Interest Issues for In-House Counsel

- **Who is your client**
- **To whom are your duties owed**
- **Issues that arise when duties conflict**

# Conflict of Interest Issues for In-House Counsel

- Who Is Your Client
- Your client is the corporation, not the person instructing you (Rule 2.02(1.1))

# Conflict of Interest Issues for In-House Counsel

- To Whom Are Your Duties Owed
- You owe duties to your client
- You also owe a duty to the public/the administration of justice
- You also owe duties to former clients

# Conflict of Interest Issues for In-House Counsel

- Issues That Arise When Duties Conflict
- Duty to the public/the administration of justice
- Interest of other organizations in corporate group
- Interests of individuals within corporation
- Duties to former clients

# Conflict of Interest Issues for In-House Counsel

- **Duty To The Administration Of Justice**
- Duty to corporation may conflict with duty to the administration of justice, although this will hopefully never arise
- Lawyer cannot assist in dishonesty, fraud or illegal conduct or advise corporation how to violate law & avoid punishment (rule 2.02(5))
- Where lawyer knows that corporation has acted / intends to act in such a manner, lawyer must advise instructing party of the illegality and “whistle blow” up the chain of command (rule 2.02 (5.1) & (5.2))

# Conflict of Interest Issues for In-House Counsel

- Duty To The Administration Of Justice (cont'd)
- Lawyer must withdraw if corporation still intends to engage in conduct
- Lawyer may disclose confidential information to prevent harm to a person (rule 2.03(3))

# Conflict of Interest Issues for In-House Counsel

- Affiliates
- While affiliates are often thought of as one organization, each corporation is a separate legal entity and normally only one will be your client
- Canadian law has generally not recognized concept of “group enterprise”
- Interests of affiliates may conflict in extreme situations (eg: *In re Teleglobe Communications Corp* (3d Cir, 2005), Lehman insolvency)
- Lawyers who serve more than one corporation within corporate family may face unique challenges

# Conflict of Interest Issues for In-House Counsel

- Dealing With Individuals Within The Company
- Need to:
  - Be sure who has authority to instruct you, and on what issues
  - Be alive to possibility that person instructing you has interests that conflict with those of company
  - Ensure that individuals know that you are the company's lawyer and cannot provide advice to others
  - Be especially careful when individuals seek casual legal advice

# Conflict of Interest Issues for In-House Counsel

- Dealing With Individuals Within The Company (cont'd)
- While lawyers in private practice can accept joint retainers in some cases, in-house counsel are generally not insured to act for anyone but the company & are generally prevented by duty of loyalty to the company from acting for other parties

# Conflict of Interest Issues for In-House Counsel

- **Duties To Former Clients**
- Rule governing transfer of lawyers between firms applies equally to lawyers who transfer to / from in-house positions (rule 2.05)
- Company should screen new hires for conflicts (*MacDonald Estate v Martin*, [1990] 3 SCR 1235))
- Has been suggestion that rules will be applied less strictly where in-house counsel are concerned (*CPR Co v Aikins Macauley Thorvaldson* (1998) 157 DLR (4th) 473 (Man CA))
- Departing in-house counsel must insure proper protections are put into place when they enter private practice

**THANK YOU**