

# Ethical Issues for In-House Counsel

## Presenters:

**Angela Giroux**


Senior Counsel, Compliance & Employment; Nutrien

**Valerie Payne**

Complaints Counsel; Law Society of Saskatchewan



**Law Society  
of Saskatchewan**



*"The General Counsel has one foot planted firmly in the shifting treacherous terrain of the law, and the other planted just as firmly in the oozing swamp of business."*

**-Timothy Terrell, Professor of Law, Emory University**





# In-House Counsel's Multiple Roles

Cautions and Potential Pitfalls





# Multiple Roles of In-House Counsel

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In-house counsel often do, or are expected to, “wear multiple hats” within an organization. These can include:

- Lawyer/Legal Counsel
- Business Partner/Advisor
- Director
- Employee

It is important to always be aware of what role you are currently fulfilling, and be vigilant to avoid conflicts between these roles and your professional obligations.



# Multiple Roles of In-House Counsel

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As **Lawyer/Legal Counsel**, company personnel must understand that in-house counsel's first priority is as a legal advisor to the company. This is especially true when in-house counsel is involved in intra-company communications that require confidentiality and may be protected by privilege.

In cases where the two conflict, a lawyer's duties, responsibilities and obligations under the *Code of Professional Conduct* and *Rules of the Law Society* take precedence over the instructions/directions of their client.





# Multiple Roles of In-House Counsel

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As **Business Partner/Advisor**, one must be careful to clearly distinguish when one is acting in a business capacity, and when one is acting in the capacity of legal counsel. When a business partnership exists, it will, in many cases, be difficult to reconcile your personal interests with your responsibilities to advise, and there is great potential for conflict in these cases.

A **Business Advisor** relationship may arise from other “business-type” relationships that the in-house counsel may have with the employer, such as when in-house counsel also sits on smaller committees within the organization where their role is not as legal advisor.





# Multiple Roles of In-House Counsel

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## *Code of Professional Conduct.*

7.3-1 A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.



# Multiple Roles of In-House Counsel

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## Commentary

[1] A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client.

[2] When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.







# Multiple Roles of In-House Counsel

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As a **Director**, there is also great potential for conflict of interest to arise.

*Code of Professional Conduct.*

Examples of Areas where Conflicts of Interest may Occur:

A lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.



# Multiple Roles of In-House Counsel

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## *Code of Professional Conduct.*

- These two roles may result in a conflict of interest or other problems because they may:
  - (a) affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
  - (b) obscure legal advice from business and practical advice,
  - (c) jeopardize the protection of lawyer and client privilege, and
  - (d) disqualify the lawyer or the law firm from acting for the organization.



# Multiple Roles of In-House Counsel

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In-house counsel can act as a director, provided:

- The board and management are advised of the risks involved.
- There are no immediate conflicts of interest and the lawyer complies with the Model Code if any conflicts of interest arise.
- The board of directors and the company consent to the dual role.





# Multiple Roles of In-House Counsel

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In-house counsel can act as a director, provided:

- The dual role does not jeopardize or impair the lawyer's representation of the company, professional integrity, independence and independent judgment on behalf the company, competence, and duty of loyalty to the company.
- The lawyer ensures that it is clear in which capacity the lawyer is acting on a particular transaction.





# Multiple Roles of In-House Counsel

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As **Employee**, the subtle pressures of continuation of employment, professional and corporate advancement, and company and other perks have the potential to cause the less-aware in-house lawyer to drop the “client” portion in the description of his employer-client, leaving the term “employer”.

If this were to occur to even a limited extent, the vital elements of impartiality and objectivity in serving the employer-client in its legal needs will suffer. The preventative remedy is seen to be unceasing vigilance on the part of the in-house lawyer that this will not be permitted to happen.





# Multiple Roles of In-House Counsel

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As **Employee**, in-house counsel may feel pressured to accept all work that they are tasked with, regardless of the fact that they may not possess the requisite skills, knowledge or experience to complete the work competently. The obligation to provide competent legal services is paramount to employment obligations, and in-house counsel should be alive to circumstances where they should advise their client to obtain external experienced counsel.





# Multiple Roles of In-House Counsel

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**Duty of Candour:** A lawyer is required to be honest, candid and fully advise the company on all information and issues relevant to a legal matter.

This means that you must deliver all relevant information to the client, even if it is bad news, or doesn't fit with what your employer wanted to hear from you. You cannot be tempted to withhold negative or contrary legal opinions or advice to appease the employer.





# Who is your client?

...and who isn't?







# Who is your client?

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One of the principal ethical challenges faced by in-house counsel is identifying the client. In-house lawyers represent the company or organization. However, a company/organization acts through several authorized constituents, including its:

- Officers
- Directors
- Employees
- Shareholders or members
- Agents or other representatives



# Who is your client?

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*Code of Professional Conduct.*

Commentary on definition of “client”:

[2] When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing;

[3] For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.



# Who is your client?

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*Code of Professional Conduct.*

## **When the Client is an Organization**

3.2-3 Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.



# Who is your client?

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*Code of Professional Conduct.*

Commentary

[1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, **the lawyer should ensure that it is the interests of the organization that are served and protected.** Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.





# Who is your client?

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Be wary of:

- An employee who may have interests adverse to the company seeking an in-house lawyer's advice on a company legal matter.
- Officers, directors and employees seeking legal advice from in-house counsel on purely personal matters.



# Who is your client?

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## In-house counsel should:

- Advise employees that the lawyer represents the company and not the employee.
- Not advise employees or other constituents on personal legal matters.
- Instruct employees and other constituents to retain separate counsel for personal legal matters, at their own expense.
- Train employees and other constituents about the boundaries of in-house counsel's role as a lawyer for the company to:
  - prevent conflicts of interest; and
  - dissuade employees and other constituents from bringing personal matters to the legal department.



# Who is your client?

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When the answer is “there are several”, consider the rules in relation to Joint Retainers.

*Code of Professional Conduct.*

Commentary to s. 3.2-3:

[2] In addition to acting for the organization, a lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests.



# Who is your client?

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- 3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that:
- (a) the lawyer has been asked to act for both or all of them;
  - (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
  - (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.





## Who is your client?

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3.4-6 If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

3.4-7 When a lawyer has advised the clients as provided under Rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer must obtain their consent.



## Who is your client?

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3.4-9 Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary:

[2] When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.





# Conflicts of Interest





# Conflicts of Interest

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Lawyers have an ethical duty to avoid and cannot, without the consent of their clients, act on a matter if there is a conflict of interest, ... a lawyer still cannot act if there is a **substantial risk** that the representation of the client would be materially adversely affected by:

- The lawyer's own interests.
- The lawyers duties of loyalty to:
  - another client;
  - a former client;
  - a third person.

# Conflicts of Interest

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## Duty of Loyalty:

The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. ...

Arising from the duty of loyalty are other duties, such as a **duty to commit to the client's cause**, the **duty of confidentiality**, the **duty of candour** and the **duty to avoid conflicting interests**.





# Conflicts of Interest

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As noted previously, “internal” conflicts of interest can arise as a result of the lawyer’s multiple roles:

- Personal interests as employee, business partner, shareholder v. client’s interests
- Obligations as director to pursue the strategic goals and profit/success of the organization v. lawyer’s professional obligations

These may result in situations where the lawyer is in danger of preferring other interests over that of the client



# Conflicts of Interest

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In-house counsel must be aware of potential conflict scenarios that arise when representing the company on routine legal matters, such as transactions and litigation.

Examples:

In-house lawyer is asked to represent the company and other parties in forming a joint venture





# Conflicts of Interest

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## Examples:

In-house lawyer is asked to represent the company and members of management who wish to acquire the company or some of its assets.







# Conflicts of Interest

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## Examples:

Company/employer is sued, or other action is taken against it (i.e.: Human Rights Complaint). If the company is a party, along with its officers, directors or employees, in-house counsel may be asked to represent all parties.





# Conflicts of Interest

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## Examples:

Officer/Director/Employee approaches in-house counsel for advise on employment or business matters as between the company and the Officer/Director/Employee.





# Conflicts of Interest

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## Examples:

In-house counsel is asked to advise/take legal action in relation to a former client or employer (previous to their employment as in-house counsel).





# Solicitor-Client Privilege

When it applies, when it doesn't, and protecting it





# Solicitor-Client Privilege

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Because of in-house counsel's multiple roles, application of the solicitor-client privilege to in-house counsel's communications depends on context.





# Solicitor-Client Privilege

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Solicitor-client privilege protects communications between in-house counsel and company personnel when the following three elements are met:

- The communication is between a lawyer and client.
- The communication is intended to be confidential.
- The communication is for the purpose of seeking or receiving legal advice.



# Solicitor-Client Privilege

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Avoid the “cc:” trap:

- Copying in-house counsel or the legal department generally on emails or other written communications does not protect those communications under the solicitor-client privilege if the sender is not seeking legal advice.
- Conversely, indiscriminate copying (throughout the organization and beyond) of communications that otherwise contain solicitor-client privileged information may result in argument that the privilege has been lost.



# Solicitor-Client Privilege

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- When advising the client in writing (including by email), in-house counsel should send legal and business advice in separate communications and only to personnel who need the information.
- If the communication contains legal advice, it should be clearly marked with a “Privileged and Confidential” notation.
- Portions of minutes of board meetings containing the advice of counsel should be separated from business and clearly marked as privileged and confidential. If minutes must be shared outside of the attendees, the legal advice should be redacted





# Solicitor-Client Privilege

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Additional processes that in-house counsel can establish to create and protect privilege:

- Educate the legal department and other employees about the importance of privilege and maintaining confidentiality.
- Ensure that the company routinely enters into confidentiality agreements with employees and other parties, where appropriate.
- Use legal department letterhead rather than corporate letterhead.

# Solicitor-Client Privilege

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- Maintain a confidential file of documents over which privilege is claimed.
- Where possible, engage external counsel for sensitive matters and in jurisdictions where privilege may not be available to in-house counsel.
- If external experts are retained to assist counsel with providing legal advice, any retainer letter or reports should clearly indicate this and be addressed to counsel's attention.





# Illegal or Unethical Conduct by Organization

Obligations to Advise, Intervene and/or Report





# Illegal or Unethical Conduct by Organization

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- Ethical requirements placed on in-house counsel relating to honesty, good faith, and courtesy are the same as any other lawyer.
- Remember such obligations as:
  - Prohibition from communicating with a party known to be represented by another lawyer in the matter
  - Special obligations when dealing with unrepresented parties
  - includes ensuring that communications, whether with the company, former clients, third parties or other lawyers are not abusive or offensive and are not inconsistent with the proper tone of a professional communication from a lawyer



## Illegal or Unethical Conduct by Organization

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In-house lawyers are required to be vigilant with respect to any conduct of the company (and its officers, directors and employees) which is dishonest, fraudulent, criminal or illegal.

Lawyers are prohibited from knowingly assisting or encouraging such conduct and they cannot instruct the company on how to violate the law and avoid punishment



# Illegal or Unethical Conduct by Organization

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## *Code of Professional Conduct:*

3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally, must do the following, in addition to his or her obligations under Rule 3.2-7:

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;



## Illegal or Unethical Conduct by Organization

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- b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
- c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with section 3.7.



# Illegal or Unethical Conduct by Organization

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## Withdrawal:

- Obligation would also apply to circumstances which are not illegal, but in which the client organization insists that the in-house counsel act in a manner that is contrary to their ethical and professional obligations under the *Code of Professional Conduct*
- As an employee, withdrawal from a single matter may be difficult, if not impossible.







# Illegal or Unethical Conduct by Organization

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## Withdrawal:

- If a lawyer reports misconduct up the ladder and the conduct continues, the lawyer cannot continue to represent the client on that or related matters.
- Continued illegal or unethical conduct and/or instructions will result in lost confidence of and in the company, making it challenging to continue to represent the company.

# Illegal or Unethical Conduct by Organization

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## Withdrawal:

- In these cases the lawyer may need to resign, in particular if continued employment with the company could lead to a breach of the lawyer's ethical standards and professional responsibilities.
- Under the *Code*, a lawyer is obligated to withdraw if the client persists in instructing the lawyer to act contrary to professional ethics.


# Illegal or Unethical Conduct by Organization

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## Withdrawal:

- If the lawyer is forced to ultimately withdraw from a matter or resign, in-house counsel still owes a duty of confidentiality and the law of privilege may still apply to any information about the illegal conduct.
- The lawyer is prohibited from disclosing information about, or even knowledge of, the illegal conduct to anyone outside of the company, unless an exception to the duty of confidentiality applies and then disclosure must only be to the extent necessary.





"In looking for people to hire, you look for three qualities: integrity, intelligence, and energy. And, if they don't have the first, the other two will kill you."

– **Warren Buffet**

