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**E-95-2 In-house counsel providing legal services to third parties**

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**Question**

May in-house counsel provide legal services, at the direction of the employer, to persons other than the employer, while still being compensated by the employer?

**Opinion**

It generally is permissible for in-house counsel to represent others at the employer's direction and without compensation from the other person, subject to certain safeguards. In undertaking such representation, in-house counsel by definition steps outside the role of in-house counsel. Any lawyer-client relationship created with a person other than the corporate employer must stand on its own terms, complete with all the responsibilities that ordinarily attach to the relation, and impervious to interference by the corporate employer.

In directing or permitting such outside representation, the corporate employer is in effect releasing in-house counsel to spend time on nonemployment matters. Although the representation may be instigated by the corporate employer and compensated by the corporation, in-house counsel is not acting as a corporate agent in performing the work. The outside client, not the corporate employer, enjoys all client rights, including but not limited to the right to direct the lawyer in his or her work under SCR 20:1.2, the right to be informed under SCR 20:1.4, the right to maintain confidentiality of information under SCR 20:1.6, the right to the lawyer's loyal service under SCR 20:1.7, and the right to the lawyer's best counsel and advice under SCR 20:2.1. In addition, the outside client is entitled to the protections afforded by SCR 20:1.8(f).

The corporate employer's decision to donate legal counsel to another client may serve the corporation's interests in any number of ways. What legitimate corporate interests may be served by directing or authorizing in-house counsel to provide legal services to others is beyond the scope of this opinion. Assuming that a legitimate corporate interest is being served, the corporate employer is entitled to expect no more in terms of benefits than those derived from the mere

fact of the representation of the client. It should expect no special benefit because *its* lawyer is representing the other client; in fact, in such representation, in-house counsel is *not* its lawyer, but rather lawyer for the other client.

The corporate employer is not entitled to be informed about the status of the representation (beyond whether it is continuing or terminated) nor is it entitled to any other information relating to the representation. *See* SCR 20:1.8(f)(3). Most certainly, the corporate employer is not entitled to have the representation proceed in such a manner that its interests are served. Moreover, decisions as to the objectives and means of the representation remain exclusively within the province of the lawyer and other client under SCR 20:1.2. *See also* 20:1.8(f)(2).

In-house counsel does owe continuing duties to its corporate client while representing the other client, particularly the duty to avoid conflicts of interests under SCR 20:1.7 and to maintain confidentiality of information under SCR 20:1.6. In many situations, particularly when the other client is a constituent of the corporate employer, a very substantial threshold concern in determining whether the representation may proceed is whether a conflict of interest is present. *See* SCR 20:1.7, 20:1.13(e), Formal Op. E-89-8. Formal Opinion E-89-8 addresses numerous issues relating to multiple representation by in-house counsel, particularly conflict of interest issues, and that opinion is hereby expressly reaffirmed.

The limitations and cautions discussed in this opinion should be communicated to the corporate employer and prospective client before any representation is commenced. *See* SCR 20:1.4 and 10:1.8(f). If both parties determine that the representation should proceed under these understandings and no other disqualifying circumstances are present, the representation is permissible. Because in-house counsel is stepping outside the role of in-house counsel in such representation and because the corporate employer is deriving no fees or share of fees from the representation, there would be no violation of SCR 20:5.5(b), which prohibits assisting another in the unauthorized practice of law. The corporation is not practicing law; in-house counsel is stepping outside his or her regular role to do so and should evaluate the possible need for compliance with the trust account rule, SCR 20:1.15, as well as the possible need for legal malpractice insurance. This assumes that the representation is not precluded by conflicts of interest or for other matter-specific reasons grounded in the law governing lawyers.