

Ethics: Real Cases, Real Issues: Why Should In-House Counsel Care?

Daniel J. Young, Partner

Research by: Amanda C. Cavazos, Summer Associate

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Agenda

Identify and Discuss

- When ethics rules apply to in-house counsel
- Fundamental rules that apply to in-house counsel
- Ethics rules that always apply to a licensed attorney

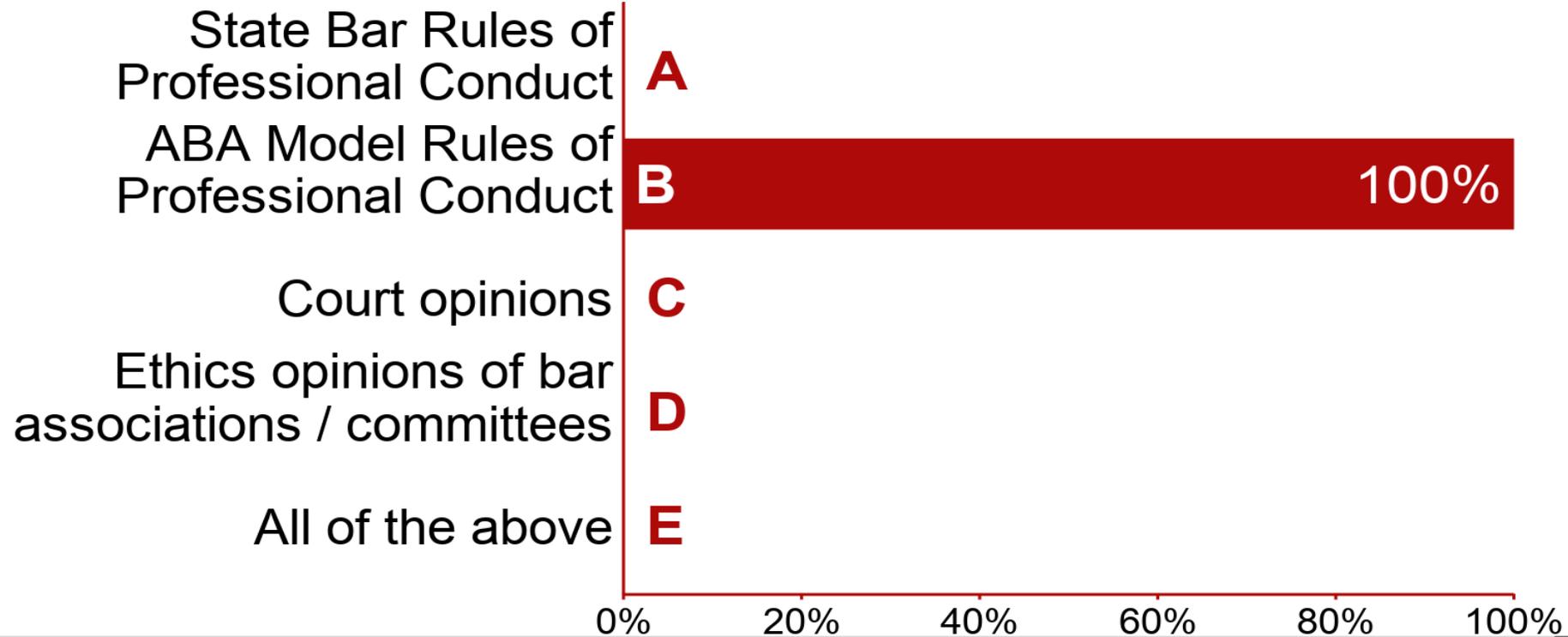
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Polling Question



Where can one find governing law and guidance regarding rules of professional conduct for attorneys?



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Duties in Attorney-Client Relationships

"A relationship of client and lawyer arises when:

- 1.** A person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
 - (a)** the lawyer manifests to the person consent to do so; or
 - (b)** the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; . . . "

Restatement Third, The Law Governing Lawyers §14

Fiduciary Duties in Confidential Relationships

Duties can arise even without a clear attorney-client relationship

- “A confidential relationship exists . . . as a matter of fact whenever one person has reposed a special confidence in another to the extent that the parties do not deal with one another on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other.” *Dinger v. Allfirst Financial, Inc.*, 82 F. App'x 261 (3d Cir. 2003)

Conflicts of Interests Between Counsel and Client

Conflicts Rules Apply to In-House Counsel

Client-Lawyer Relationship

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

- (a) **While lawyers are associated in a firm**, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 [concerning conflicts of interests] or 1.9 [concerning duties to former clients] . . .

Model Rule 1.0 Terminology

- . . . (c) "**Firm**" or "**law firm**" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or **the legal department of a corporation or other organization**.

Model Rule 1.7: Conflicts of Interest with Client

(a) Except as provided in paragraph (b), **a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.** A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to **another client, a former client or a third person or by a personal interest of the lawyer.**

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), **a lawyer may represent a client if:**

- (1) the **lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation** to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation **does not involve the assertion of a claim by one client against another client** represented by the lawyer in the same litigation or other proceeding before a tribunal; **and**
- (4) each affected client **gives informed consent**, confirmed in **writing**

Model Rule 1.8(a): Prohibited Transactions with Client

(a) A lawyer shall not **enter into a business transaction with a client** or **knowingly acquire an ownership, possessory, security or other pecuniary interest adverse** to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest **are fair and reasonable** to the client and are **fully disclosed and transmitted in writing** in a manner that can be reasonably understood by the client;
- (2) the client is **advised in writing of the desirability of** seeking and is given a reasonable opportunity to seek the advice of **independent legal counsel** on the transaction; and
- (3) **the client gives informed consent, in a writing signed by the client,** to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Model Rule 1.8(b): Disadvantaging the Client

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Case Studies

- *Kaye v. Rosefielde*, 432 N.J. Super. 421, 75 A.3d 1168 (N.J. Super. Ct. App. Div. 2013)
- *People v. Miller*, 354 P.3d 1136, 1142 (Colo. O.P.D.J. 2015)

Kaye v. Rosefielde (New Jersey)

- **Rosefielde's Conduct:**

- GC for multiple companies owned by Mr. Kaye, as well as COO
- Lawyer, but was not licensed in the state in which he was acting as GC
- Set up chain of command that bypassed Kaye
- Used deceptive and secretive scheme to acquire equity stakes in Kaye's businesses without providing any consideration
- Advised employee regarding a separation agreement disclosing conflicts or advising independent counsel
- Enlisted an employee to forge quitclaim deeds to be recorded as a settlement for defaulted timeshare owners in lieu of instituting formal foreclosure proceedings
- Sexual harassment/assault

Kaye v. Rosefielde (New Jersey)

- **Rosefielde's Defenses:**

- Prohibitions on getting an equity interest in his client don't apply to him because he is in-house
- He was acting in his capacity as COO for some of his conduct, not as an in-house lawyer



Takeaways from *Kaye v. Rosefielde*

- "We find nothing . . . to suggest or even imply that lawyers who are retained by corporate clients as in-house or general counsel are exempt from the proscription of [Rule 1.8(a)]." p. 1204.
- "In view of the trust placed in an attorney by his [or her] clients and the attorney's often superior expertise in complicated financial matters, a lawyer must take every possible precaution in ensuring that his [or her] client is fully aware of the risks inherent in the proposed transaction and of the need for independent and objective advice." p. 1205.
- "When a lawyer drafts a legal document, he or she is acting as an attorney, notwithstanding any other title or relationship he or she may have had at the time with the client." p. 1188

Kaye v. Rosefielde (New Jersey)

- **Rosefielde's Consequences:**
 - Equity interests in Kaye's companies rescinded
 - Salary as in-house counsel was disgorged
 - Ordered to pay compensatory damages, punitive damages, and attorneys fees



People v. Miller, 354 P.3d 1136, 1142 (Colo. O.P.D.J. 2015)

- Defendant, while serving as shareholder and director of his family's corporation, acted as counsel to the corporation and as an interest party in two interested transactions:
 - A management agreement putting defendant in control, and
 - Lease agreement for his mother's former home as a residence and law office for \$100
- Defendant did not obtain consent from the corporation to enter into the transactions and *concealed* them from the board.
- **Consequences:** Defendant was suspended for six months and ordered to retake and pass the MPRE before seeking reinstatement.

Application

Polling Question . . .

Scenario:

- An employer is being sued for unsafe working conditions that allegedly caused an employee to fall and become injured.
- Another employee ("witness-employee") was present when the incident occurred and wrote two statements that were slightly inconsistent with one another.
- The injured employee called the witness-employee to testify in a deposition where the company's in-house counsel, the witness-employee, and the injured employee's counsel were present.

. . . Polling Question Cont.

- The witness-employee asked who would protect him during the deposition because he had testimony that was unfavorable to the employer.
- The in-house counsel responded that: (1) he would be the witness's attorney for the deposition since he was an employee of the company; and (2) that witness-employee's job would not be affected as long as he told the truth.
- Thus, in-house counsel was representing the employee and the company in the same deposition.
- Witness-employee presented unfavorable testimony about the company and conflicting statements at the disposition. He was fired thereafter.

Did in-house counsel violate any ethical rules?

No. The witness-employee had no reasonable expectation that in-house would advocate for his interests if his testimony became adverse to the company.

100%

No. To violate ethical rules regarding conflicts of interest, the employee-witness must show that the representation by in-house counsel the "but-for" cause of his termination.

Yes. In-house counsel could not reasonably provide competent and diligent representation while representing two potentially adverse clients in one deposition.

No. The matter employee-witness was testifying for did not involve the assertion of a claim by the company against employee-witness.

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Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization **represents the organization** acting through its duly authorized constituents.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, **a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.**

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 4.3: Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel:

- A lawyer shall not state or imply that the lawyer is *disinterested*.
- When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Complex Corporate Families & Conflicts of Interest

- Generally no conflict where parent and wholly-owned subsidiary are both solvent with interests aligned.
- "Corporate affiliate conflict:"
 - "[A] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary . . . However, an attorney may not accept representation adverse to a client affiliate if circumstances are such that the affiliate should also be considered a client of the lawyer."

GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C., 618 F.3d 204, 210 (2d Cir. 2010) (citing ABA Model Rule of Prof'l Conduct 1.7 cmt. 34 (2006)).

Confidentiality & Attorney-Client Privilege

Model Rule 1.6: Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client **unless** the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client **to the extent the lawyer reasonably believes necessary**:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Model Rule 1.6: Confidentiality Cont.

- (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (6) to comply with other law or a court order; or
 - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make **reasonable efforts** to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Attorney-Client Privilege & Unlicensed Attorneys

Practicing Law while unlicensed in a State = Bad Idea

- "[N]otwithstanding the general rule that the attorney-client privilege applies only to licensed attorneys, courts have found communications with non-attorneys to be privileged in limited circumstances in which the client reasonably believes that the person to whom the communications were made was in fact an attorney."

Anwar v. Fairfield Greenwich Ltd., 982 F. Supp. 2d 260, 265 (S.D.N.Y. 2013)

Confidentiality

There are only a handful of very narrow exceptions to the confidentiality rules.

- "[B]y accepting employment, a lawyer chooses to place his loyalties with his employer-client and agrees to act as its confidant and advocate. An in-house attorney enjoys unique position of special trust, and the employer-client necessarily occupies a concomitant position of vulnerability with respect to its relationship with counsel."

Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir. 1994)

Polling Question...

Scenario:

- A company manages petroleum reserve facilities of the Department of Energy ("DOE"). The company and the DOE have a contractual relationship and, under the contract, the company must operate free from discriminatory practices.
- The DOE officials conduct audits to assure the company is complying with the contract. During an audit, an African-American, female in-house attorney complained of racial and sex discrimination at the company. She also revealed information to the DOE about other complaints of discrimination at the company.
- At the in-house attorney's performance evaluation, company representatives said she failed to exercise good judgment during the DOE audit.

... Polling Question Cont.

- In-house counsel wrote a response letter to the comments from her evaluation in which she complained of being subjected to racial and sex discrimination. She also included confidential information about other scenarios of alleged discrimination and showed it to DOE representatives, who were not privy to this information.
- She was fired for revealing information about other scenarios of alleged discrimination to DOE representatives. Did in-house counsel violate her ethical duties by bringing to light instances of racial and sex discrimination?

Did in-house counsel violate her ethical duties by bringing to light instances of racial and sex discrimination?

No. Bringing to light allegations of pervasive racial and sex discrimination is protected activity under federal law.

Yes. In-house counsel had an ethical duty not to reveal her client's confidential information, even if its conduct is unlawful.

No. The information about other scenarios of discrimination were not confidential because the DOE and the company had a contractual relationship.

Yes. In-house counsel is never allowed to reveal her client's confidential information.

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100%

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Attorney-Client Privilege & Complex Corporate Families

Remember: Generally no conflict where parent and wholly-owned subsidiary are both solvent and their interests are aligned.

But: When parent/subsidiary interests diverge, for example in spin-off, sale, or insolvency, parent should secure outside representation for the subsidiary to preserve privilege.

- Parent can only be compelled "to produce disputed documents because of the adverse-litigation exception to the co-client privilege, if it finds that the [parent] and the [subsidiaries] were jointly represented by the same attorneys on a matter of common interest that is the subject-matter of those documents."

In re Teleglobe Commc'ns Corp., 493 F.3d 345, 3786-87 (3d Cir. 2007), as amended (Oct. 12, 2007)

Preserving Privilege in Corporate Families:

- "It is important for in-house counsel in the first instance to **be clear about the scope of parent-subsiary joint representation**. By properly defining the scope, they can leave themselves free to counsel the parent *along* on the substance and ramifications of important transactions without risking giving up privilege in subsequent adverse litigation." *In re Teleglobe*, 493 F.3d at 383.
- "[O]nce the parties' interests become sufficiently adverse that the parent does not want future controllers of the subsidiary to be able to invade the parent's privilege, **it should end any joint representation** on the matter of the relevant transaction." *Id.* at 373.
- "By taking care not to begin joint representations except when necessary, to limit the scope of joint representations, and seasonably to separate counsel on matters in which subsidiaries are adverse to the parent, in-house counsel can maintain sufficient control over the parent's privileged communications." *Id.* at 374.

Will following the rules get me in trouble?

Answer: Maybe.

- *See Pang v. International Document Services*, 2015 UT 63, 356 P.3d 1190 (2015): In-house counsel was an at-will employee who was terminated after reporting usurious lending practices "to a higher authority in the organization" as required by Rule 1.13(b). The Utah Supreme Court affirmed the lower court's holding that the "reporting up" requirement "does not constitute a clear and substantial public policy that prevents the termination of an at-will employee."
- *But see Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009): In-house counsel were terminated after reporting up possible stock fraud within the company. The Ninth Circuit court held that reporting stock fraud was a protected activity under the Sarbanes–Oxley Act.
- See also *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 866 (Tenn. 2002): "In-house counsel may bring a common-law action of retaliatory discharge . . . for reporting the unauthorized practice of law."

But *not* following the rules can *definitely* get you in trouble

Model Rule 8.4 *Misconduct*:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the [Rules], knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) **engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
- (d) engage in conduct that is prejudicial to the administration of justice;

But *not* following the rules can *definitely* get you in trouble

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the [Rules] or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

But *not* following the rules can *definitely* get you in trouble

- Concealing documents/transactions from clients or parties entitled to review and approve the documents
 - *People v. Miller*, 354 P.3d 1136, 1142 (Colo. O.P.D.J. 2015)
- Withholding documents and providing false responses during discovery
 - *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233 (9th Cir. 2016)
- Failing to protect and preserve electronic information
 - *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414 (S.D.N.Y. 2010)

Concluding Remarks and Questions?

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Daniel Young

Partner

(612) 701-6686

daniel.young@quarles.com

