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Ethics and Risk Allocation between In-House and Outside Counsel

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INTRODUCTION

Time was, the role of in-house counsel was somewhat limited. Near the end of a lawyer's career, a lawyer would go in-house and coordinate outside counsel, who did the substantive work. Occasionally the general counsel would review corporate minutes or other routine matters. Most companies that had in-house counsel were quite large, but their in-house staffs were small.

The first reported opinion involving an ethical issue for an in-house lawyer was in 1989, but in that case the in-house counsel was the victim of the outside lawyer's unethical conduct (this dichotomy—in-house lawyer as both client and lawyer will occur repeatedly in this paper).

The first reported case in which an in-house attorney's ethical conduct was addressed was 1991, and actually there it was a former in-house counsel who was trying to represent a party adverse to the former client and thus the issue of the scope of representation while in-house was raised. The first reported case regarding ethical issues involving a contemporaneous in-house counsel was in 1995. The first reported opinion involving a malpractice claim against an in-house lawyer was not until 1998.

But no more. Today, an in-house lawyer might be one of only two or three employees at a small company, especially in the IT or IP fields. Large companies have in-house staffs larger than many law firms (for years the in-house Department at Qwest was the fourth largest law firm in Denver). Both malpractice cases and ethical violations against in-house counsel are no longer rare.

With the growing size of in-house law firms is a growing specialization and growing expectation of more substantive work. This is especially true in litigation, which was once inevitably outsourced but now is handled in-house to a greater extent than ever. But it is also

true in transactional practices, where now in-house lawyers have their own transactional sub-specialties.

Despite this trend, the Texas Disciplinary Rules of Professional Conduct ("Texas Rules"), like those of most states, pay scant attention to in-house counsel. In-house counsel is only expressly mentioned twice in the Texas Rules: once in the definition of "firm" and once in Texas Rule 1.10, Imputed Disqualification (reminding lawyers that if a "firm" is disqualified due to the disqualification of one lawyer in it, then this could include an in-house legal department).

Coinciding with the increase in in-house counsel has been an explosion of electronic communications and electronically-stored information. This has substantially changed the discovery process in litigation and often aspects of transactional practice as well, particularly due diligence in sales.

SOME BASIC RESOURCES

Texas Rule 1.01 Competent and Diligent Representation:

> (a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence . . . .

Texas Rule 1.02 Scope and Objectives of Representation:

> (a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a client's decisions: (1) concerning the objectives and general methods of representation . . . .

Texas Rule 1.12 Organization as Client

> (a) A lawyer employed or retained by an organization represents the entity. . . .
> (e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

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