

---

## **E-89-8      House counsel professional conduct guidelines**

---

### **Questions**

What professional conduct guidelines would the Professional Ethics Committee suggest for full-time house counsel under the following circumstances:

1. When house counsel's employer proposes to bill or actually bills other legal entities (i.e., partnerships or corporations) for legal services provided to them by house counsel at his or her employer's direction?
2. When house counsel's employer directs house counsel to provide personal legal services to the principal shareholder and/or to his or her family members?
3. When house counsel's employer directs house counsel to provide all legal services required for all concerned in transactions and matters involving the employer-business and affiliated entities in which the employer and/or employer's family have financial interest?
4. When house counsel's employer discharges or threatens to discharge house for refusing to comply with employer directives that house counsel reasonably believes would involve house counsel in illegal conduct and/or professional misconduct?

### **Opinions**

1. Billing others for house counsel services. Wisconsin for-profit business entities may not engage in the practice of law. *See, e.g., State ex rel. State Bar v. Bonded Collections*, 36 Wis. 2d 643, 655-56, 154 N.W.2d 250 (1967); and Wisconsin OAG 39-86 (10/21/86). Lawyers may not assist nonlawyers in engaging in the practice of law (*see* SCR 20:5.5(b)) nor may lawyers share legal fees with nonlawyers (*see* SCR 20:5.4(a)). Therefore, except as permitted by SCR 11.06 (relating to group and prepaid legal services plans) or by other law (e.g., a court ordered attorney's fee award), full-time house counsel may not participate in any arrangement under which his or her employer charges for his

or her legal services. *In accord*, State Bar Committee on Professional Ethics, Formal Opinion E-83-5 (1983).

2. House counsel providing personal legal services to officers, directors or employees of employer or to family members thereof. If permitted by a full-time house counsel's employer, a house counsel may represent other persons or entities, whether they or the legal matters in question are related to the employer-business, but only subject to SCR 20:1.7 pertaining to representation of conflicting interests. *See* SCR 20:1.13(e). However, we believe that house counsel must exercise a high degree of caution in accepting such matters when they involve persons, entities or issues relating to his or her employment. And we further believe that house counsel and their employers would be well-advised to limit house counsel's services only to the employing entity.

House counsel who nevertheless engages in providing legal services to those other than the employing entity and the employing entity should be aware that:

(a) House counsel must comply with all standards of professional conduct when providing such services and that compliance may inconvenience or disrupt house counsel-employer relationships (e.g., compliance with confidentiality [SCR 20:1.6] and exercise of independent professional judgment [SCR 20:2.1] requirements).

(b) Circumstances could develop in which house counsel's employer could be held jointly and severally liable in a legal malpractice action brought by the persons or entities served. *See, e.g., Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973); and *In re Allstate Ins. Co.*, 722 S.W.2d 947, 953 (1987).

3. House counsel's dual representation of employing and affiliated entities. Although dual representation of a house counsel's employer and entities affiliated with the employer may be possible under some circumstances, it would seem generally ill advised unless the ownership interest in the respective entities were identical. *See, e.g., Glueck v. Jonathan Logan Inc.*, 512 F. Supp. 223 (S.D.N.Y. 1981), *aff'd* 653 F.2d 746 (2d Cir. 1981); and *Whiting Corp. v. White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977). *See also generally* SCR 20:1.7, 20:1.13(d) and (e) and 20:2.2. Because of the full-time house counsel-employer association, this committee believes that an objective finding that "the representation will not be adversely affected" would be unlikely, except in routine and/or financially inconsequential matters. SCR 20:1.7(b)(1). *See also* SCR 20:2.2(3) and Comment at "Confidentiality and Privilege."

4. Wrongful discharge of house counsel. (It has been argued that house counsel should have a cause of action for wrongful discharge when they are fired for refusing contrary to the employer's interests or orders, to break rules designed to protect the integrity of the legal system.

"Anyone . . . would have predicted as late as 1986 that house counsel be among the employees the courts would use the public policy exception to protect. Yet the first two appellate decisions on the question are to the contrary." T. Schneyer, "Professionalism and Public Policy: The Case of House Counsel," Institute for Legal Studies, 32 (U.W. Law School) (Aug. 1988), citing *Willy v. Costal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986) and *Herbster v. North American Co.*, 150 Ill. App. 3d 21, 501 N.E.2d 343 (1986).

Whether the wrongful discharge law in Wisconsin eventually is held to protect house counsel, it is clear that the rules of conduct applicable to attorneys generally apply to house counsel as well. *See, e.g.*, C. Wolfram, *Modern Legal Ethics* at 737 (1986). Some of the rules that may relate to potential wrongful discharge scenarios would be, for example: SCR 20:1.2(d) and (e); 20:1.6(b) and (c)(1); 20:1.13(b) and (c); 20:3.3(a)(4) and (c); 20:3.4(b); and 20:8.4(c). This committee concurs with those who argue for the extension of wrongful discharge protection for lawyers who adhere to the standards of conduct promulgated by the Wisconsin Supreme Court. *See generally Schneyer, supra* at 31-41.