ETHICS FOR IN-HOUSE COUNSEL

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CHAPTER 8
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LAW-RELATED PUBLICATIONS

The New Rules of Professional Conduct: Significant Changes for In-House Counsel, 36 Colo. Law No. 11, p. 71 (November, 2007) also available at firm web site (www.fwlaw.com)


Amendment to Federal Rule of Evidence 701 www.fwlaw.com (2001)


Domain Name Dispute Resolution www.fwlaw.com (1998)
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ETHICS FOR IN-HOUSE COUNSEL

I. INTRODUCTION

In-house counsel have dual roles. First, they are lawyers working for their clients. Second, they are gatekeepers for legal services, and often are viewed as the client itself by outside counsel. Thus in-house counsel must be familiar with the Texas Disciplinary Rules of Professional Conduct ("Rules") from both perspectives—as a lawyer and as a client.

Further, the stakes may be higher for in-house counsel than for outside counsel. Although outside counsel may have the fallback of ceasing representation of a particular client if things get too sticky, ethically speaking, in-house counsel usually have no such luxury.

This article provides an overview of how the Rules, along with some recent Texas Professional Ethics Opinions ("Opinions") apply to in-house counsel both as lawyer and as client. The discussion is divided into three broad categories: getting hired or promoted as in-house counsel, everyday practice in-house, and handling things that go wrong.

II. GETTING HIRED (OR PROMOTED) IN-HOUSE

A. Being Licensed in Texas

There is no exception in the Rules for In-house counsel. The first aspect of that condition is this: In-house counsel must be admitted to practice law in Texas. While some other states do not require in-house counsel to be admitted to practice in-house, Texas has no such exception. Attorneys regularly working or practicing in Texas must be admitted to the Texas bar. As discussed below in the "In-House Practice" section, having an attorney not licensed in Texas practicing in-house raises serious ethical issues, both for that attorney and the other attorneys in house at the same company.

B. Compensation issues

1. Acceptance of stock or stock options may be a "prohibited transaction"

   If an in-house counsel position includes compensation in the form of stock, stock options, or other non-monetary consideration, being hired by a client is itself a "business transaction with a client." Under Rule 1.08 (which has the ominous and foreboding title of "Conflict of Interest: Prohibited Transactions"), a lawyer may not enter into a business transaction with a client unless the transaction has certain characteristics and certain procedural steps are taken.

   Generally, the transaction must be fair and reasonable to the client, transmitted in writing, and reasonably understandable by the client. The client must be given time to have other counsel review the transaction before it is consummated. The client must give written, informed consent to the transaction.

   When applied to a client offering an in-house position to an attorney, some of these conditions usually are met. For example, the offer presumably will be understandable by the client if the client is making it.

   The offeree attorney should make sure the transaction complies with Rule 1.08, however. Particularly, he or she should advise the offeror to have another attorney review the offer and give the offeror time to do so. This is especially important in a small, start-up company, where the client may be less sophisticated, the lawyer’s influence greater, and each employee’s compensation may be unique.

   The danger is not so much a grievance by the management team hiring the lawyer later claiming they themselves did not understand the offer, but rather a shareholder derivative suit or some other litigation in the future. If a disgruntled shareholder brings suit claiming management insiders (who may well include in-house counsel) looted the company, the shareholder may argue that the lawyer received the stock or stock options in an unethical fashion.

   If in-house counsel later is offered a promotion and non-monetary compensation, in-house counsel should again follow the Rule 1.08 procedures. If, as is often the case, the in-house attorney is offered the same compensation package that other employees are being offered, this would be strong evidence that the offer was objectively reasonable. Even so, the in-house attorney still should advise the client to have another lawyer review the transaction and give the client time to do so. This is especially important in a small company, where each employee’s compensation may be unique.

   2. Non-monetary compensation may create an unconscionable fee

   Traditionally, a contingency fee lawyer who only wrote a letter or two could receive a disproportionate fee because it was possible that he or she could have had to take the case through trial without receiving any compensation. Thus the fee was reasonable (or at least not unconscionable) at the time the fee arrangement was created.

   The same analysis should apply to stock and stock options—the stock or options may be worth little at the time they are awarded to in-house counsel and thus the fee was reasonable at the time it was paid. The fact that the stock options may be quite valuable by the time they vest was not only not determinative, but not even relevant.

   Rule 1.04 now provides, “A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or an unconscionable one.” (Emphasis...

The comments make clear that the analysis of whether the fee is unconscionable should be made both at the time the agreement for the fee is entered into and at the time the fee actually is collected. Thus, stock options that may be worthless when issued but valuable by the time they vest may be subject to attack by the same disgruntled stockholder referenced above, especially if they have been cashed in before the stock later dropped in value.

In this situation, however, the disgruntled stockholder has an even better argument than the one in part a above, because even if the transaction was reasonable when made, and even if the lawyer complied with the requirements of Rule 1.08, the fee nevertheless may be unconscionable at the time it is collected.

3. **Non-monetary compensation may create conflicts of interest**

   The lawyer considering going in-house and being paid with stock or stock options should always consider the limits on representation provided for in Rules 1.06 (Conflict of Interest) and 2.01 (Independent Judgment). For example, consider a situation where the in-house attorney has stock options in the employer/client, and those options have been earmarked for the attorney’s retirement. The client is considering two possible courses of action, one that will result in an increase in the price of the stock in the short run but may be riskier in the long run. The other will provide greater certainty in value in the long run, but the stock’s value will not spike in the short run.

   If the attorney’s advice would be different if he or she was two years from retirement than it would be if the attorney was twenty years from retirement, the attorney probably has a “material limitation” conflict under Rule 1.06(b) and is not exercising independent judgment as required by Rule 2.01. Although there may be ways around this (discussed below), it may be simpler for the in-house attorney to request only monetary compensation.

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### III. IN-HOUSE PRACTICE

Once hired as in-house counsel, numerous ethical issues may arise in day-to-day practices that are affected by the New Rules.

#### A. Licensing

As noted above, there is no exception to the requirement of licensure for Texas in-house counsel. This raises numerous problems in the actual practice of the in-house department.

1. It is a crime to practice law without a license;
2. it is an ethical violation in the state in which the lawyer is licensed; (3) the disgruntled shareholder might attack even the wages earned by the unlicensed in-house counsel on the ground that he or she was not authorized to practice law and therefore should not have been paid; and (4) practicing without a license may raise serious issues of privilege for the client.

   One of the necessary elements of the attorney-client privilege is a communication between a client and an attorney. If the in-house employee is practicing law without a license, however, it is not clear that the attorney-client privilege is created. Thus, all communications between the in-house employee and the client may be subject to discovery.

   Further, this creates an issue for legal counsel with unlicensed co-workers. Under Rule 5.05(b), it is an ethical violation to assist in the unauthorized practice of law, which one is likely doing by knowingly practicing with an unlicensed co-worker.

#### B. Rule 1.01: Diligence

Common complaints of in-house counsel include both having too much work to do and having to do work that is outside of their area of comfort. In addition to the general stresses of such problems, they also raise ethical issues.

Comment [6] to New Rule 1.01 (Competent and Diligent Representation), provides, “A lawyer’s work load must be controlled so that each matter can be handled with diligence and competence.” This may provide important fodder for discussion regarding in-house counsel’s workload, both in terms of quantity and diversity.

#### C. Rule 1.04: Fees

If in-house counsel performs services for which the customer of the client is charged, the client is allowed to charge only its “actual cost” for in-house counsel for such services, i.e., the pro-rata share of the lawyer’s salary. If the company itself made a profit on the lawyer’s work, that would be a violation of Rule 1.04, which prohibit splitting of legal fees with non-lawyers.

#### D. Rule 1.05: Confidentiality of Information

Rule 1.05 was changed in 2005, and must be considered by in-house counsel along with the federal Sarbanes-Oxley Act of 2002 and the SEC’s implementing regulations. Traditionally, an attorney could reveal only information protected by Rule 1.05 when the client intended to commit a serious crime, and only the information necessary to prevent the crime.

As enacted, the Sarbanes Oxley statute appeared to enable a lawyer to reveal information to rectify the consequences of any financial crime. Given the corporate scandals that led to Sarbanes Oxley, the general understanding was that the attorney could
disclose where the spoils from the looting of the corporate treasury were hidden, even though the crime had already occurred. Under the Sarbanes Oxley regulations that were later enacted and are currently in force, however, this exception is limited to instances where the attorney’s services are used to perpetuate the crime.9

Under Rule 1.05(c)(8), the lawyer can reveal the same information as before, and also reveal information:

To the extent revelation appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.

This is the first time Texas has allowed a lawyer to breach the obligation of client confidentiality to “rectify” the consequences of a crime or fraud. This does not go as far as the Sarbanes Oxley statute, because of the requirement that the lawyer’s conduct be involved in the crime or fraud, but it still is a revolutionary development and matches the current regulations under Sarbanes Oxley.10

Rule 1.05(c)(4) states that a lawyer (in-house or outside) may reveal confidential information “when the lawyer has reason to believe it is necessary to comply with a court order. . . .” This likely includes a subpoena.

A comment to Rule 1.05 notes that even if confidential information may be revealed, the lawyer generally should assert the attorney-client privilege on behalf of the client. The tribunal nevertheless may order disclosure, in which case the lawyer “may testify as ordered by the court.”11 It is a good idea for the lawyer to consult with the client about the possibility of an immediate appeal or prohibition proceeding before taking the stand or disclosing documents.

Under Opinion 572, it is ethically acceptable for an attorney to disclose confidential information to third party independent contractors, such as a copy service, if the lawyer reasonably believes the contractor will keep the information confidential.12 The Opinion is limited, however, to circumstances where the client did not instruct the lawyer otherwise. Thus if in-house counsel has a particularly sensitive matter, he or she should instruct outside counsel as such.

E. Rule 1.06: Conflict of Interest: General Rule

Rule 1.06 is organized to require lawyers to analyze conflicts of interest in two categories—“directly adverse to client” conflicts and “material limitation” conflicts. To resolve either type of conflict, the same process is used. First, identify the client or clients to determine whether a conflict exists. Second, determine if the conflict is waiveable, i.e., whether the representation could be unaffected by the conflict. Third, if so, each affected client must give consent “to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences” of the representation.

1. Directly Adverse Conflicts

Although at first blush “directly adverse to client” conflicts might not appear to affect in-house counsel, it is possible for in-house counsel to be adverse to his or her own clients, particularly when there are groups of related companies for which the in-house counsel sometimes works. In-house counsel should go through the same steps described above.

Representing one of several related companies, without more, does not prevent being adverse to the other companies; however, there often is more. For example, if in-house counsel paid by one company has done even uncompensated work for related companies, this can create serious conflicts for the attorney for future inter-company issues. In such case, the in-house attorney must obtain informed consent confirmed in writing from all clients involved.

2. Material Limitation Conflicts

The material limitation conflict also may arise for in-house counsel—recall the above discussion regarding stock or stock options that are earmarked for counsel’s retirement. If counsel cannot give objective, independent advice, he or she must withdraw from the matter under Rules 1.06 and 2.01 (requiring lawyer to exercise “independent professional judgment”). There are no “in-house” exceptions to these rules (or any others, for that matter).

If the attorney finds herself or himself in such a situation, then the attorney must either divest the stock or not participate in the decision-making process itself, unless the attorney complies with Rule 1.06(c). That rule provides an exception where the lawyer: (1) reasonably believes the representation will not be affected; and (2) the client consents after full disclosure of the existence, nature, implications, and possible consequences of the representations. If the attorney is really troubled by the situation, part (1) of this exception is not likely to be met.

3. Board of Director Conflicts

Comment [16] to Rule 1.06 impresses the seriousness of being a lawyer for a company and serving on the board of directors. Such double duty is common for in-house counsel, especially general counsel. Although not a conflict per se, the lawyer must be vigilant regarding whether a conflict has arisen,
especially when the lawyer will be called on to give advice to the board.

Comment [16] suggests the following factors, among others, should be considered in determining whether an attorney can both represent a company and serve on the company’s board of directors:

a. how often the lawyer will be called on to give advice to the board;
b. the potential intensity of the conflict; and

c. the potential effect of the lawyer’s resignation from the board.

If there is a material risk the conflict will affect counsel’s role as lawyer, he or she should not serve on the board. As a member of the board, the lawyer should advise other board members that the lawyer’s mere presence at meetings does not mean the attorney-client privilege applies. 13

F. Rule 1.10: Special Conflicts of Interest for Former Government Employees

If a government attorney leaves government practice and becomes in-house counsel, special rules regarding conflicts of interest apply. Rule 1.10 provides that the lawyer cannot work on any matter for the new firm (which is defined to include an in-house legal department) that the lawyer worked on “personally and substantially” while employed by the government, unless the government agency gives informed consent after consultation. 14

This can result in the entire in-house staff of a company being disqualified, as in-house staff is considered a firm for this purpose. Disqualification of the department can be avoided if the new employer complies with the following: (1) the disqualified lawyer is timely screened and does not receive a fee on the matter; and (2) the disqualified lawyer gives notice to the government agency, as soon as practicable.

A recent Opinion has confirmed that if an attorney that has left government regulatory practice did not “personally and substantially” work on a particular matter while a government lawyer, the attorney can appear before his former employer regulatory agency on that matter. 15

A lawyer who has personal (as opposed to implied or constructive) confidential governmental information about persons or other legal entities may not represent a private client whose interests are adverse to that person. 16 This could raise serious issues for government regulatory lawyers who then go in-house in their same industry and who want to oppose regulatory overtures of competitors.

G. Rule 1.12: Organization as Client

Most lawyers who represent businesses deal with a certain group of constituents within that business. In such circumstances, it can sometimes be unclear to both the lawyer and the client who is being represented. Rule 1.12 makes clear it is the organization itself, not any particular group within it, that is the client. Comment 4 thereto states that when the lawyer knows or should know that the constituents with whom the lawyer is dealing have interests adverse to the organization, “the lawyer shall explain the identity of the client.” 17 The lawyer must also explain to the constituent group that the attorney-client privilege may not apply. 18

Many lawyers do not actively practice law, and this is especially true of in-house counsel. The fact that the lawyer is acting as a business person, however, does not mean that the lawyer is excused from the ethics Rules. To the contrary, both the Rules and the courts have consistently stated that as long as the lawyer is licensed, the ethics Rules apply. 19

A lawyer who also functions as a business person should be vigilant to observe the two roles, and be quick to remind others in the workplace as the roles change.

To underscore the schizophrenic state described above, a lawyer acting as a business person is bound by the ethical rules, and has among his or her ethical duties the obligation to tell other business people at “the client” that the lawyer is not acting as a lawyer and the attorney-client privilege does not apply.

H. Rules 4.02 and 4.03: Communications with Others

1. Dealing with a represented party

A lawyer cannot communicate with a represented person, except when the other lawyer consents. This can raise issues for transactional in-house counsel, who routinely deal with businesses that may, or may not, be represented by in-house or outside counsel.

Rule 4.02(c) states which members of the constituent group of a company (or government entity) are covered by the representation. They include those: (1) with managerial authority for that matter; (2) those current employees whose act or omission may make the entity vicariously liable. However, it is limited to representation “regarding the subject.” Thus even if the other side in a business deal has regular in-house or outside counsel, if the counsel is not yet working on the particular transaction in question, then Rule 4.02 (c) probably does not apply.

For example, if a businessman says “at some point I am going to have to run this past our legal department,” there is probably not an attorney-client relationship on that matter, and the lawyer is free to continue communicating directly on the business
points of the transaction. If the businessman says, however, “I was talking with Ms. Smith in legal, and she said . . . .” then there is a representation and the lawyer should break off communications until permission from Ms. Smith is obtained.

Rule 4.02, Comment 2, provides the helpful reminder that this prohibition on lawyers and those they direct (including their staff), but not clients. Thus, when the client says, “it is the other lawyer who is killing this deal, can we call the buyer directly?” The lawyer can say, “I cannot, but you can.”

2. Dealing with an unrepresented party

Rule 4.03 (Dealing with Unrepresented Person) provides that the only legal advice the lawyer should give an unrepresented person is to get counsel. This can be quite frustrating for in-house counsel when trying to complete a transaction or settle a dispute with an unrepresented person, and the other person begins asking questions such as “what is the effect of this release?” or “what rights does this warranty give me?”

The pressure to close the deal may encourage the lawyer to answer these questions in substance, but that should be avoided due to the ethical considerations above. Further, it can be very messy when the other person then grieves the in-house lawyer (or sues the in-house lawyer for malpractice) claiming that he thought the lawyer was giving him legal advice, and bad advice at that.

I. Supervisory Duties of In-House Counsel

Rule 5.01(a) (Responsibilities of a Partner or Supervisory Lawyer) applies to any lawyer who is a “partner or supervising lawyer” in a “firm.” Although the definition of “partner” would exclude in-house counsel, the definition of “firm” includes “lawyers employed in the legal department of a corporation . . . or other organization.” Thus in-house counsel who supervise other lawyers are subject to Rule 5.01 and one who supervises non-lawyers is subject to Rule 5.03.

Rule 5.01 allows in-house counsel to be disciplined if the lawyer “orders, encourages, or knowingly permits the [ unethical] conduct involved” or “if the lawyer has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer’s violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer’s violations.”

Rule 5.03 imposes even greater burdens regarding the supervision of non-lawyer assistants. The lawyer “shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” This greater burden is because the Rules themselves tend to require ethical conduct by a supervised lawyer, whereas the Rules do not apply to non-lawyers.

The supervising lawyer can also be disciplined for the same conduct as above, i.e., knowingly failing to take remedial action. The comments to Rule 5.03 appear to exclude in-house attorneys, except for those with direct supervisory authority.

IV. WHEN THINGS GO WRONG

Not every transaction or case goes according to plan. When things go wrong, in-house counsel must know his or her duties both as lawyer and as client.

A. Reporting Errors

1. Company errors

In another out-growth of Sarbanes Oxley, Rule 1.12(c) now provides that a lawyer is obligated to engage in “up the ladder” reporting of ongoing actions that violate the law, or actions of constituents that violate a legal obligation to the organization, and are likely to result in substantial injury to the organization. The only exception is when the lawyer “reasonably believes that it is not necessary and in the best interests of the organization to do so.”

The good news for Texas lawyers is that if one gets fired for doing this, he or she is off the ethical hook—under the ABA Model Rules, the termination for whistle blowing does not end the lawyer’s ethical duties. The fired lawyer then has a duty to report the termination if the lawyer believes it was in retaliation for whistle blowing.

2. Lawyer errors

Rule 8.3 (Reporting Professional Misconduct) requires reporting of professional misconduct in certain circumstances. This applies to in-house counsel regardless of who engaged in the unethical conduct. It does not, however, require the lawyer to report the lawyer’s own misconduct to the client.

In-house counsel should be aware of the relatively low duty to disclose in the event of an error by outside counsel. Outside counsel does always have a duty to the client of truthfulness, however. Thus if outside counsel’s conduct appears to change, in-house counsel may want to ask some blunt, direct questions.

If it comes to light that the outside counsel has erred, it could be time to terminate the relationship. As several state ethics opinions have noted, however, few lawyers are more motivated to prevail than those who have erred. Thus the client may want the representation to continue.

If so, the outside lawyer must perform a Rule 1.06 analysis to determine whether there is a conflict or if the interests of the lawyer and client are aligned. If there is a conflict, then it must be determined if the conflict can be waived. If so, the final step is to obtain consent thereto in writing.
B. Terminating Representation

1. Terminating outside counsel

Under Opinion 570, when outside counsel is terminated it is required, upon request, to turn over its entire file, including the attorney’s notes, even if it has already provided the information to the client previously (assuming there is no lien in place).26

2. Resignation as in-house counsel

Rule 1.15 (Declining or Terminating Representation) should be considered by in-house counsel when deciding whether he or she must or can withdraw from the representation of the corporate client. If the representation does terminate, Rule 1.15(d) requires the withdrawing lawyer to take steps to the extent reasonably practicable to protect the client’s interests.

Depending on the circumstances, a number of issues, including the following, might be relevant for the departing attorney to consider:

• the client’s right to choose counsel
• notice to the client of the departure
• proper and continuous handling of client matters
• withdrawal from litigation by the attorney
• what to do with client files
• conflicts of interest arising out of the departing lawyer’s new job
• restrictions on the right to practice
• the duty of candor.

The attorney’s obligations to the client for proper and continuous handling of client matters could be significant, especially where the in-house staff is small. It may be that the in-house lawyer cannot simply quit with no notice the way other employees can.

C. Malpractice Claims Against In-House Counsel

Although malpractice actions against in-house counsel are rare, they are not unprecedented.27 They often arise in response to a demand for additional compensation by terminated in-house counsel.28

Many in-house counsel do not have malpractice insurance, perhaps relying on the company’s directors’ and officers’ policy. Whether such a policy would cover a malpractice claim against in-house counsel is beyond the scope of this article, but it should be noted that many such policies exclude coverage for “professional services.”29 A rider for in-house malpractice can often be obtained very inexpensively.

If a claim is actually filed, then the in-house lawyer has every right to get his or her own counsel. Prior to filing of a claim or other overt manifestation of a conflict between the attorney and client, however, and when considering disciplinary issues, the need for outside legal advice can cause a problem for in-house counsel. There is no exception under Rule 1.05 that allows a lawyer to disclose client confidences when seeking his or her own counsel.30 In other words, lawyers are about the only people not allowed to have access to counsel when things go awry. If in-house counsel does need to talk to a lawyer, he or she should do so in a way that no attorney-client information is disclosed (use of vague hypothetical examples might suffice).

V. CONCLUSION

The role of in-house counsel often requires them to view matters from two perspectives—as the lawyer and as the client. Further, withdrawal from representation is a serious decision when the lawyer has only one client. In-house counsel therefore must be familiar with an attorney’s ethical obligations from both perspectives, be prepared to counsel their client, and understand the ethical significance of the actions of their outside counsel.
Notes

1 So many states have such exceptions that the ABA is considering a new Model Rule 5.6 that would require all in-house counsel to register with the state bar, pay a fee, and submit to discipline. Some states already have such a rule. E.g., Colorado Rule of Civil Procedure 222 (allowing attorney admitted in another jurisdiction with “a single client” (including groups of related companies) to not be admitted to practice in Colorado so long as the attorney registers with the Colorado Supreme Court, pays a fee, and agrees to submit to the jurisdiction of the court).

2 In fact, receiving a salary technically would be a “business transaction with a client.” Under Rule 1.08, however, the hiring of a lawyer for a wage is not a prohibited transaction. This point is underscored by Rule 1.04, and the comments thereto.

3 Currently, the Rules do not set a standard for conduct outside of the disciplinary context. See Rules, Preamble Scope, at ¶ 15. The new ABA Model Rules, however, recognize that violation of the rules may be admitted as direct evidence of breach of the applicable standard of conduct, but state that this should be done only in “appropriate cases.” Some states have already adopted this rule. Meanwhile, even currently, violation of the Rules can be offered in appropriate cases as supporting evidence of the standard of care. E.g., Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896 (Tex. App. 2001) rev’d on other grounds (ethical rules admitted to show standard of care).

4 E.g., Texas v. Martinez, 116 S.W.3d 385 (Tex. App. 2003) (necessary element of attorney-client privilege is one party to communication was attorney).

5 Brink v. Dalesio, 82 F.R.D. 664 (D. Md. 1979) (attorney-client privilege did not protect communications between client in Maryland and “attorney” in Maryland where, inter alia, lawyer officed in Maryland, but had never been licensed to practice there, had only ever been licensed in Virginia, and license in Virginia was inactive).

6 Texas Ethics Opinion 531 (1999) discusses the plan of a title company to charge for the services of its in-house counsel to prepare legal documents at “market rates” rather than the company’s cost. Texas Opinion 531 says this is unethical “fee-splitting” with a non-lawyer (the company). Only lawyers and law firms—not other companies—are allowed to profit from the practice of law.


9 17 C.F.R. § 205.3.

10 Prior to the adoption of the regulations, an interesting dispute arose between the S.E.C. and the Washington State Bar. The Washington Bar (which is a mandatory bar and which disciplines its members) announced that anyone who complied with Sarbanes Oxley in violation of the Washington equivalent of Rule 1.05 would be disciplined. The S.E.C. countered with a threat to enjoin such discipline under the supremacy clause. This never resulted in a resolution, as the S.E.C. regulations are more limited than the statute itself.

11 Rule 1.05 (Confidentiality of Information), Comment [6].


13 See Rule 1.12, Comment 4.

14 Rule 1.10(a).

15 Texas Professional Ethics Opinion 574 (September 2006).

16 Rule 1.10(c).

17 Rule 1.12(e).

18 Rule 1.12, Comment 4; see, e.g., Texas v. Martinez, 116 S.W. 3d 385 (Tex App. 2003) (attorney-client privilege only applies where communication is for purpose of legal advice, and therefore must be directed to lawyer in capacity as such).

19 See Rule 8.04(a)(1) (“A lawyer shall not ... violate these rules ... whether or not such violation occurred in the course of a client-lawyer relationship.”); see also Diaz v. Commission for Lawyer Discipline, 953 S.W.2d 435 (Tex. App. 1997) (rejecting argument that lawyer could not be disciplined for submitting false papers to court on the grounds that he did so not as a lawyer, but as a party).
20 See, Terminology Section of Rules.

21 Rule 5.03(a).

22 Rule 5.03(b)(ii).

23 See, Rule 5.03, Comment 2 (referring to “lawyers in positions of authority in a law firm or in a government agency. . .”).

24 Rule 1.12(c).

25 See ABA Model Rule 1.13(e).

26 Texas Professional Ethics Opinion 570 (May, 2006).


30 Rules 1.05(c)(5) and (6).