

## **When Should a University's In-House Counsel Retain His or Her Own Lawyer?**

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*By Thomas B. Mason*



**Partner**  
**Washington, DC**  
202.778.1844  
202.822.8106 fax  
[tmason@zuckerman.com](mailto:tmason@zuckerman.com)

The question of when an in-house lawyer should retain his or her own lawyer is ultimately an issue of judgment. There are circumstances when the advice of a lawyer can be helpful and protect the organization's attorney from making mistakes or subjecting himself to professional discipline, adverse employment action, civil or even criminal liability. Generally speaking, the need for personal counsel is most acute when the lawyer is confronted with misconduct or potential misconduct. There may also be a need when his or her own personal needs conflict with his duties to the institution.

Of course, a lawyer, like any other individual, never is required to have a lawyer. Lawyers and non-lawyers alike often represent themselves in a variety of situations. In addition, a lawyer cannot hire his own lawyer whenever a difficult problem arises. The issue then is not when must an organization's lawyer hire his own counsel, but in what circumstances should an in-house lawyer hire his own attorney. After discussing some practical steps that in-house counsel might take to prepare for the situation when he needs personal counsel, I outline some of the most common scenarios when retaining personal counsel would be most appropriate and necessary.

### **Preparing for A Crisis: Identifying Suitable Candidates for Personal Counsel**

The decision about whether to retain personal counsel should not be influenced by the time and practicalities required to locate and select the right attorney. One should not fail to seek legal advice or to retain a lawyer who is not suitable by experience or judgment simply because one has not thought about who the right counsel might be and now doesn't have the time to do so. If we fall ill suddenly, we know to go to the emergency room or call 911. No such network exists for legal representation so one should identify in advance who he might call when a legal "911" situation arises.

The situation when a lawyer should retain his or her own lawyer may arrive suddenly and will almost certainly occur in a time of stress. Often the lawyer may need to make a quick decision, and the lawyer will need to be able to find personal counsel rapidly. Further, the lawyer may not have time to locate and interview different prospective counsel and then go through a careful interview and selection process. The lawyer therefore may want to identify several suitable candidates for personal counsel in advance before a crisis arises. Taking some steps to solicit recommendations or think about potential candidates is easy to do before a problem occurs.

The wisdom of identifying in advance multiple candidates for the role of personal counsel is underscored by the fact that lawyers in the area may

have conflict issues. This is particularly true if one lives in a “college town,” or if most of the lawyers one would consider typically represent the college or university, one might wish to consider several candidates. Private counsel who regularly represent the university or university officials may be conflicted from serving as personal counsel for a lawyer for the university even if the private attorney represents the university only matters entirely unrelated to the subject matter of the lawyer’s possible retention as counsel for the in-house attorney. *See, e.g.*, ABA Model Rule of Professional Conduct 1.7(a). The retention of a lawyer who is regularly adverse to the university similarly raises conflict issues that could require disclosure and perhaps consent from the lawyer’s clients who are adverse to the university. *Id.* (Model Rule 1.7(a)(2) provides that a conflict exists when a lawyer’s responsibilities would be “materially limited” by a lawyer’s responsibilities to other clients.).

### **The Need for Personal Counsel When Confronted With Misconduct Within the Organization**

Lawyers should consult with personal counsel when their clients are engaged in or are considering improper conduct that a lawyer cannot either (1) quickly and easily stop; or (2) report to the proper authorities without the consent of the client. The most difficult scenario is when the improper conduct originates at the highest levels of the organization. Lawyers in private firms may have the luxury of being able to consult with the firm’s own internal general counsel about the client’s conduct. Lawyers for organizations unfortunately do not always have the luxury of a colleague at hand with whom they can consult on these issues (or if they do, the colleague may be infected with the same dilemma as the lawyer).

Lawyers can counsel and advise their clients but clients ultimately decide how to conduct their affairs. Moreover, clients frequently act without consulting an in-house attorney in advance. When clients act improperly or contemplate doing so—contrary to university policy or contrary to a legal obligation—despite, against or in the absence of the lawyer’s advice, the lawyer may have an obligation to report a “higher authority” within the organization under ABA Model Rule 1.13(b). No one seeks the role of internal whistleblower but Model Rule 1.13(b) requires that a lawyer report to the “highest authority” within the organization regarding misconduct that (a) violates the law or a legal obligation to the organization and (b) is “likely to result in substantial injury to the organization.” A lawyer contemplating such internal whistleblower status should consult with personal counsel. After the lawyer has internally reported such conduct, if the conduct is not addressed adequately, the lawyer may then have the option (but not the obligation) to report the matter outside of the organization. ABA Model Rule 1.13(c) (permitting but not mandating disclosure of client confidences outside the organization under certain circumstances).<sup>1</sup>

Beyond the reporting up or out requirements contained in ABA Model Rule 1.13, there are other rules applicable to the issue of when a lawyer can or must make a disclosure in the face of persistent client misconduct. Given the consequences of an unauthorized disclosure, a lawyer should not try to analyze and apply these rules without advice or assistance. Model Rules 1.6 and 3.3 can permit and sometimes mandate disclosure of client

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<sup>1</sup> Some jurisdictions have not adopted ABA Model Rule 1.13(c). *See, e.g.*, District of Columbia Rule of Professional Conduct 1.13 (permitting “reporting up” but not “reporting out”); Virginia Rule of Professional Conduct 1.13 (same).

confidences, depending on the circumstances surrounding the misconduct. For example, Model Rule 1.6(b)(3) authorizes but does not require disclosure of a client crime or fraud when (i) the crime or fraud is likely to result in substantial financial injury and (ii) the lawyer's services were unwittingly used by the client to further that fraud. This optional disclosure under Rule 1.6 can, however, become mandatory when there is a fraud upon a tribunal (Model Rule 3.3(b) & comment [10]) or upon a third party (Model Rule 4.1(b)). State adoption of these rules varies.<sup>2</sup> Finally, a lawyer in a situation where his or her client has acted or intends to act improperly also has to navigate between the ethical obligations and the legal obligations imposed by substantive law. The lawyer who violates the former risks professional discipline; the lawyer who violates the latter risks civil or criminal liability.

Outside counsel faced with a rogue client bent upon fraud or other misconduct has the option, and often the obligation, to withdraw from the representation. ABA Model Rule 1.16(a)(1) requires a lawyer to withdraw when a representation "will result in a violation of ... law." *See also* Comment [10] to Rule Model Rule 1.2 ("A lawyer may not continue assisting a client in conduct the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter.") The stakes are higher for in-house counsel than for outside counsel. Losing a "client" or withdrawing from a matter may mean losing a job. Whether and in what circumstances a lawyer can separate him or herself from improper conduct that the lawyer cannot stop (and perhaps cannot report) and yet keep his job is a scenario that the lawyer should not confront alone.

### **The Need For Counsel When the Misconduct is (Allegedly) Your Own**

One scenario in which a lawyer should always seek personal counsel is when the lawyer has acted improperly or may be accused of acting improperly. Confession may be good for the soul but bad for the career. Even (or perhaps especially) close friends within the organization will likely not be able to offer the objective judgment and analysis of a well-chosen personal counsel. Moreover, close friends or colleagues may have mixed loyalties or their own agenda. A lawyer you retain has one concern and one concern only: your professional well-being and success. Because of the confidentiality rules, one can be completely candid with one's lawyer. Such unrestrained disclosure to others outside the attorney-client relationship is fraught with peril.

Lawyers accused of misconduct need advice on how to respond to the allegations against them for many reasons. Lawyers are no better at representing themselves than non-lawyers. Even if the lawyer believes that their conduct has been proper and consistent with the university's best interests, the mere fact that their actions are under scrutiny is itself ethically significant. Comment [10] to Model Rule 1.7 states: "if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."

Lawyers have the additional risk that the ethics rules may constrain their

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<sup>2</sup> District of Columbia Rule of Professional Conduct 3.3(d) is narrower than its ABA counterpart (Model Rule 3.3(b)), as it authorizes disclosures to remedy a fraud perpetrated upon the tribunal only to the extent not prohibited by Rule 1.6. Model Rule 3.3(b) requires disclosures even if such disclosures are otherwise prohibited by Rule 1.6.

ability to defend their conduct in non-privileged settings. While Model Rule 1.6 permits lawyers to defend themselves in court proceedings, it may not always allow a lawyer to rebut charges or statements made outside of formal proceedings, even though statements in less formal settings can be equally as damaging for an attorney's career. The law is, however, moving increasingly towards allowing an in-house attorney to reveal confidential client information as a plaintiff in a wrongful discharge claim. See, e.g., ABA Formal Ethics Opinion 2005-136 (in-house counsel can use client confidences in wrongful discharge suit); Marshall, *In Search of Clarity: When Should In-House Counsel Have the Right to Sue for Retaliatory Discharge?*, 14 Geo. J. Legal Ethics 871 (2001); see also *Annotated Rules Model Rules of Professional Conduct* 106 (6<sup>th</sup> ed. 2007)(collecting cases).

### **The Problem of Conflicting Obligations or Directions Within the Organization**

Beyond the myriad of scenarios that one could construct around a client's or a lawyer's misconduct, there are situations where a lawyer for an organization may have seemingly conflicting duties or obligations to the different constituents of the organization. (Such issues may not always arise in isolation but can and frequently do occur in conjunction with issues of misconduct and malfeasance.) Of course, issues of conflicting instructions or obligations to different constituencies of an organization could, in theory, be frequently resolved by just "going to the top" and requesting direction. Such an option may be costly to the lawyer's standing and prospects within the organization, and consultation with personal counsel may eliminate the need to seek such guidance from the highest levels or, alternatively, to help shape the form and manner of such consultation so as to accomplish the lawyer's goals with the least adverse effect on the lawyer.

### **Conclusion**

It is impossible to catalog all of the situations in which an in-house lawyer for a university should retain personal counsel. It is important to understand, however, that such situations can arise and to understand that when they do, it can be a dangerous mistake to proceed without personal advice. Perhaps the best indicators that such a situation has in fact arisen are when (a) one doesn't know what to do, (b) there is no one other than one's own lawyer who one can safely ask, and (c) one is concerned about the consequences of a wrong decision or mistake.