



| Resource Library

# Top Ten Cases Involving Ethical Issues for In-House Counsel (United States)

Jan 15, 2016

By Jack Tanner



Save to My Resources

Speakers on ethical issues for in-house counsel often get challenged by the audience as to the reality of the problems posed. Many in-house counsel apparently believe that the ethical rules do not apply to them, or apply with less force.

In fact, reported cases involving ethical issues in-house counsel have risen dramatically in recent years. What follows is a list of ten of the most significant cases involving in-house counsel and ethical issues.

## 1. *Kaye v. Rosefelde*, 75 A.3d 1168, 1204 (New Jersey Super. Ct. App. Div. 2013).

This is a dream case for commentators on in-house ethics because it raises two of the most common "defenses" asserted by in-house lawyers when pushing back against ethical concerns.

Mr. Rosefelde was in-house for several small companies owned by Mr. Kaye. He also represented Mr. Kaye himself and a trust for his children. As he had done many times before, Mr. Rosefelde created a small company at Mr. Kaye's direction and gave himself a small equity share.

He did not hide this from Mr. Kaye, but he also did not comply with Rule of Professional Conduct 1.8 regarding business transactions with a client.

Mr. Kaye later sued Mr. Rosefelde for malpractice, and alleged among other things that Mr. Rosefelde had violated Rule 1.8 by not advising Mr. Kaye in writing to have another lawyer review the transaction, and giving him (Mr. Kaye) time to do so.

Mr. Rosefelde's first defense was that the requirements of Rule 1.8 regarding a business transaction with a client did not apply to him because he was in-house. This was rejected so soundly as to be described as being irrational:

"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" (Emphasis added.)

Another argument of Mr. Rosefelde was that for some conduct he was acting as officer of the company, not as its in-house lawyer, and therefore the ethical rules did not apply to his conduct. This was also squarely rejected as "fallacious."

**Practice Tips: The ethical rules, including Rule 1.8 restrictions on getting an equity interest in your client, apply to you. Further, the ethical rules probably apply even when you are acting not as counsel, but as an officer of the company.**

## **2. Yanez v. Plummer, 164 Cal. Rptr. 3d 309 (California Ct. App. 2013)**

This case involved an incident at a factory. The company conducted an investigation, and Mr. Yanez, a company employee and bystander witness, told the investigator the company was not at fault. In later litigation, Mr. Yanez was identified as a witness and his deposition was

to be taken.

The company agreed to provide him with counsel to defend the deposition, and it provided its in-house counsel Mr. Plummer. Literally on the way to the deposition, Mr. Yanez told Mr. Plummer that: (a) he had lied to the company investigator; and (b) that the truth was worse for the company than he had said previously. Mr. Plummer essentially said: "Just tell the truth; you'll be fine."

Mr. Yanez indeed testified differently than he had told the company investigator. The company opened a new investigation, and subsequently fired Mr. Yanez for lying during the first investigation. He sued the company for wrongful discharge and Mr. Plummer for malpractice. While the trial court granted summary judgment for Mr. Plummer, the court of appeals reversed.

Mr. Plummer's error was in not recognizing that, once Mr. Yanez told him that his testimony at deposition would be different than he had given previously and not as favorable to the company, Mr. Plummer had an irreconcilable conflict of interest between his two clients (the company and Mr. Yanez).

**Practice tip: In-house counsel have to be vigilant regarding possible conflicts when representing anyone other than the company.**

### **3. Pang v. International Document Services, 2015 WL 4724812 (Utah).**

The in-house attorney reported improper business practices "up the ladder" as required by Rule 1.13. At some point, the attorney was fired and brought suit for retaliatory discharge. The attorney's claim was dismissed and the dismissal was affirmed on appeal. The Utah Supreme Court held that the attorney was an employee at will, was entitled to be fired for any reason not illegal, and the ethical requirements that he report "up the ladder" were insufficient to overcome the general public

policy in favor of employees being at will.

This is contrary to other cases that have allowed lawyers to bring suit for whistle-blower terminations, seeking monetary relief but not reinstatement. In *Van Asdale v. International Game Technology*, 587 F.3d 989 (9th Cir. 2009), the Ninth Circuit reinstated a claim for wrongful discharge under Sarbanes Oxley brought by two terminated in-house counsel. The in-house counsel had brought suit claiming they were discharged for reporting possible stock fraud to higher-ups within the company. The District Court had granted summary judgment on the grounds that the claims were not "protected activity." The Ninth Circuit, however, reversed, holding that reporting stock fraud was a protected activity.

**Practice tip: complying with your ethical obligations may not be painless. This is the life we have chosen, and it comes with some costs.**

#### **4. Anwar v. Fairfield Greenwich Ltd., 982 F. Supp. 2d 260 (Southern District of New York 2013)**

This is yet another in the long line of cases out of the Southern District of New York (SDNY) involving issues of in-house counsel not being licensed in the jurisdiction where they regularly office. The court held that there was no attorney-client privilege for communications between the in-house counsel and the client because the in-house counsel was not licensed and, therefore, not an "attorney."

There is some split of authority on this issue. Some courts have held that if the attorney is licensed somewhere then the fact that the attorney is practicing law without a license in the particular state does not implicate the attorney-client privilege. Other courts have held this rule only applies where the company reasonably relies on the attorney having a license.

*Crews v. Buckman Labs. Int'l*, 78 S.W.3d 852 (Tenn. 2002) demonstrated

the burden on counsel, co-workers, and the client that can arise from the unlicensed practice of law in-house. An associate in-house counsel discovered that the general counsel was not licensed to practice law in Tennessee where the general counsel officed. She reported this first to the general counsel and later to the company's board of directors. After considerable time, the general counsel was still not admitted, so the in-house obtained her own legal advice concerning her ethical obligations and felt compelled to report the unlicensed practice of law to appropriate State agency. The reporting counsel was later fired and brought suit for common-law retaliatory discharge. No lawyer should want to subject their client to this kind of embarrassment, and this was all driven by the general counsel's refusal to become licensed in the state where she practiced.

**Practice Tip: Not being licensed in the jurisdiction where you regularly office can be a crime, an ethical violation in the state where you are licensed, can get your colleagues in trouble, and can wreck your client's claim to the attorney-client privileged. Please consider getting licensed where you regularly office.**

#### **5. Haeger v. Goodyear Tire and Rubber Co, 793 F. 1122 (9th Cir. 2015).**

In this case, Goodyear withheld documents and otherwise gave false responses during discovery. The court entered drastic sanctions against Goodyear, and the "nail in the coffin" was the fact that Goodyear's in-house counsel had participated in reviewing the false discovery responses before they were filed.

**Practice Tip: If you are practicing law, take it seriously.**

#### **6. People v. Miller, 354 P.3d 1136 (Colorado O.P.D.J. 2015).**

A lawyer was helping run the family business, which was controlled by

his mother and shared with his siblings. There was no engagement letter. As the mother started aging and fading, there were disputes among the children (the lawyer and his siblings) how things should be handled.

The lawyer had the mother sign documents giving lots of power and authority to the lawyer and putting him on a salary, and he hid these documents from his siblings. The lawyer was disciplined for violations of Rule 1.7 (conflicts of interest); Rule 1.8 (business transaction with a client); and Rule 8.4(c) (dishonesty, fraud, and deceit). Interestingly, disciplinary prosecutor asked for a 90-day suspension as a penalty, but the court sua sponte imposed twice that.

**Practice Tip: All the ethical rules apply to in-house counsel, including prohibition on deceitful conduct.**

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

This case involved an in-house attorney who complained to the US Department of Energy (DOE) about discrimination at her client. To further her case, she gave information to the DOE about other complaints of discrimination at the company. Even though she prevailed in her jury trial, the ruling was reversed. The Fifth Circuit held that there was no exception to the ethical rules that allowed her to disclose information regarding other wrongs without client consent, which she did not have. The verdict was reversed and the case dismissed based on the lawyer's misconduct.

**Practice Tip: You cannot talk about client information with any third parties absent with some narrow exceptions. Even when an exception applies, it is no broader than is absolutely necessary to fulfill the purpose of the exception.**

### **8. Dinger v. Allfirst Fin., Inc., 82 Fed. Appx. 261, 265 (3rd Cir. 2003)**

In this case, former officers of a bank brought a claim against the bank, alleging that its in-house counsel had given them bad legal advice regarding the exercise of stock options. The company won on summary judgment on the merits of the case, with the District Court determining that the lawyer's advice had been reasonable. The issue of the lawyer giving advice to someone other than his client was not discussed. In affirming, the Third Circuit noted that "The District Court recognized that defendants owed plaintiffs a fiduciary duty based on the confidential relationship that existed between [the lawyer] and plaintiffs, but found no breach of that duty."

**Practice Tip: Be careful in giving advice to anyone other than your client. You may inadvertently create an attorney-client relationship.**

### **9. *In re Teleglobe Commc'ns. Corp.*, 493 F.3d 345 (3rd Cir. 2007)**

This case involved a dispute among related companies. The in-house counsel for one company had often performed legal work for the related companies. In the dispute, it was determined that the lawyer's notes were not privileged as to any of the companies in the dispute, as he was each company's lawyer. It was also held that the common-interest doctrine did not apply to protect the notes, because that doctrine requires the involvement of multiple lawyers.

An even more striking case arose in *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204 (2nd Cir. 2010). Again, this case involved the question of attorney-client relationship where a lawyer did legal work for multiple closely-related companies. When a dispute arose between a subsidiary and a third party, the subsidiary was able to disqualify the third-party's lawyer who had previously done work for the parent company. The court held that the connection between the wholly owned

subsidiary and its parent corporation was sufficiently close that the two were a single client for attorney-disqualification purposes. The court noted, among other things, that the subsidiary and the parent relied on the same in-house legal department, and that the parent's legal department had been involved in the dispute between the plaintiff and subsidiary since it first arose.

**Practice Tip: When you do work for related companies, you are the lawyer for all of them, owe fiduciary duties to all of them, and cannot prefer one over the other.**

### **10. Harkabi v. SanDisk Corp., 275 F.R.D. 414 (S.D.N.Y. 2010)**

In this case, the defendant was sanctioned because its in-house counsel failed to preserve evidence while litigation was pending. Although in-house counsel was involved in several steps to protect information, he did not supervise or even approve the copying and wiping of laptop hard-drives and was not involved in the transfer of email archives from servers. Thus, when that information was no longer available, the defendant was determined to have a culpable state of mind regarding the failure to preserve.

**Practice Tip: If you are going to bring litigation in house, be aware of the risks. Your in-house litigators will essentially have the duties of both lawyer and client.**

### **Conclusion**

The ethical rules still apply to in-house counsel. Not only that, the stakes are higher because it is much more difficult for you to disengage from your client when you are in-house. If you have any questions about your ethical duties at all, contact the author.

Region: United States

Interest Area: **Compliance and Ethics**



## Related ACC Resources

Interest Area: **Compliance and Ethics**

### More Resources By This Contributor Jack Tanner

---

**Material Type: Articles**

#### **Top Ten Cases Involving Ethical Issues for In-House Counsel (United States)**

*Publication Date*

*Fri, 01/15/2016 - 10:35*

This short list explains the ten most significant cases, and provides some insightful practical takeaways, involving in-house counsel and ethical issues from the past 25 years within the United States.

### More Resources Like This

---

**Material Type: Sample Forms, Policies, and Contracts**

#### **Elements of an Information Governance Program Charter**

*Publication Date*

*Fri, 01/12/2018 - 08:34*

Information governance (“IG”) is the activities and technologies that organizations employ to maximize the value of their information while minimizing associated risks and costs. One of the first steps to take when embarking on IG is to develop an IG Charter. The IG Charter is a foundational document that explains the purpose, goals, stakeholders, and responsibilities associated with an organization’s IG Program. The following outline explains each element of an IG Charter that an organization would use to plan for and operate its IG program.

**Material Type: Sample Forms, Policies, and Contracts**

#### **Five Information Governance Steps to Comply with the NYDFS Cybersecurity Regulations**

*Publication Date*

*Fri, 01/12/2018 - 08:51*

While the Cybersecurity Regulations require several technical controls (e.g., monitoring network activity and implementing multi-factor authentication and encryption), most of the requirements involve instituting information governance (“IG”) practices and structures to manage cyber risks. In the following, we set out five steps which address the key IG issues and requirements that can help your organization come into compliance with the Cybersecurity Regulations.

**Material Type: Articles****Top 10 Operational Tips: Preparing for Regulatory Investigations***Publication Date**Wed, 01/31/2018 - 16:54*

This brief resource (Top Ten) outlines 10 operational tips when preparing for a regulatory investigation.

The information in any resource collected in this virtual library should not be construed as legal advice or legal opinion on specific facts and should not be considered representative of the views of its authors, its sponsors, and/or ACC. These resources are not intended as a definitive statement on the subject addressed. Rather, they are intended to serve as a tool providing practical advice and references for the busy in-house practitioner and other readers.

Sponsored By:



## ACC Global Headquarters

1001 G Street NW  
Suite 300W  
Washington, D.C. 20001 USA

 [Contact Directory](#)

## Explore ACC

[Resource Library](#)

[Chapters & Networks](#)

[Education & Events](#)

[Careers](#)

[Services & Initiatives](#)

[About ACC](#)

[Membership](#)

[Advertising & Sponsorship](#)

[Website Survey](#)

[Privacy Statement](#)

[Privacy & Other Policies](#)

© 1998-2019, Association of Corporate Counsel. All Rights Reserved.