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Who Is the Client? The Ethics Rule Implications for In-House Counsel and Outside Counsel



5 Min Read

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This article is related to a Showcase CLE program at the ABA Business Law Section's 2022 Hybrid Spring Meeting. To learn more about this topic, [view the program as on-demand CLE](#)

[\(https://qa.americanbar.org/events-cle/ecd/ondemand/422936165/\)](https://qa.americanbar.org/events-cle/ecd/ondemand/422936165/), free for Section members.

Although the rules of professional conduct differ in each state, all states in the United States have enacted some form of the [Model Rules of Professional Conduct](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/) by the American Bar Association. Such rules apply not only to lawyers in private practice but also to in-house lawyers. Further, the application of such rules to how lawyers in private practice interact with each other at 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, for example, Rule 1.0(c) of the ABA’s Model Rules of Professional Conduct (“Model Rules”). Also see Comment [3] to Model Rule 1.0: “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 and the rules of professional conduct in most states 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, and 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). Certain 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 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. Such rules include the following:

Model Rule 1.7, which precludes an attorney from representing two or more clients if the representation of one 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). Such a conflict situation might arise when the attorney is representing both its employer organization or business entity and one of its officers, directors, or shareholders. Conflicts of interest may also exist among entities within the corporate family and among affiliated entities.

Model Rule 1.9, which precludes an attorney from working on a matter on behalf of a client if that client's interests are materially adverse to the interests of a former client of the attorney and the attorney represented that former client in the same or a substantially related matter (unless the attorney secures the informed consent, confirmed in writing, of the former client). Such a conflict situation might arise when an in-house attorney finds themselves across the table from a former client (from when the in-house attorney worked at a law firm) or a former employer (if the in-house attorney worked in-house at another company).

Model Rule 1.10, which provides that the conflict of interest of one attorney in a law firm (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. This is particularly troublesome in a legal department, where the conflict of one in-house attorney may be

imputed to all of the other in-house attorneys in the legal department, thereby precluding the in-house team from working on a particular matter on behalf of their employer client.

Model Rule 1.13, which makes clear that an attorney employed or retained by an organization represents the organization acting through its duly authorized constituents (e.g., officers, directors, etc.), although such rule also permits the attorney to represent any such constituent in addition to the organization. However, if the organization's consent to such a dual representation is required by Model 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.

In addition, although the attorney-client privilege generally applies to communications between clients and their attorneys, where an in-house attorney is acting in their capacity as a businessperson or principal of the organization (and not as an attorney), such communications may not be privileged. This same risk may apply to outside attorneys as well if they are also interacting with their entity clients in a non-legal capacity, such as by serving as a member of the entity's board of directors.

As a result, it is important for both in-house and outside counsel to consider and address the following requirements:

- properly identifying who is, and who is not, the client with respect to an entity client;
- dealing with conflict of interest in an entity client context, especially with the respect to dealing with entity constituents, the inadvertent creation of attorney-client relationships, possible joint representations, and affiliated entities and joint ventures (Model Rules 1.7, 1.9, 1.10, and 1.13);
- addressing Model Rule 1.6 confidentiality, the attorney-client privilege, and the work product doctrine in the entity client context; and

- gaining a better understanding of the application of other Model Rules to the attorney (in-house or outside counsel) representing an entity, including Rule 1.8 (business transactions and other relations with a client); Rule 5.5 (the [unauthorized practice of law](https://businesslawtoday.org/2014/03/unauthorized-practice-of-law-and-the-transplanted-in-house-counsel/) (<https://businesslawtoday.org/2014/03/unauthorized-practice-of-law-and-the-transplanted-in-house-counsel/>)) and multi-jurisdictional practice, in the cross-border context); and Rule 1.13(b) and (c) (reporting up and out when representing an entity client).

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