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
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- **Who Is Your Client**

- Your client is the corporation, not the person instructing you (Rule 2.02(1.1))
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- **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
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- 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
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• **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))
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- **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))
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- **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 the concept of "group enterprise".
  - Interests of affiliates may conflict in extreme situations (e.g., *In re Teleglobe Communications Corp* (3d Cir, 2005), Lehman insolvency).
  - Lawyers who serve more than one corporation within a corporate family may face unique challenges.
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• **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
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• **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.
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- **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