



Ethics for In-House Corporate Counsel: The Rules of Professional Conduct DO Apply

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Caitlin M. Jones, Esq. is an experienced litigation and trial attorney in Pettit Kohn Ingrassia Lutz & Dolin PC's San Diego office. As a trial attorney, she has handled a broad range of lawsuits representing individuals and business clients in state and federal court. Ms. Jones focuses her practice on professional liability and complex business and commercial litigation. She has had significant success handling all aspects of litigation, helping clients achieve practical results that are in the client's best interests. She has been recognized in the 2021 and 2022 editions of the *Best Lawyers: Ones to Watch* for her work in Professional Malpractice Law. Ms. Jones received her *Juris Doctor* from George Washington University School of Law and received her Bachelor's degree from the University of Michigan.



The Rules of Professional Conduct Apply to All Members of Cal. State Bar *and* All Registered In-House Counsel

(Rule 1.0.1(c): the legal department of any company is a “firm” or “law firm” as that term is defined in the rules of professional conduct)

Key Rules of Professional Conduct

- Rule 1.1: Competence
- Rule 1.13: The Organization as Client
- Rule 1.2.1: Advising or Assisting in the Violation of Law
- Rule 1.6: Client Confidentiality
- Rule 1.7: Conflicts of Interest

Rule 1.1: Competence

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.

Rule 1.1: Competence, cont'd

- Requires lawyers to stay apprised of relevant changes in law and policy
- Requires lawyers to understand risks involved with electronic information storage and have competence with basic cybersecurity, e-Discovery
 - Secure storage and transmission of confidential information
 - Document retention, litigation holds

Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.

Rule 1.13: Organization as Client

- The identity of an organization's constituents will depend on its form, structure, and chosen terminology. In the case of a corporation, constituents include officers, directors, employees and shareholders...any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.
 - To whom do you report?
 - From whom do you take direction?

Can I represent the organization and its constituents?

- Rule 1.13(g): Yes. A lawyer representing an organization may also represent any of its constituents, subject to all of the conflict and disclosure rules (e.g., Rules 1.7, 1.8.2, 1.8.6, and 1.8.7).
 - But is it a good idea? Use caution.
- If the organization's consent to the dual representation is required, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

Clarity in Attorney-Client Relationship

Rule 1.13(f): In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.

- A lawyer should not mislead a constituent into believing that he or she may communicate confidential information in a way that will not be used in the organization's interest if the organization is or becomes adverse to the constituent.
- *Upjohn* warning

Implied Attorney-Client Relationship

- In-house counsel can create *implied* attorney-client relationship with constituents / partners giving rise to malpractice liability
- Responsible Citizens v. Superior Court (1993) 16 Cal.App.4th 1717
 - Looks at totality of circumstances and list of factors including size of partnership, nature and scope of engagement, and attorney's access to partner information to determine whether attorney's conduct gave rise to implied attorney-client relationship
- Sprengel v. Zbylut (2019) 40 Cal.App.5th 1028
 - Asks whether the parties conducted themselves in a way that would reasonably cause a shareholder to believe the attorney would protect the shareholder's individual interests

Rule 1.13 and Corporate Change in Control

What happens when a change in control occurs or is threatened?

- Lawyers can face extremely complex decisions
- Personal relationships and loyalties
- Institutional relationships and loyalties
- Critically analyze what duties are owed and to whom
- Consider seeking outside advice

Rule 1.13: Reporting Up the Ladder

- Two-part test to determine whether a lawyer has an ethical obligation to report up the ladder:
 1. Does the lawyer have actual knowledge that a constituent is, has, or plans to act (or refuses to act)?
 2. Would a reasonable lawyer conclude that the constituent's course of action is a violation of law or a legal duty and likely to result in substantial injury to the organization?
- Examples:
 - False statements in public disclosures
 - Unlawful employment practices

Should I report to a higher authority?

If the two-prong test is met, referral to a higher authority is usually required. But there could be circumstances where the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority.

Example: The constituent has an innocent misunderstanding of law and, after being advised to reconsider, agrees to a different course of action.

- Frequent reporting to higher authorities can create distrust between legal and constituents.
- Depending on the seriousness, you may still want to report up.
- Document the discussion in case the constituent persists in conduct contrary to your advice.

Should I report to a higher authority?

In determining how to proceed, the lawyer should consider:

- The seriousness of the violation and its potential consequences;
- The responsibility in the organization and the apparent motivation of the person involved;
- The policies of the organization concerning such matters; and
- Any other relevant considerations.

What if a constituent is doing something that is unwise, counter-productive, or harmful, but not unlawful?

- No obligation to report under Rule 1.13
 - “A lawyer ordinarily must accept decisions an organization’s constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer’s province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk.”
- However, a lawyer always has a duty to inform the client of significant developments related to the representation.
[Rule 1.4; Business and Professions Code section 6068(m).]
- Even if there is no mandatory reporting obligation under Rule 1.13, the lawyer **may** refer to higher authority any matter the lawyer reasonably believes is sufficiently important to refer **in the best interest of the organization.**

Up-The-Ladder Reporting & Duty of Confidentiality

- In taking any action pursuant to Rule 1.13, the lawyer shall not reveal confidential information, except to prevent criminal act likely to result in death or substantial bodily harm.

Rule 1.2.1: Advise/Assist Law Violation

- May not counsel client to undertake any conduct counsel *knows* is criminal, fraudulent, or contrary to law or legal order.
- Includes not counseling corporate client to enter into contracts which have illegal provisions in transactions with employees/third parties.

Rule 1.2.1: Bar Formal Op. No. 19-0003

Illegal Contract Provisions

- If lawyer knows contract provision is illegal:
 - Must advise client of illegality
 - May not recommend use of provision, must counsel against use
 - May not present illegal provision to third party
- If client insists on proceeding with illegal provision:
 - Lawyer may withdraw from the representation but is not required to do so
 - Lawyer must report up the ladder if in corporation's best interest

Ex: Non-Compete Clauses (and choice of law to avoid non-competes), marital/testamentary agreements, rights waivers

RULE 1.6 & Bus. & Prof. Code Section 6068: CONFIDENTIALITY

- Rule 1.6 provides:
 - A lawyer **shall not** reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.
 - (b) A lawyer **may, but is not required to**, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is **likely to result in death of, or substantial bodily harm to, an individual**.

RULE 1.6 & Bus. & Prof. Code Section 6068: CONFIDENTIALITY

Business and Professions Code section 6068, subdivision (e)(1), provides it is a duty of a lawyer: “To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

Confidential Information (Rule 1.6)

- Before revealing confidential information, unless to prevent a criminal act, a lawyer shall, if reasonable under the circumstances:
 1. Make a good faith effort to persuade the client to pursue a different course of conduct; and
 2. Inform the client, at an appropriate time, of the lawyer's ability or decision to reveal the confidential information.

Special Limitations on Confidentiality: Wrongful Termination Suits

- Former in-house counsel may be able to divulge client confidences and attorney-client privileged communications to support his or her wrongful termination suit.
- See *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308, 106 Cal. Rptr. 2d 906 [In a wrongful termination action, a “former in-house counsel may disclose to her attorney all facts relevant to the termination, including employer confidences and privileged communications.”)]

Special Limitations on Confidentiality: General Counsel as Whistleblower

- Wadler v. Bio-Rad, 212 F. Supp. 3d 829 (N.D. Cal. 2016)
 - GC asked audit committee to investigate senior management involved in a possible bribery scandal in China – a violation of the Foreign Corrupt Practices Act
 - After a four-month investigation, no direct evidence of misconduct was found
 - Three days later, GC was terminated
 - GC sued for whistleblower retaliation
 - Company sought to exclude all evidence based on information GC learned in the course of his employment as confidential and privileged

***Wadler v. Bio-Rad* continued**

Holding:

- In-house attorneys may use privileged and confidential materials under limited circumstances in support of a whistleblower retaliation claim
- Whistleblower protections under federal laws such as the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) prevail over conflicting state ethical rules governing the scope of attorney-client privilege and confidentiality

RULE 1.7: CONFLICTS OF INTEREST

- *Yanez v. Plummer*, 164 Cal. Rptr. 3d 309 (California Ct. App. 2013)
 - Malpractice case against in-house counsel for conflict in representing employee at deposition
 - Company conducted an investigation into incident at factory; Yanez, a company employee and bystander witness, told the investigator the company was not at fault
 - In litigation, Yanez was identified as a witness and deposed; company agreed that in-house counsel would represent Yanez at deposition
 - On the way to deposition, Yanez told counsel that he had lied to the investigator and the company was at fault
 - In-house counsel told him as long as he told the truth at his deposition his job would not be affected

RULE 1.7: CONFLICTS OF INTEREST

- Yanez testified differently than he had told the company investigator; company reopened the investigation and fired Yanez for lying
- Yanez sued the company for wrongful discharge and sued in-house counsel for malpractice
 - Failure to inform of conflicts
 - Failure to obtain conflict waiver and informed written consent
- Trial court granted summary judgment for in-house counsel but the court of appeals reversed
- **Counsel's error**: counsel failed to recognize the moment an irreconcilable conflict of interest arose between his two clients (company and Yanez)

Attorney-Client Privilege: Dual Roles

- Corporate counsel can wear many “hats”
 - Legal advisor
 - Business advisor
- Can compromise corporate counsel’s work product, privilege
 - Communications given in business context may not carry same privilege as those given in a legal context
- Best practice
 - Clarify role (business/legal advice)
 - Designate legal advice “confidential – attorney-client privileged” or “attorney work product”

Example From Recent Fraud Case

Mid-level employees ran a sophisticated business fraud scheme through the company. One employee who knew of the scheme forwarded the GC an AP invoice and wrote the following unsolicited email:

From: Employee 1

To: GC

Subject: Accounts Payable

GC,

We should probably just write this one off because of the issues we know about with [Name's] accounts.

-Employee 1

Second Example From Recent Fraud Case

John Smith with ABC Company leaves voicemail for Employee 1:

“Hi Employee 1, this is John Smith, I just received a text message from your General Counsel saying that our recent transactions are being looked at for potential irregularities, and General Counsel wants me to send over all our records for their review. I don’t know what this is about but I’ll send General Counsel all my emails with you, our purchase orders and invoices, and our records of accounts paid and receivable so call me back when you get this...”

Both this voicemail and the email from the previous slide were produced in litigation (among many others).

Handling Internal Investigations

If corporate counsel becomes aware of allegations of wrongdoing and potential litigation for the company, should corporate counsel handle the investigation or outsource it?

Considerations:

- Who is accused of wrongdoing? Directors, low-level employees?
- Does GC have perceived bias or motive to skew investigation?
- Is GC a percipient witness to the wrongdoing, or was GC acting in business capacity during event?
- Is investigation on a routine matter (HR/employment) or an extraordinary one (fraud/criminal activity)?

Handling Internal Investigations, cont'd

- Document retention
 - Best practices
 - Have a document retention policy in place
 - Implement policy immediately upon learning of investigation
 - Work with IT to suspend deletions, archive documents
 - Litigation hold memo
 - Identify and collect relevant documents and devices
- Preserving privilege during investigation
 - Best practices
 - Thoroughly document purpose and scope of investigation
 - Frame all inquiries to employees as a privileged request in furtherance of counsel's need for information in order to advise the company on actual/threatened litigation
 - Segregate investigatory communications from routine business communications

Interviewing Current and Former Employees

- Communications with officers and directors
- Communications with current employees
- Communications with former employees
- Communications with third parties

Special Ethical Issues with Remote Work

- December 2020 ABA ethics opinion on Lawyers Working Remotely
- Cal. State Bar Opinion: working remotely, cloud-based legal practice, electronic communications with clients, and using third-party internet vendor for legal service is acceptable
 - Must understand technology being used
 - Must consider whether remote engagement appropriate
 - Must avoid unauthorized practice of law in CA by est. office here if unlicensed
 - Must avoid advertising and holding out as licensed in CA if not licensed

Questions?



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