

WALKING THE TIGHTROPE – MANAGING CONFLICTS OF INTEREST INTERNALLY



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Over a long career in the law and business, Michael has gained extensive experience as a country and city solicitor as well as being in-house counsel for both a major statutory corporation in Victoria and an Australian electricity supply industry association. Now as a senior ethics solicitor at the LIV, Michael provides advice to solicitors on ethics issues and supports the work of the LIV Ethics Committee. He also presents ethics seminars to solicitors.

Introduction

A lawyer employed as in-house counsel is subject to the same professional and ethical obligations as any other lawyer. The only difference between lawyers in private practice and in-house lawyers is that the latter have only one client – the organisation by which they are employed.

A highly respected Australian legal academic has written:

"Status as an employed lawyer, whether in private enterprise or in government, in no way diminishes or alters professional responsibility to the client, the court or the public." (1)

A leading judicial statement on the subject is that of Lord Denning MR:

"They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidence. They and their clients have the same privileges." (2).

Your paramount duty as a lawyer

All lawyers are officers of the court to which they owe their primary ethical duty:

"A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty." (3)

A clash of ethical duties between those owed to the client on the one hand and the lawyer's paramount duties owed to the court and the administration of justice may, in an extreme case, lead to devastating personal consequences for an in-house counsel leading to loss of status, income, and employment. (4)

Managing issues such as potential conflicts of interest internally by in-house counsel can often be both an ethical and management challenge.

In a one-hour documentary, *LIVing Ethics for In-House Counsel*, commissioned by the Law Institute of Victoria in 2016 a retired corporate general counsel, Simon Doyle, gave valuable insights into the processes used by him to achieve satisfactory commercial results for his employer whilst ensuring that its activities remained within the law and upheld high ethical standards. These included having in place formal compliance processes underpinned by education of management,

as well as maintaining both formal and informal internal networks to achieve legally and ethically compliant outcomes for the company which supported its corporate financial and business objectives. (5)

Two respected Australian commentators have written:

"Having the ability to provide advice in a commercial way, together with ensuring professional and ethical responsibilities are not compromised, makes the in-house lawyer a business asset. The obligation to be a lawyer first and foremost should never be seen as an impediment to the business." (6)

In-house counsel must avoid conflicts of interest

Like all lawyers, in-house counsel have a fiduciary duty to their client to avoid conflicts of interest. This is summarised in the Association of Corporate Counsel Australia, Guidance on Ethical Decision Making:

"In-house counsel must avoid conflicts of interests as they compromise the independence of counsel and could impinge on legal professional privilege. When faced with an unavoidable conflict, in-house counsel must be conscious of the conflict throughout their dealings, declare it openly, clarify the capacity in which they are acting and discontinue acting should the conflict become unmanageable." (7)

Client confidentiality can be the first cousin of conflict

One of the fundamental ethical duties owed by a lawyer to a client is that of confidentiality. Another fundamental ethical duty is to put at the disposal of your client any information in your possession which is relevant to the affairs of the client for whom you are currently acting. When these two ethical duties clash, you have a conflict of interest. The duty of confidentiality will prevail and the only way of resolving the conflict will be for you to cease acting for your current client unless your former client gives you informed consent to reveal the confidential information.

For example, what if you are asked to advise your current corporate employer on a potential investment in a corporation for which you once acted as an external lawyer? If you possessed relevant confidential information from your previous client engagement, you would have to advise your employer that you are conflicted because of a previous solicitor-client relationship and cannot now act.



Who is your client?

More often than not, the first ethical challenge faced by in-house counsel in terms of managing potential conflicts of interest internally lies in the identification of who is their client. It is the very nature of the lawyer-client relationship itself that gives rise to a lawyer's professional and ethical obligations. Is the in-house lawyer a lawyer first or merely an employee of the organisation carrying out legal tasks for it?

A former regulator of the legal profession in New South Wales has noted:

"The duty to the client for the in-house counsel is the duty to the organisation and no-one else. The in-house counsel does not, without other specific agreements, serve as the legal practitioner for any of the organisation's officers, employees, directors or shareholders." (8)

The ultimate duty owed by in-house counsel to the corporation is to the Board of Directors. Of course, from a day to day management perspective, in-house counsel may be advising the Chief Executive Officer or other members of the senior executive team. However, in-house counsel must always keep in mind where their ultimate client duty lies.

Internal requests for legal advice

From my own experience of more than 10 years as an in-house counsel I know that it is not uncommon for managers and employees of the corporation to seek legal advice about their own affairs or about their roles and actions within the corporation.

For example, a senior manager may ask for legal advice on the terms of their employment relationship with the corporation. In responding to any such request, in-house counsel must be scrupulous in making it clear to the employee that any legal advice given by them can only be on behalf of the corporation and they should politely inform the senior manager to seek independent legal advice about their own position or personal affairs.

Also, it should be remembered by in-house counsel that they cannot give legal advice other than to the corporation which employs them unless they hold a full practising

certificate issued under the legal regulatory regime in the Australian State or Territory where they practise.

Competing interests within the business

What about when different sections of the organisation with internal competing commercial and compliance interests seek legal advice from in-house counsel?

For example, sales and marketing people might wish to launch a new product to market as quickly as possible to gain increased market share whereas the quality assurance people may wish to conduct further health and safety tests before doing so? Clearly, that situation may require in-house counsel to investigate further and escalate the ultimate decision further up the organisation's hierarchy.

One Canadian commentator has written:

"The identification and management of conflicts of interest is vitally important as the business world becomes increasingly complex.... Navigating through those conflicts is often perplexing, however the basic principles at the departure are simple, one must remember that there is only one client, the corporation, and that counsel must always act in the company's best interests." (9)

Be alert to possible external law firm conflict

Before engaging an external law firm to act for your employer in a particular matter, it is prudent to ask the law firm to ensure that it does not have any potential conflict issues of which you are not aware. It is primarily the duty of the law firm to satisfy itself that there will not be any conflicts in acting for your employer in the particular matter, but reinforcement of the need for the law firm to undertake adequate conflict checks is a wise step to take. This is particularly so in the current migratory legal environment in which we live.

A lawyer's statutory protection regarding ethical responsibility

The Legal Profession Uniform Law, in force in New South Wales and Victoria since 1 July 2015 has created a new offence under the heading of "Undue Influence":

"A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner associate of a law practice to contravene this Law, the Uniform Rules or other professional obligations. Penalty: 100 penalty units." (10)

In a recent matter which came to my attention a corporation was pressuring its in-house lawyer to act in a clear conflict of interest situation, but client education on this part of the Uniform Law was instrumental in resolving the situation.

Conclusion

Like all lawyers, in-house counsel have an ethical duty to avoid conflicts of interest. Often this can be a challenge when the lawyer is working inside an organisation. Identifying the lawyer's client is the first step to managing internal potential conflicts successfully. As in-house counsel, you need to carefully inform yourself, ask questions, and seek internal or external advice from legal colleagues or your professional bodies (so you don't have to sweat it on your own). ⁴

References:

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10. *Legal Profession Uniform Law Application Act 2014 (Victoria)* (No. 17 of 2014), Schedule 1, Section 39