



Ohio Board of Professional Conduct

OHIO ETHICS GUIDE

Corporate Ethics





NOTE: Ethics Guides address subjects on which the staff of the Ohio Board of Professional Conduct receives frequent inquiries from the Ohio bench and bar. The Ethics Guides provide nonbinding advice from the staff of the Ohio Board of Professional Conduct and do not reflect the views or opinions of the Board of Professional Conduct, commissioners of the Board, or the Supreme Court of Ohio.

Corporate Counsel

This ethics guide provides lawyers who are new to organizational representation, whether in-house or outside counsel, with an overview of general ethical issues that may arise and that should be considered. The primary rule addressing representation of an organizational client is Prof.Cond.R. 1.13. The rule is not intended to be the exclusive rule applicable to corporate counsel, nor is it intended to limit or expand a lawyer's responsibility under other conduct rules.

Who is the Client?

When representing an organization, the first basic consideration is identifying the client. This can be difficult when the organization is a closely held corporation or if the organization has multiple affiliates or subsidiaries. An organization is a legal entity acting only through its constituents. Constituents are identified as owners, duly authorized officers, directors, employees, and shareholders.¹ A lawyer employed by an organization, as in-house or outside counsel, represents the entity as an organization and not the independent interests of the organization's constituents.² A lawyer owes allegiance to the organization and must act in the best interest of the organization.³ The best interests of the organization are defined by its constituents acting in accordance with the organization's decision-making procedures.⁴ Consequently, even though a lawyer may take direction from a constituent of an organization, the organization's lawyer must remember that the constituent providing direction is not the client. Often, constituents hold the misconception that the organization's lawyer is their own personal lawyer. A lawyer for an organization must clarify his or her role as often as necessary. Further, when an organization has multiple affiliates or subsidiaries, it is best practice to immediately establish whether the affiliates or subsidiaries will be treated as clients of the lawyer.

Conflicting Direction

A lawyer for an organization may receive conflicting directions from one or more constituents in the organization. Because a lawyer has an obligation to abide by a client's decision concerning the objectives of the representation, a lawyer for an organization must use reasonable efforts to resolve internal conflicts between constituents in favor of the best interests of the client.⁵ A lawyer for an organization must evaluate and consider the relative authority of each constituent in the hierarchy of the organization and take direction from the higher authority.⁶ In order to avoid subsequent confusion, at the outset of representation, a lawyer for an organization should clarify with the client-organization the reporting relationships among constituents and keep informed as to changes in the organizational hierarchy.⁷

Conflicts of Interest

Lawyers for an organization are subject to the same conflict-of-interest provisions in the Rules regarding current clients and former clients.

Representation of Constituents

A common conflict of interest question arises when a constituent of the organization wants the organization's lawyer to represent the constituent in his or her individual capacity. A lawyer representing an organization is not prohibited from jointly representing officers, directors, employees, members, shareholders, or other constituents, but may only do so if the lawyer is able to comply with Prof.Cond.R. 1.7.⁸ Consent must be obtained from both the constituent and the organization. However, a lawyer may not represent a constituent when the constituent or organization has a claim against the other in the same matter. It is appropriate to advise a constituent that he or she may wish to obtain independent representation.

Former Clients

When representing an organizational client, even in-house, counsel must continue to monitor for conflicts with former clients.⁹ Without informed written consent, a lawyer may not represent a new organizational client in the same or substantially related matter when the new client's interests are materially adverse to the interests of a former client. Further, a lawyer who was previously associated with a firm (or who worked as in-house counsel for an organization), but may not have been directly responsible for a particular matter, may not later represent a new organizational client in the same or substantially related matter when the clients' interests are materially adverse *and* when the lawyer acquired information about the former client that is protected under Prof.Cond.R. 1.6 or 1.9(c).

Potential for Conflicts within the Corporate Family or Subsidiaries

Counsel providing legal services to affiliates or subsidiaries must continue to monitor potential conflicts of interest between those entities and the parent organization. If questions arise or it becomes apparent that there is no longer a unity of interests between a parent organization and another represented entity, counsel must determine two things. First, because questions of client identity in this context can be mixed questions of law and ethics, counsel must determine how the jurisdiction legally treats affiliates or subsidiaries. Second, a thorough Prof.Cond.R. 1.7 analysis must begin. If interests are determined to conflict, the lawyer may attempt to resolve the conflict by way of consent and waiver under Prof.Cond.R. 1.7(b) or recommend that the organization retain outside counsel.

Dual Role as Corporate Director and Counsel

Dual roles as corporate director and corporate counsel may create a material limitation conflict. Serving in a dual role may also raise questions about preserving confidentiality and privilege. It is also possible that to fulfill a role as director, corporate counsel may have to decline or withdraw from representing the corporation in a particular matter and/or may have to abstain from voting as a director in a particular matter. This type of conflict may arise when a lawyer-director is called upon to advise the corporation as to the actions of other directors.¹⁰ Prof.Cond.R. 1.7, cmt. [19], advises that before taking on a role as a director, corporate counsel must comply with Prof.Cond.R. 1.7(b) and advise the board members of the potential for conflicts of interest to arise, what may happen if a conflict arises, and seek consent from the board to the dual roles.¹¹

Consent

If it becomes necessary for counsel to obtain consent to representation pursuant to Prof. Cond.R. 1.7 or 1.9, the lawyer must be sure to seek consent from the appropriate individual. A constituent may give consent on his or her own behalf. An individual consenting on behalf of the organization must be authorized to do so and disinterested in the outcome of the particular matter. The individual providing consent to the representation on behalf of the organization cannot be counsel for the organization or the person to be represented.

Imputation of Conflicts

The conflicts of interest of members of an organization's legal department are imputed to other members of the department.¹² It is recommended that members of an organization's legal department create and maintain former client lists to check for potential conflicts.

Employment and Business Relationships with an Organization

Some forms of compensation considered common for corporate executives may raise conflict of interest questions when the executive to be compensated is corporate counsel. Counsel for an organization should be familiar with Prof.Cond.R. 1.8(a), which addresses business transactions and pecuniary interests related to clients, and Prof.Cond.R. 1.5 regarding reasonable fees.

Standard Employment Agreements

Employment agreements between in-house counsel and a client are governed by Prof. Cond.R. 1.5, just as are fee agreements between a client and outside counsel. A lawyer may not make an agreement for or collect an illegal or clearly excessive fee.¹³ Some factors to consider when determining if an employment agreement is reasonable are the following: 1) the customary salary among similarly situated counsel in the locality; 2) the typical time commitment and hours required of the position; 3) the complexity of the legal matters; 4) the experience of counsel; 5) the reputation of counsel; 6) the length of relationship between counsel and the client; and 7) the sophistication and financial standing of the client. When evaluating the reasonableness of an employment contract, in-house counsel must consider his or her employment contract as a whole. In-house counsel should have a written employment contract.

Covenant not to Compete

In-house counsel must carefully determine how to proceed when presented with an employment contract that contains a covenant not to compete. Prof.Cond.R. 5.6 prohibits a lawyer from entering into an employment agreement that restricts his or her right to practice. However, in-house counsel often provides both legal services and business services to the client. In Adv. Op. 2020-1,

the Board concluded that a lawyer may not ethically agree to an employment contract with a covenant not to compete that will restrict in-house counsel's right to practice after separation of employment. However, a lawyer may execute an employment contract that is drafted in a manner to restrict only those future activities that do not constitute the practice of law.¹⁴

Stock or Stock Options

There is no inherent conflict of interest when a lawyer represents a corporation in which he or she owns stock.¹⁵ However, a lawyer must comply with Prof.Cond.R. 1.8(a) if accepting stock or stock options in a client corporation in connection with the provision of legal services.¹⁶ To accept stock or stock options in connection with providing legal services, the transaction itself must be fair and reasonable.¹⁷ A lawyer must also address all the following in writing: 1) all the terms of the transaction; 2) advise the client and give the client a reasonable opportunity to seek outside counsel; 3) obtain informed consent as to the terms and lawyer's role in the transaction. When evaluating whether the terms of the transaction are fair and reasonable, a lawyer should consider the nature, size, financial power, and sophistication of the client entity. A lawyer must continue to monitor for any material limitation conflict that may arise due to his or her personal interest in the value of the stock of the corporation. If the lawyer feels that he or she may fail to provide appropriate advice based on this interest, then he or she must divest the interest or withdraw from representation.

Purchase of Products

Prof.Cond.R. 1.8(a) does not apply to standard commercial transactions between a lawyer and client. Any products and services that a client generally markets to others is considered a standard commercial transaction outside the scope of Prof.Cond.R. 1.8(a).¹⁸ Requiring a client and lawyer to complete the Prof.

Cond.R. 1.8(a) requirements when a lawyer has no advantage over a client is unnecessary and impracticable.¹⁹

Sharing Legal Fees

In certain circumstances it may be necessary for in-house counsel to refer organizational legal work to outside counsel. In-house counsel must be aware that a lawyer cannot share legal fees with another lawyer who is not in the same firm unless certain requirements are met.²⁰

In-house counsel may not refer some of an organizational client's legal work to outside counsel and then accept a portion of those fees back as a "referral fee."²¹ This type of arrangement deprives the client of relying on its in-house counsel to choose honestly among lawyers by comparing their skills, abilities, reputation, knowledge of the law, and fees to be charged.²²

Confidentiality & Attorney-Client Privilege

Questions of confidentiality and privilege can be mixed questions of law and ethics. The duty of confidentiality prescribed by the Rules of Professional Conduct applies to an organizational client just as it does to any client relationship.

Attorney-Client Privilege

Attorney-client privilege is statutorily governed by R.C. 2317.02, and its application to corporations is governed by R.C. 2317.021.²³ While counsel should conduct their own legal research related to privilege, counsel should be aware of the following general concepts outlined in Ohio case law:

- The attorney-client privilege belongs to the organization and not its employees outside their employment capacity.²⁴
- Privilege can be waived or asserted by those constituents endowed with appropriate authority by the organization, usually officers and directors.²⁵

- The authority to waive or assert privilege typically ends with termination of employment or other revocation of authority.²⁶
- When a corporation has been dissolved, the privilege extends to the last board of directors, their successors or assigns, or the trustees, their successors or assigns.²⁷

Communications from counsel when acting in a business capacity, rather than providing legal advice may not be privileged.

Confidentiality

When questions of confidentiality arise, counsel must look to Prof.Cond.R. 1.13 in connection with Prof.Cond.R. 1.6. Generally, communications from constituents to counsel are confidential to those outside the corporation but may be shared with the organizational client.²⁸ This includes investigative interviews completed by counsel.²⁹ If a constituent asks to disclose information to counsel that the constituent wants held in confidence, counsel must inform the constituent that any information provided may be disclosed to the organization.³⁰

The discretion or duty to reveal information outside the organization is governed by Prof.Cond.R. 1.6(b) and (d). Prof. Cond.R. 1.6(b) lists exceptions as to when information may be revealed. Prof.Cond.R. 1.6(d) indicates when information must be revealed.

Internal Misconduct

As counsel to an organization, a lawyer's duty to protect the client arises when a constituent's action, intended action, or refusal to act (1) violates a legal obligation to the organization, or (2) is a violation of law that reasonably might be imputed to the organization and is likely to result in a substantial injury to the organization.³¹

A lawyer in this situation must proceed as necessary in the best interest of the organization and may consider the following to determine how to proceed:

- The seriousness and consequences of the action;
- The responsibility of the constituent in the organization;
- The motivation of the constituent involved, including whether the conduct was the result of a misunderstanding of duty or persistent misconduct after counseling;
- The policies of the organization; and
- Any other relevant consideration.³²

A lawyer need not act when the conduct or decisions in question concern policy or operations and the lawyer simply disagrees with the decision or finds it to be imprudent. When counsel determines that he or she must act to protect the organization, counsel must refer the matter to a higher authority and, if warranted, to the highest authority that can act on behalf of the organization.

If counsel reports internal misconduct and the organization fails to act, counsel must consider if it is necessary to withdraw (i.e. resign if in-house counsel). Prof.Cond.R. 1.16 provides guidance for counsel as to when it is permissible or required to withdraw from representation. A lawyer must resign if continued representation will result in a violation of the Rules or the law.³³

The Ohio Rules of Professional Conduct include two significant differences in Prof. Cond.R. 1.13 when compared to the ABA Model Rules of Professional Conduct. First, Prof.Cond.R. 1.13 does not include a special “reporting out” requirement addressing internal misconduct but expressly limits “reporting out” to the exceptions found in Prof.Cond.R. 1.6. Second, Prof.Cond.R. 1.13 does not have a “noisy withdrawal” provision that requires counsel to make sure that the governing body of the organization is aware that counsel’s resignation or termination was the result of an attempt to report internal misconduct “up” or “out.”

Communication with Person Represented by Counsel

Prof.Cond.R. 4.2 prohibits a lawyer from communicating “about the subject of the representation with a person the lawyer knows to be represented by another lawyer * * * .” The application of Prof.Cond.R. 4.2, 1.13, and the conflict-of-interest rules, do not support a blanket assertion of representation by counsel of the organization and *all* of the organization’s current and former employees. Thus, a lawyer for an organization may not prohibit contact by opposing counsel with all current and former employees.³⁴

Counsel for an organization may appropriately object to adverse counsel contacting certain categories of current employees without counsel’s permission. First, counsel may instruct opposing counsel not to communicate with any constituent who: 1) supervises; 2) directs; or 3) regularly consults with the organization’s lawyer in regard to the matter.³⁵ Second, counsel may prohibit opposing counsel from communicating with any constituent who has authority to obligate the organization in the matter.³⁶ Third, counsel may prohibit opposing counsel from communicating with any constituent whose act or omission in connection with the matter may be imputed to the organization.³⁷

However, once an employee has left an organization, he or she no longer supervises, directs, or consults with the organization’s lawyer and cannot obligate the organization. Consequently, counsel may not instruct opposing counsel to refrain from contacting former employees. Consequently, organizational counsel may not instruct opposing counsel to refrain from contacting former employees. Even if a former employee’s acts or omissions may be imputed to the organization, counsel still may not instruct opposing counsel to refrain from contacting the former employee. Counsel may require opposing counsel to obtain permission to contact former employees if counsel is representing the former employee in an

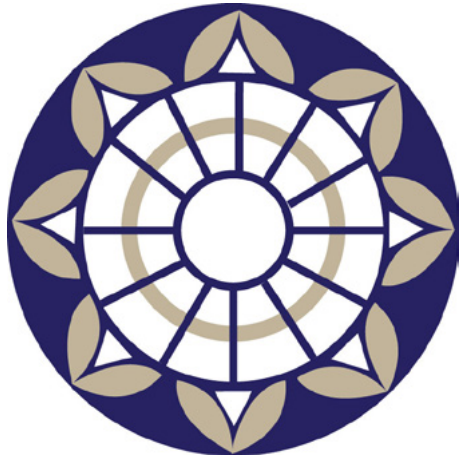
individual capacity and is able to do so in compliance with Prof.Cond.R. 1.7.

Unauthorized Practice of Law

A lawyer may not practice law in violation of the regulation of the legal profession in that jurisdiction.³⁸ Even when in-house counsel does not appear in court as part of his or her duties, this rule applies. In addition to abiding by the licensing requirements of his or her employer, in-house counsel must abide by the licensing requirements in the jurisdiction where he or she works and, in any jurisdiction where he or she holds an active license.³⁹ In Ohio, lawyers registered under corporate counsel status may perform legal services for the qualified employer, but only on matters related to the lawyer's work for the employer. Further, a lawyer registered as corporate counsel may not: 1) appear before a court or tribunal without permission by the court or tribunal; 2) provide legal services to any other person; and (3) hold him or herself out as being authorized to practice law in Ohio.⁴⁰

Endnotes

- 1 Prof.Cond.R. 1.13, cmt. [1].
- 2 *Id.* See also Adv. Op. 2018-1.
- 3 *Id.*
- 4 *Id.*
- 5 Adv. Op. 2018-1.
- 6 *Id.*
- 7 *Id.*
- 8 Prof.Cond.R. 1.13(e).
- 9 ABA Formal Op. 99-415.
- 10 Adv. Op. 2008-02 and Prof.Cond.R. 1.7, cmt. [19].
- 11 Prof.Cond.R. 1.9, cmt. [19].
- 12 Prof.Cond.R. 1.0(c) and 1.10(a).
- 13 Prof.Cond.R. 1.5(a).
- 14 Adv. Op. 2020-01.
- 15 ABA Formal Op. 00-418 (2000).
- 16 *Columbus Bar Assn. v. Barns*, 156 Ohio St.3d 50, 2018-Ohio-5098 and *Columbus Bar Assn. v. Polly-Murphy*, 167 Ohio St.3d 1, 2021-Ohio-3302.
- 17 *Id.*
- 18 *Id.* at cmt. [1].
- 19 *Id.*
- 20 Prof.Cond.R. 1.5(e).
- 21 *Ohio State Bar Assn. v. Kanter*, 86 Ohio St.3d 554 (1999).
- 22 *Id.*
- 23 *Shaffer v. OhioHealth Corp.*, 2004-Ohio-63, ¶9.
- 24 See *Shaffer* at ¶10.
- 25 *Id.*
- 26 *Id.*
- 27 R.C. 2317.021(A).
- 28 Prof.Cond.R. 1.13, cmt. [2].
- 29 *Id.*
- 30 Prof.Cond.R. 1.13, cmt. [3] & [4].
- 31 Prof.Cond.R. 1.13(b).
- 32 Prof.Cond.R. 1.13, cmt. [4].
- 33 Prof.Cond.R. 1.16(a)(1).
- 34 Adv. Op. 2016-5 (citing ABA Formal Op. 95-396 (1995)).
- 35 Prof.Cond.R. 4.2, cmt. [7].
- 36 *Id.*
- 37 *Id.*
- 38 Prof.Cond.R. 5.5(a).
- 39 *Disciplinary Counsel v. Fuhry*, 151 Ohio St.3d 549, 2017-Ohio-8813 and *Disciplinary Counsel v. Maciak*, 153 Ohio St.3d 185, 2018-Ohio-544.
- 40 Gov.Bar R. VI(6)(F).
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Columbus, Ohio 43215-3431

Published December 2022