

January 2015

This article is from Skadden's *2015 Insights* and is available at [skadden.com/insights](http://skadden.com/insights).

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From legal adviser to business strategist to compliance officer, an in-house counsel typically finds herself playing multiple roles in her organization. Each role requires knowing the organization's business, understanding its goals, and at all times demonstrating a commitment to its success. Yet these functions risk creating a tension with an in-house counsel's ultimate risk management responsibility. Protecting the organization's interests requires an in-house counsel to be clear about who the client is and what role the in-house counsel is undertaking, all while fostering a culture of compliance.

## Identifying the Client

To provide timely, relevant, effective advice, an in-house counsel must have an in-depth understanding of the organization's business, needs, goals and risk tolerance profile. Equally important is clarity about who is the client. Rule 1.13 of the ABA Model Rules of Professional Conduct (Organization as Client) states that the organization is the client of an in-house lawyer; the in-house lawyer does not represent the organization's constituents, e.g., its directors, officers, employees, members, shareholders or others.

As compared to outside counsel, a lawyer working in-house spends every day as a colleague of the organization's business people. This informality of relationships is useful as it furthers information flow, allowing an in-house counsel to stay up-to-date on business as well as legal issues. In such discussions, she must remain mindful of Model Rule 1.13(f), which provides that, when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the individual, the lawyer must explain to the individual that the organization is the lawyer's client. That is, an in-house lawyer must ensure employees understand that she does not represent them individually, and any discussion with her may not be kept confidential or privileged. (Model Rule 13(g) provides that the in-house lawyer may represent an individual jointly with the organization when doing so does not present a current client conflict under Model Rule 1.7.)

The duty of confidentiality runs to the organization, and the organization owns the privilege. Any lack of clarity on this point may create an impermissible conflict of interest and compromise an in-house counsel's ability to continue to represent the organization effectively, including due to the organization potentially forfeiting control of its otherwise privileged information to personnel claiming to be her clients. Consequences may include disqualification from the matter and possible malpractice claims. An in-house counsel also may find herself named as a witness in a matter.

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## The Potential for Conflicts of Interest and Inadvertent Employee-Clients Necessitates the Use of So-Called *Upjohn* Warnings.

Interviews and, where appropriate, other formal or informal conversations with employees about matters in which they may have distinct, personal interests should begin with a discussion of confidentiality and privilege, including reminders that an in-house does not represent the individual personally and that, while the communications are confidential and privileged, she may share anything said by the individual with others in or outside the organization because the privilege belongs to the organization.

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## Wearing Multiple Hats

Similarly, an in-house counsel must be clear as to whether she is advising on a legal or business matter. In-house counsel may be consulted on a wide variety of issues, including regulatory, compliance, personnel, public relations and business negotiations. Whether such communications constitute legal or business advice or some combination thereof can implicate privilege and ethics issues. Because an in-house lawyer's role often blurs these distinctions (or can later be claimed as such by an adversary), courts tend to scrutinize claims of privilege by an in-house lawyer more rigorously than those of an outside counsel. To preserve a later argument that the attorney-client privilege applies, an in-house counsel must indicate unambiguously where the advice sought or given is predominantly legal, or risk it being discovered by third parties.

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To strengthen a later assertion of privilege, documents seeking or providing legal advice from in-house counsel should identify in-house counsel as such and contain an explicit reference to a request for legal advice. Consider using a header such as "Request for Legal Advice" in addition to "Privileged and Confidential." If nonlegal personnel are communicating among themselves regarding legal advice or to collect information at the request of counsel, they should reference the request for legal advice or the request from counsel, e.g., "for the purpose of seeking legal advice" or "at the request of counsel."

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In addition, an in-house counsel should consider that offering business advice may dilute the effectiveness of her legal function. Because business assessments are often subjective and generally open to discussion and judgment among non-lawyers, a lawyer providing business advice or advice that combines legal and business judgments may create the perception that her legal counsel is also founded on subjectivity and ultimately beholden to the bottom line. This risks undermining her authority, which can be particularly problematic when handling objective legal requirements that could impose a cost on the business. Maintaining the trust of the organization's business people is crucial to an in-house counsel's success, and delving into a business role may undermine her credibility when it is most needed.

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## Promoting a Culture of Compliance

Ultimately, an in-house counsel's function is that of risk manager. Success requires establishing clear standards that are appropriate and practical. She must ensure — through training and formal and informal discussions — that employees are aware of and can identify the relevant risk issues, including when to turn to the legal department for guidance. Not every risk issue requires legal counsel involvement, so an effective in-house counsel will provide colleagues with the knowledge and tools to address foreseeable issues before they rise to the level of requiring the legal department's assistance or intervention.

An in-house counsel should not be afraid to be a deal-breaker when necessary. Sometimes colleagues need a reminder that an in-house counsel's role is to manage risks to the business and to enable the business to operate with the utmost integrity. This becomes easier as she builds credibility by offering thoughtful, practical legal guidance and develops her colleagues' confidence in her judgment. The time spent cultivating the perception of an in-house counsel as a principled partner dedicated to the organization's best interests will contribute significantly to her effectiveness and her client's ongoing success.