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The Rules of Professional Conduct Apply to In-House Lawyers

An examination of several familiar topics of legal ethics and how they apply to the in-house lawyer.

By Neil J. Wertlieb

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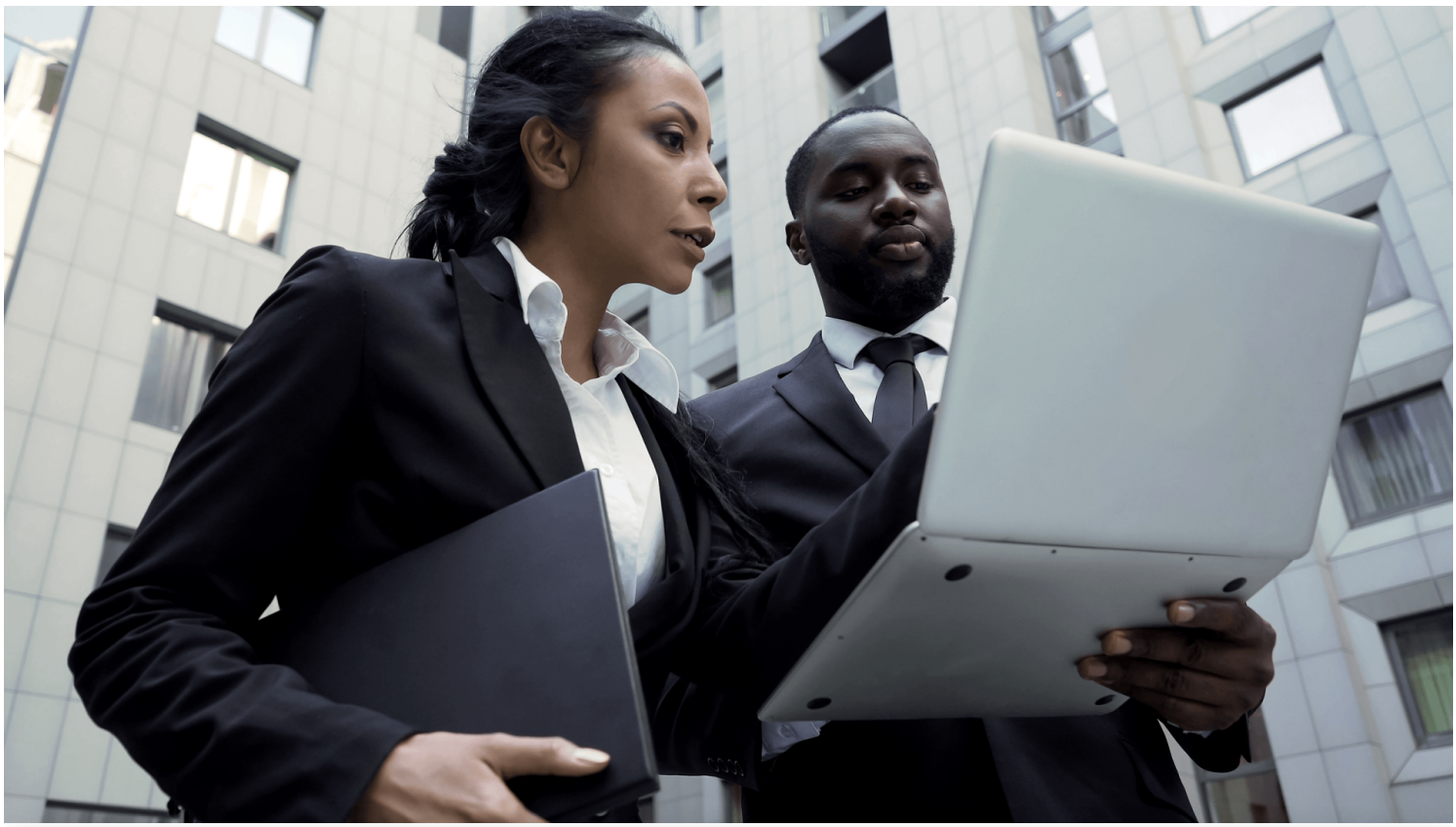

a law firm also applies to in-house lawyers, as such rules generally define *law firm* (or *firm*) to include "the legal department of a corporation or other organization." *See, e.g.*, Model Rules of Pro. Conduct r. 1.0(c); *see also id. cmt. 3* ("With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.").

While it is clear that the Model Rules of Professional Conduct apply to in-house attorneys, how those rules actually apply is not always clear. Attorneys are generally familiar with the application of the ethical rules to their practices when they work in private practice. In fact, many of the rules contemplate the attorney as an outside legal adviser with multiple clients—not an employee of a single client. Some of the rules are obvious in their application to in-house attorneys (such as the duty of confidentiality contained in Model Rule 1.6). Other rules don't really apply to the in-house attorney as a practical matter (such as the obligation to maintain trust accounts pursuant to Model Rule 1.15, and the limitations on advertising and solicitation contained in Model Rules 7.1, 7.2, and 7.3). But the application of some of the rules may have a different or surprising application to many in-house attorneys, due in part to the nature of the employer-employee relationship where the employer is the client (and perhaps the only client) of the in-house attorney, and also due to the mixed role of some in-house attorneys who serve as both a lawyer for the organization and also as a businessperson or principal of the organization.

Conflicts of Interest: Current Clients

client is directly adverse to another client, or if there is a substantial risk that the representation of a client will be materially limited by the attorney's responsibilities to another client (unless the attorney secures the informed consent, confirmed in writing, from each affected client). *See, e.g.*, *id. r. 1.7*. If the organization's consent to the dual representation is required by Rule 1.7, the consent must be provided by an appropriate official of the organization other than the individual constituent who is also being represented.

This type of situation applies to outside attorneys as well and may arise, for example, in connection with litigation defense and corporate investigations, where the attorney may be

> called upon to represent both the organization and certain named individuals. Such dual representations may require the informed consent, confirmed in writing, of each client to the extent that the interests of the clients potentially or actually conflict.

Conflicts of interest may also exist among entities within the corporate family. Parent and subsidiary business entities are generally considered separate legal entities. Thus, representing a parent entity does not necessarily lead to an attorney-client relationship with a subsidiary, or vice versa, for the purposes of conflict-of-interest analysis. However, where an in-house attorney does legal work for multiple entities within the corporate family, the conflict-of-interest rules may be implicated when the entities have differing ownership or after a subsidiary is sold. If the in-house attorney did substantive legal work for that subsidiary in addition to the corporate parent, the in-house attorney may have a conflict of interest, i.e., its representation of the corporate parent is adverse to that former subsidiary (such as in connection with a subsequent dispute between the corporate parent and such former subsidiary).

Conflicts of Interest: Former Clients

The model rules generally preclude an attorney from working on a matter on behalf of a client if

While compliance with these ethical obligations may have been obvious and routine at a law firm—with conflict checks being run on each new engagement—the attorney's obligations are no less applicable after moving in-house. An in-house attorney may be asked or expected to work on a matter on behalf of the employer organization that is adverse to, or otherwise relates to, a former client of the in-house attorney—from when the attorney was either in private practice or at a prior in-house counsel position. This could happen, for example, if the attorney's employer organization is commencing litigation against a former client of the attorney—and either the attorney represented that client in a matter substantially related to the litigation or the attorney has confidential information pertaining to the former client that is relevant to the litigation. In such event, the in-house attorney may be precluded from working on the litigation due to the conflict of interest with the former client. Similar issues may arise in other types of legal work as well, such as an acquisition or business transaction on behalf of the employer organization with a former client, where the former client's confidential information might be relevant to the transaction.

Imputation of Conflicts of Interest

It may be challenging enough for an in-house attorney to manage conflicts of interest with former clients, especially without the infrastructure of a law firm conflicts check system and a database of prior engagements to reference, but it gets even more challenging when there are multiple attorneys working together in the same legal department. This is due to the possibility of imputation of conflicts of interest.

The Model Rules of Professional Conduct generally provide that the conflict of interest of one attorney in a law firm (again, defined in the Model Rules to include a legal department) is imputed to all other attorneys in the firm, such that none of them may represent a client when any one of them practicing alone would be prohibited from doing so. *See, e.g.*, *id. r. 1.10(a)*. As a result, if any attorney in the legal department is precluded from working on a matter adverse to a former client as described above, then all other attorneys in the legal department may also be precluded from

In an in-house legal department, just as in a law office, attorneys collaborate with one another, discuss confidential information, and work together to achieve the goals of their client (i.e., their common employer). Because the ethical considerations for attorneys in a law office and for attorneys in an in-house legal department are the same with respect to conflicts of interest, the potential disqualification of entire legal departments should be the same as it would be for law offices.

The Model Rules, as well as the rules in some states, provide for an exception to the preclusion by imputation, where the conflicted attorney is "timely screened from any participation in the matter"—but strict compliance with the requirements for an ethical screen, including providing notice to the affected former client, would be required in order for such exception to apply. *See* Model Rules of Pro. Conduct r. 1.10(a)(2).

While few legal departments utilize a system for checking conflicts and approving new engagements—let alone maintaining a list of former clients—of each in-house attorney, such a system might be advisable to avoid potential violations. Further, whenever a conflict becomes apparent, the in-house attorney may need to consider some form of prophylactic or remedial action, such as creating an ethical screen, securing the informed written consent of the affected former client, or perhaps even having a nonlawyer colleague interface with outside counsel on the matter (thereby avoiding the need for in-house attorneys on such matter).

Sexual Relations with Clients

The rules of professional conduct in most states provide that an attorney may not have sexual relations with a client (unless the sexual relationship existed before the attorney-client relationship commenced). *See, e.g.*, *id. r. 1.8(j)*. Although this rule appears to be directed toward protecting clients who are natural persons, the rule also applies where the client is an organization. For example, comment 22 to Model Rule 1.8 makes clear that "[w]hen the client is an organization,

house attorney should be mindful of this rule before initiating sexual relations with the colleague.

The "No Contact" Rule

Attorneys are bound by the "No Contact" Rule (reflected in Model Rule 4.2), which provides

that an attorney may not communicate about the subject of a representation with a person that the attorney knows to be represented by another attorney in the matter, unless the attorney has the consent of the other attorney. Although the No Contact Rule generally prohibits an attorney from communicating with a represented person, the rule does not prevent the parties themselves

from communicating with respect to the subject matter of the representation. *See, e.g.*, *id. r. 4.2 cmt. 4* ("Parties to a matter may communicate directly with each other."). Accordingly, the rule should not prohibit an attorney who is also a party to a legal matter from communicating on his or her own behalf with a represented person.

Similar to the other rules discussed herein, the No Contact Rule may apply differently to in-house attorneys than it does to outside attorneys. Because many in-house attorneys serve not only as attorneys but also as businesspeople—with decision-making authority acting as a principal—it is not always clear when an in-house attorney is acting as a lawyer or as a principal or client. When an in-house attorney is communicating in his or her capacity as a principal or employee of an organization (rather than as the attorney for the organization), the in-house attorney may be permitted to communicate with a represented person without the consent of the party's attorney. However, unless it is clear that the in-house attorney is acting in a nonattorney representative capacity on behalf of the employer organization (e.g., as a party contemplated by comment 4), communication with a represented person may be prohibited.

Failure to Act Competently

Conclusion

In-house attorneys are required to abide by the ethical rules set forth in the applicable rules of professional conduct. While the ethical rules by their own terms apply to all attorneys, whether in private practice or in-house, the application of the rules to in-house attorneys can be awkward in many instances. To avoid a violation of the ethical rules, in-house attorneys—just like attorneys at law firms—must be mindful of the rules and the policies that underlie them, even though the application of some of the rules may be different or surprising in terms of their in-house practice.

Neil J. Wertlieb founded Wertlieb Law Corp. in Pacific Palisades, California. Wertlieb also teaches courses at various law schools and is senior adviser to Milbank@Harvard, a training program for Milbank associates.

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Authors

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