Top 10 Things In-House Lawyers Need to Know about Ethics

by Jack Tanner

This article highlights ethical issues that are of particular concern to in-house counsel.

In-house lawyers are subject to the same ethics rules that govern all attorneys. But some attorneys become in-house counsel with the mistaken belief that the ethics rules will be less problematic for them. This may be because they only represent one company and thus have few clients, or they act in a capacity other than lawyer, for example, as vice president of a company.

This article discusses 10 important facts about ethics rules that in-house counsel should be aware of. Adhering to the requirements of these rules is imperative to avoiding ethical violations and legal actions based on questionable conduct.

1. The Ethics Rules Apply to All Attorneys

Both the Colorado Rules of Professional Conduct (Colo. RPC or Rules) and most of the CBA Ethics Committee's Formal Ethics Opinions focus primarily on attorneys in private practice. The Rules and ethics opinions give scant guidance to in-house practitioners, but that does not mean the Rules do not apply to them.

The Rules expressly refer to in-house counsel in only one instance,[1] in the definition of "firm" or "law firm," which includes "lawyers in the legal department of a corporation or other organization." The few other references to in-house counsel are located within official comments.[2] But this paucity of references does not mean that in-house counsel face no ethical dilemmas.

In recent years, an increasing number of cases have addressed ethics issues affecting in-house counsel. *Kaye v. Rosefielde*,[3] a New Jersey case, blatantly demonstrates—contrary to the belief of some in-house counsel—that the ethical rules do apply to them.

Kaye involved an in-house lawyer who was also the lawyer for the owner of the business and for trusts benefiting the owner's children. The lawyer set up new companies for his individual client's ventures, and in one instance, the lawyer gave himself an ownership interest in a newly formed company without following the steps required by the New Jersey version of Rule 1.8 (Conflict of Interest: Current Client: Special Rules).[4] Among other things, the lawyer violated Rule 1.8 by failing to advise the owner in writing to have another lawyer review the business transaction and then failing to allow the owner time to do so.

Later, the owner sued the (by then former) in-house lawyer for malpractice, claiming the lawyer violated several of New Jersey's ethical rules, including its version of Rule 1.8. One of the lawyer's defenses was that the requirements of Rule 1.8 did not apply to him because he was in-house counsel. The court soundly rejected this contention:

> Independent of the particular facts of this case, we also discern *no rational basis to exempt attorneys who have been hired by corporate clients to serve as in-house counsel from the ethical requirements* of RPC 1.8. . . . We find nothing in the plain language . . . to suggest or even imply that lawyers who are retained by corporate clients as in-house or general counsel are exempt from the proscriptions of RPC 1.8(a).[5]

2. In-House Counsel Can Easily Have Conflicts of Interest

In-house counsel may feel that ethics issues involving conflicts are not of particular concern. In fact, in-house practice can often present ethical issues related to conflicts.

"Directly Adverse" Conflicts Under Rule 1.7(a)(1)

When in-house counsel represents groups of related companies, or officers, directors, owners, or employees at a company, these multiple representations can develop into a "directly adverse" conflict

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under Rule 1.7(a)(1) (Conflict of Interest: Current Clients). Dealing with a third party or giving a subsidiary legal advice may constitute legal representation that can lead to a conflict when issues arise between the subsidiary and parent. In other cases, mere inadvertence might create an attorney–client relationship between the in-house lawyer and a person or entity other than the company that employs him. For example, when an in-house lawyer answers legal questions from officers, employees, or owners about their personal legal issues (as opposed to those of the company), this can create an attorney–client relationship and thus increase the possibility of a directly adverse relationship arising with the company.

In *Yanez v. Plummer*,[6] Yanez, an employee of Union Pacific Railroad, witnessed an accident at work. During a company investigation of the accident, he gave statements to an investigator. In subsequent litigation, he was to be deposed as a bystander witness, and Union Pacific provided one of its in-house lawyers, Plummer, to represent Yanez. Immediately before the deposition, Yanez told Plummer that his deposition testimony was likely to be unfavorable to Union Pacific and that he feared for his job. He asked Plummer who would "protect" him at the deposition. Plummer told Yanez that he was his attorney for the deposition, and that if he told the truth his job would not be affected. Plummer did not discuss any conflict of interest.

Yanez's deposition testimony differed from the statements he had given to the investigator. He was later fired by Union Pacific for dishonesty. He brought suit against Union Pacific for wrongful discharge and against Plummer for malpractice, breach of fiduciary duty, and fraud. Plummer won on summary judgment, but the ruling was reversed on appeal.

The California Court of Appeals noted that as soon as Yanez told Plummer that his deposition testimony was likely to be unfavorable and he feared for his job, Plummer had a conflict of interest and needed to obtain the informed written consent of each client to continue the representation. Because he did not, Yanez had a possible malpractice claim. The court thus reversed the summary judgment and reinstated Yanez's malpractice claim against Plummer.[7]

In *Dinger v. Allfirst Financial, Inc.*,[8] the in-house lawyer gave bank officers what appeared to be legal advice about when to cash in their stock options. When this advice turned out to be flawed, the (by then former) officers sued the bank, alleging that the bank (through the in-house lawyer) breached its fiduciary duty and made negligent misrepresentations. The Third Circuit acknowledged the district court's ruling that there was a "confidential relationship" between the lawyer and the officers that created a fiduciary duty, and agreeing with the district court that the bank had not breached this duty, it affirmed summary judgment for the bank.[9]

In neither *Yanez* nor *Dinger* was the lawyer formally engaged, let alone paid, by the employees. The lesson from these cases is that if in-house lawyers give advice to owners or employees on their personal issues, they may create attorney–client relationships and thereby find themselves with a directly adverse conflict.

"Material Limitation" Conflicts Under Rule 1.7(a)(2)

Conflicts under Rule 1.7(a)(2) may also arise for in-house counsel. These "material limitation" conflicts can result from the lawyer's own interest in the company, from the involvement of others with whom the lawyer has a personal relationship, or for myriad other reasons. For example, a lawyer's ownership of stock in the client's company may materially affect the lawyer's advice to the client. Simply owning stock in a company and therefore wanting the company to do well, without more, does not create this conflict. But if an in-house lawyer owns stock in a company and prioritizes her interests in the performance of the stock over the good of the company when giving advice to the company, the lawyer could have a "material limitation" conflict.

Resolving the Conflict Under Rule 1.7(b)

If conflicts under either Rule 1.7(a)(1) or (a)(2) exist, the in-house lawyer, like any other lawyer, must follow the steps in Rule 1.7(b) to resolve the conflict and obtain the necessary consent. Otherwise, the in-house lawyer has a disqualifying conflict of interest.

3. An Offer of Stock or Stock Options in a Client Is a "Business Transaction" under Rule 1.8

Rule 1.8(a) was specifically addressed in *Kaye*, where in-house counsel obtained an equity interest in the client. Analytically, there is no difference between outside counsel entering into a business venture with a client, which raises obvious Rule 1.8 concerns, and in-house counsel being offered stock or stock options in the client.[10] In both instances, the lawyer engages in a business transaction with the client, and Rule 1.8 requires that (1) the transaction be fair and reasonable to the client, (2) the terms be fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client, and (3) the client be advised in writing to obtain advice from separate counsel and be given time to do so.[11]

4. Confidential Information May Not Be Protected by the Attorney–Client Privilege

Rule 1.6 (Confidentiality of Information) provides, "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)."[12] Whether information is subject to the duty of confidentiality is a different issue than whether a communication is protected by the attorney–client privilege.[13]

Many laymen (and a disturbing number of lawyers) erroneously believe that the attorney–client privilege attaches to all communications with a lawyer. The attorney–client privilege applies only where a confidential communication occurs between a lawyer and a client for the purpose of giving or receiving legal advice.[14]

Thus, for example, when a CEO requests business advice from an in-house lawyer, neither the question nor the answer is protected by the attorney–client privilege.[15] While the lawyer must not speak of this without client consent under Rule 1.6, that does not mean it is protected from discovery by a third party if litigation ensues. Similarly, a number of cases hold that routine human resources or procurement discussions might not be protected by the attorney–client privilege and might be discoverable in later litigation.[16]

Further, not everyone who works at the same company as in-house counsel is considered to be the "client." The test for determining who the client is can be difficult to apply. Generally, for purposes of the attorney–client privilege, a "client" is a person who

regularly consults with the lawyer regarding a particular matter or who has the authority to bind the company regarding the matter.[17] Communications with company employees outside of these parameters might not be privileged.[18]

Comment [2] to Rule 1.13 (Organization as Client) provides:

> When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. … This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

Thus, in-house counsel's disclosure of confidential information to certain constituents not only puts the attorney–client privilege at risk but is also unethical.

5. In-House Counsel Does Not Automatically Represent Every Employee

Under Rule 4.2 (Communication with Person Represented by Counsel), legal representation is analyzed on a matter-by-matter basis. A lawyer is only prohibited from dealing with an adverse party when the lawyer "knows" (as defined in the Rules) that the adverse party is represented in that particular matter. Thus an in-house lawyer may negotiate with an employee in the procurement department of a large multi-national corporation that has scores of in-house attorneys unless and until the lawyer "knows" the client is represented in that particular matter.

6. The Imputed Disqualification Rule May Disqualify an Entire In-House Legal Department

As stated above, the Rules rarely mention in-house counsel, but the definition of "firm" in Rule 1.0(c) includes "the legal department of a corporation or other organization" and Comment [1] to Rule 1.10 (Imputed Disqualification) contains a reminder that "firm" includes an in-house legal department.

Under Rule 1.10, when one lawyer in an in-house legal department is disqualified the entire legal department will usually be disqualified (depending on the basis of the disqualification), just as an entire firm in private practice would be disqualified.

If the basis for the lawyer's conflict is a "personal interest," such as a personal relationship with opposing counsel, the entire department will not be disqualified unless there is a significant risk that the representation by others will be materially limited.[19] If the disqualification is based on a former-client conflict (e.g., the lawyer participated in the dispute at a prior firm), the entire in-house department would likely be disqualified absent either timely, effective screening of the lawyer or consent from both the lawyer's former client and current employer.[20]

7. Confidentiality Walls May Not Avoid Disqualification of an In-House Department

Rule 1.10(e) allows a law firm or legal department to avoid a disqualifying conflict by erecting a confidentiality wall where the screened lawyer did not participate "substantially" in the matter creating the conflict, as long as several steps are taken.[21] Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) allows a confidentiality wall to segregate even an attorney who previously "personally and substantially" participated in a matter for an adverse government agency with the same steps and conditions.[22] Whether screening is effective for an in-house lawyer who "personally and substantially" participated in a matter depends on the nature of the prior representation.

8. The Organization Itself Is the Client

Rule 1.13 provides that the client is the organization itself—not the officers, management, or even the board of directors. Many times executives or owners at companies treat in-house counsel as their own personal counsel, and this can lead to the conflicts described above, or even malpractice suits. It is part of in-house counsel's ethical duties to identify these conflicts and explain them to the client. Rule 1.13(f) states that, "[i]n dealing with an organization's . . . 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." This is elaborated on by Comment [10] of the Rule, which provides:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.[23]

This is the rule Plummer did not follow, as discussed above. When Yanez told Plummer that his testimony might be unfavorable for the company and that he feared for his job, Plummer should have made these disclosures and allowed Yanez to obtain separate counsel.

9. Acting as a Nonlawyer Does Not Necessarily Avoid Application of the Rules

Some ethics rules apply even when a lawyer is not acting as such. In *People v. Rishel*,[24] an attorney was disbarred for violating Rule 8.4 (Misconduct) for his handling of monies from individuals who pooled funds to purchase Colorado Rockies baseball team season tickets, conduct that had absolutely nothing to do with his practice of law. He argued that the Rules did not apply because of the non-legal context. The Hearing Board rejected this contention:

> Colo. RPC 8.4(c) applies equally to transactions outside the practice of law where, as in the present case, an attorney accepts funds from third parties for a stated purpose, knowingly fails to use the funds for that purpose, withholds the funds after their authorization is withdrawn, and ultimately fails to refund the amount to the parties.[25]

In *People v. Kane*[26] the lawyer was suspended from practice for three years for not complying with a child support order and avoiding arrest, violations that had nothing to do with the lawyer's law

practice. Numerous other courts around the country have disciplined lawyers for conduct unrelated to their legal practice.[27]

Many in-house counsel also have an additional job for the organization, such as vice-president or secretary. At times, attorneys accused of ethical improprieties have argued that their conduct in question was undertaken in that "other" capacity. These defenses tend to be ineffective, because courts focus on protecting the client.

For example, in *Kaye*, the lawyer argued he was performing certain tasks in his capacity as chief operating officer, and thus the ethical rules did not apply. This argument was soundly rejected by the trial court, whose decision was affirmed by the appellate court, which quoted favorably from an expert's testimony:

> Poplar [the expert] . . . rejected as "fallacious" any attempt by Rosefielde to exempt himself from his ethical obligations as an attorney by suggesting that, at the time he prepared Lattuga's separation agreement from Kaye, he was acting within his dual role as COO.[28]

10. In-House Lawyers Should Be Licensed in the State(s) Where They Regularly Practice and in Colorado

Many in-house lawyers allow their licenses to lapse, thinking the licenses are unnecessary for in-house practice. Others maintain their original licenses in another state, but regularly practice in Colorado. This is dangerous; practicing law without a license in Colorado can be a crime.[29] Practicing law without a license in Colorado may also be an ethical violation,[30] both for the attorney and the attorney's colleagues (because the Rules prohibit lawyers from assisting in the unauthorized practice of law).[31]

Further, practicing law without a license may adversely affect the attorney–client privilege. In multiple cases, courts have held that a communication between a client and a "lawyer" whose license expired or who was licensed only in a different jurisdiction was not protected by the attorney–client privilege.[32] The leading cases in this area are *Gucci America, Inc. v. Guess?, Inc.* (*Gucci I*),[33] and *Gucci v. Guess?* (*Gucci II*), which overruled *Gucci I*.[34]

In *Gucci I* and *Gucci II*, the General Counsel for Gucci had been licensed in California and then moved to New York and practiced there for 10 years, during which time he allowed his California license to become inactive. When this was discovered at his deposition, Guess? sought to compel all communications between the General Counsel and Gucci. In *Gucci I*, the magistrate judge ordered disclosure of the communications on the grounds that an unlicensed lawyer is not a lawyer at all, and thus no attorney–client privilege could attach.

The district court judge reversed that order in *Gucci II*. He noted that Gucci produced declarations from six current and former executives, all stating that the declarants had believed that the General Counsel had been a licensed lawyer, and noting that the company had even paid his bar dues. The district court thus held that the client had a "reasonable belief" that the individual was a licensed lawyer, so the attorney–client privilege still applied.[35]

It is not clear how far *Gucci II* can be stretched beyond its particular facts. In this Internet era where any client can determine in a quick web search whether a lawyer is licensed in good standing in a particular state, it will be increasingly difficult for a client to claim it had a "reasonable belief" that its unlicensed in-house counsel was actually licensed.

Fortunately, Colorado has a "single client rule," which allows in-house lawyers licensed in another state to become licensed in Colorado by completing a simple application and paying a fee.[36] In this regard, "single client" includes "a business entity or an organization and its organization affiliates."[37] There is no excuse for in-house counsel not to be licensed in Colorado.[38]

Conclusion

Attorneys are not off the hook, ethically speaking, by working as in-house counsel. In-house counsel must be aware of their ethical duties to avoid negative consequences for themselves, their colleagues, and their clients.

Notes

1. Colo. RPC 1.0(c).

2. *See, e.g.*, Colo. RPC 1.10, Comment [1] (reminder that definition of "firm" includes in-house legal department); Colo. RPC 1.16A, Comment [2] (same); Colo. RPC 6.1, Comment [11].

3. *Kaye v. Rosefielde*, 75 A.3d 1168 (N.J. Super. Ct.App.Div. 2013), *aff'd in part, rev'd in part as to remedy*, 121 A.3d 862 (holding that attorney was also subject to disgorgement of compensation).

4. Until the 2008 rule changes, this rule was ominously but misleadingly entitled "Prohibited Transactions." Even then business transactions with a client were not "prohibited," but could be entered into by meeting certain substantive and procedural requirements contained in the rules.

5. *Kaye*, 75 A.3d at 1204 (emphasis added).

6. *Yanez v. Plummer*, 221 Cal.App. 4th 180 (Cal.Ct.App. 2013).

7. *Id.* at 187–91.

8. *Dinger v. Allfirst Fin. Inc.*, 82 Fed. App'x. 261 (3d Cir. 2003).

9. *Id.* at 265–66.

10. *See generally* CBA Formal Ethics Comm. Op. 109: Acquiring an Ownership Interest in a Client (May 19, 2001, annotated June 20, 2009 and Aug. 6, 2015) (analyzing requirements of Rule 1.8), www.cobar.org/ethicsopinions.

11. Colo. RPC 1.8(a); CBA Formal Ethics Comm. Op. 109, *supra* note 10.

12. This duty is far broader than the prohibition on revealing "confidences and secrets" in the old Code of Professional Responsibility, ABA Model Code of Professional Responsibility D.R. 4-101, but a number of lawyers still rely on this outdated distinction from time to time.

13. For a fuller discussion of this distinction, *see* Berger and Reilly "The Duty of Confidentiality: Legal Ethics and the Attorney–Client and Work Product Privileges," 38 *The Colorado Lawyer* 35 (Jan. 2009).

14. CRS § 13-90-107(b). *See, e.g.*, *Wesp v. Everson*, 33 P.3d 191, 196–198 (Colo. 2001) (listing and discussing requirements of attorney–client privilege).

15. *See, e.g.*, *Shriver v. Baskin-Robbins Ice Cream Co., Inc.*, 145 F.R.D. 112, 115 n.2 (D.Colo. 1992) (applying Colorado law) (communications between corporate counsel and company for business advice not privileged); *Boca Investerings P'ship v. United States*, 31 F.Supp.2d 9, 11–12 (D.D.C. 1998) (communications with in-house counsel for business advice not privileged).

16. *See, e.g.*, *Kourmoulis v. Indep. Fin. Mktg. Group, Inc.*, 295 F.R.D. 28, 44 (E.D.N.Y. 2013) (where predominant purpose of communications between human resources director and attorney was for business advice, they were not protected by attorney–client privilege); *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 348 (N.D. Ohio 1999) (neither attorney–client privilege nor common interest privilege applied where communications were standard business communications involving procurement issues).

17. *See* Colo. RPC 4.2, Comment [7] (listing constituents covered by representation of adverse business entity as including one "who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the

matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.").

18. As discussed above, however, depending on the context, a new attorney–client relationship with the employee could be created, as in *Yanez*.

19. Colo. RPC 1.8(k), 1.10(a).

20. Colo. RPC 1.10(e)(2) (timely, effective screening) and 1.10(c) (cross-referencing client consent under Rule 1.7).

21. Colo. RPC 1.10(e). These steps include timely establishing the ethics screen, giving prompt notice to the former client and law firm, and the disqualified lawyer "and the partners of the firm" having a reasonable belief that the screening efforts will be effective. *Id.*

22. Colo. RPC 1.11(b).

23. Colo. RPC 1.13, Comment [10]. *See also* CBA Ethics Comm. Formal Ethics Op. 120: Representing an Organization as a Party in a Dispute (May 17, 2008), www.cobar.org/ethicsopinions.

24. *People v. Rishel*, 50 P.3d 938 (Colo. O.P.D.J. 2002).

25. *Id.* at 944.

26. *People v. Kane*, 655 P.2d 390 (Colo. 1982).

27. *See, e.g.*, *Matter of Schubach*, 612 A.2d 1337, 1337–38 (N.J. 1992) (attorney suspended for three months for misconduct in personal business transactions); *Florida Bar v. Della-Donna*, 583 So.2d 307 (Fla. 1989) (attorney disbarred for violation of ethical rules while acting as both attorney and as client); *In re Fleckenstein*, 277 N.Y.S. 2d 830, 831 (N.Y. App.Div. 1967) (attorney disbarred for conviction in other state for public lewdness); *State ex rel. Oklahoma Bar Ass'n v. Johnson*, 420 P.2d 486 (Ok. 1966) (attorney disbarred for conduct in private business that tended to steer legal business to legal practice).

28. *Kaye*, 75 A.3d at 1187–88 (emphasis added).

29. 18 CRS § 18-5-113(1)(e) (criminal impersonation); *People v. Bauer*, 80 P.3d 896 (Colo.App. 2003) (lawyer whose license to practice law was suspended was convicted of criminal impersonation for holding himself out as licensed attorney).

30. Colo. RPC 5.5(a)(1).

31. Colo. RPC 5.5(a)(3).

32. *See, e.g.*, *Anwar v. Fairfield Greenwich Ltd.*, 982 F.Supp.2d 260, 265–68 (S.D.N.Y. 2013) (regardless of whether Dutch or American law applied, no privilege for communications between "client" and unlicensed lawyer); *Wultz v. Bank of China, Ltd.*, 979 F.Supp.2d 479 (S.D.N.Y. 2013) (communications with unlicensed "attorneys" not privileged).

33. *Gucci America, Inc. v. Guess?, Inc.*, 2010 WL 2720079 (S.D.N.Y. 2010).

34. *Gucci v. Guess?*, 2011 WL 9375 (S.D.N.Y. 2011).

35. *Id.* at *5-6.

36. CRCP 204.1.

37. CRCP 204.1(1)(e).

38. Many other jurisdictions have similar rules. *See, e.g.*, ABA Model Rule 5.5(c). ■