

**PRACTICAL SOLUTIONS TO ETHICAL ISSUES  
FACING IN-HOUSE LAWYERS**

**Moderator**

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Sr. Counsel  
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State Bar of Texas  
**4<sup>TH</sup> ANNUAL ADVANCED  
IN-HOUSE COUNSEL COURSE**  
October 17-18, 2005  
San Antonio

**CHAPTER 9**



**WARREN W. HARRIS**

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- EMPLOYMENT:** Bracewell & Giuliani LLP, Partner, Head of Appellate Group  
University of Houston Law Center, Adjunct Professor in Appellate Advocacy  
Supreme Court of Texas, Briefing Attorney (1988-89)
- BOARD**
- CERTIFICATION:** Board Certified—Civil Appellate Law, Texas Board of Legal Specialization
- EDUCATION:** University of Houston Law Center, Doctor of Jurisprudence *Cum Laude*
- BAR**
- ASSOCIATIONS:** American Bar Association, Tort and Insurance Practice Section Appellate Advocacy Committee (Chair 2000-01); Litigation Section Appellate Practice Committee Membership Recruitment Subcommittee (Co-chair 2002- )  
State Bar of Texas, Appellate Section (Chair-elect 2004- )  
TEXAS BAR JOURNAL (Editorial Board Chair 2002- )  
Houston Bar Association, Appellate Practice Section (Chair 1998-99)  
THE HOUSTON LAWYER (Editor in Chief 1991-92)  
International Association of Defense Counsel, Appellate Practice Committee (Chair 2003- )  
Texas Bar Foundation Life Fellow  
Houston Bar Foundation Life Fellow  
Houston Young Lawyers Association (President 1999-2000)
- SPEECHES:** Advanced Civil Appellate Practice Course, State Bar of Texas - 1996, 1998, 1999, 2001, 2002, 2003, 2004  
Conference on Techniques for Handling Civil Appeals in State and Federal Court, University of Texas School of Law - 1992, 1993, 1994, 1995, 2003  
Practice Before the Texas Supreme Court, State Bar of Texas – 2003  
Appellate Practice Institute, Houston Bar Association - 1995, 1998, 2001  
Appellate Bench Bar Conference, Houston Bar Association -1997  
Civil Appellate Law Course for Trial Lawyers, South Texas College of Law – 1997  
Appellate Practice Section, Houston Bar Association - 1991, 1992, 1998, 2002, 2004, 2005  
Appellate Law Section, Dallas Bar Association - 1993, 2000, 2005  
Litigation Section, Houston Bar Association - 1998, 2004, 2005  
Tort and Insurance Practice Section, American Bar Association - 1998, 1999, 2000  
Advanced Civil Trial Course, State Bar of Texas – 2004  
Advanced In-House Counsel Course, State Bar of Texas - 2002, 2003, 2004  
International Association of Defense Counsel - 2003, 2005  
Seminar, Houston Bar Association - 1992, 1993, 1994, 1995, 1999, 2004  
*Know Your Rights* Legal Call-in Television Show, KUHT Channel 8 - 1997, 1999, 2004
- PUBLICATIONS:** *The Texas Supreme Court Tightens the Noose on Class Actions*, 66 TEXAS BAR JOURNAL 30 (2003)  
*CD-ROM: Briefing of the Future*, 65 TEXAS BAR JOURNAL 814 (2002)  
*Recent Developments in Federal Appellate Advocacy*, TORT & INS. L.J., Winter 1999, at 375



**MICHAEL B. CLARK, ESQ**  
**Residence: Kendall County**  
**Home: 830/336-2048 ----- Cell: 210/410-8769**

**EXPERIENCE**

**1998 - Present**

**General Counsel**

**Steves & Sons, Inc.**

P.O Box 1866

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Established in 1866, Steves & Sons, Inc. is a large, privately held, door manufacturing company headquartered in San Antonio, Texas with additional facilities located in Richmond, Virginia and Lebanon, Tennessee. I report directly to the Chief Executive Officer and my responsibilities include:

- ◆ General oversight of the day to day business operations of the company; integrating production, purchasing, labor and accounting functions;
- ◆ All legal, safety, environmental and human resource matters, including supervision of staff;
- ◆ Handling a heavy contract docket. Negotiation, preparation, review and revision of all contracts, leases, capital asset purchases and insurance policies entered into by the company, including direct interaction with vendors on negotiating contracts and agreements, with emphasis on the business aspect of the transaction as much as the legal aspect. Direct handling of asset purchase agreements, manufacturing, distribution and representative agreements, software licensing agreements and equipment lease agreements;
- ◆ Maintaining moderate litigation docket and monitoring outside counsel on all other litigation matters. Direct handling of regulatory litigation (OSHA, NLRB, EEOC, TNRCC, TWCC), real-estate and merger and acquisition matters. Lead most recent union contract negotiations. Drafted current Collective Bargaining Agreement;
- ◆ Drafting all corporate and employee polices and handbooks, including absentee control plan, drug/alcohol testing, Short Term Disability and Health Insurance plans;
- ◆ Attending weekly meetings with other members of the Executive Management Committee to discuss and resolve business issues and to continue developing corporate direction and agendas;
- ◆ Providing reports and opinions to the Board of Directors and drafting corporate resolutions.

**1994 - 1998**

**Shareholder, Director, Vice President**

**Clemens & Spencer P.C**

San Antonio, Texas 78205

Handled heavy litigation and transactional practice in large "A" rated firm. Managed wide practice area including commercial, banking, securities, bankruptcy and insurance areas. Supervised and trained associate attorneys, paralegals and staff. Assisted in recruiting new lawyers and staff. Significant first chair responsibility for multi-million dollar litigation in state and federal trial and appellate courts. Last case tried while at the firm was a 25 million-dollar defense matter in Duval County, Texas.

**1989 - 1993**

**Murray, McClenahan & Sparr, Inc.**

San Antonio, Texas 78205

Handled various types of commercial and personal injury defense litigation, as well as commercial transactional work with emphasis on lender liability litigation and loan workouts. First chair experience in both trial and appellate courts in numerous jurisdictions.

## **EDUCATION**

### **Saint Mary's School of Law**

J.D. 1989, *with Distinction*

- American Jurisprudence Awards: Torts, Constitutional Law, Criminal Law
- Inductee: Harlan Society
- Outstanding Young Men of America
- Student Instructor: St. Mary's School of Law, 1988-1989

### **Southwest Texas State University**

B.B.A. 1986, Business Management

- Vice President, Management Club 1985
- Panel Debate Member: Tri College Business School Conference, 1985
- Chairman, Career Day Committee, 1985

## **PRESENTATIONS**

Panel Member/Speaker: State Bar of Texas -- July 2004

3<sup>rd</sup> Annual Advanced In-House Counsel Course

*Representing the Closely Held Corporation*

Panel Member/Speaker: American Corporate Counsel Association

5<sup>th</sup> Annual Ethics Conference – Nov. 2002

*Which Hat Today???? - Ethical Jeopardy*

Texas Lawyer: *Profiled in feature article, Texas Lawyer, In-House Crowd, May 2, 2005*

Texas Lawyer: *Executive Exchange* interview article July 4, 2005

## **MEMBERSHIPS/POSITIONS**

### **Sharon Clark Mission Foundation, Inc.: Founder/President**

Established in honor of my wife of thirteen years, Sharon, who passed away in 1998. Foundation builds/repairs church facilities in third world countries. Activities Include: funding the purchase of raw material, enlisting construction team volunteers, witnessing and preaching.

**Habitat for Humanity of San Antonio:** *Board of Director*; 2004 – Present

### **Affiliate Attorney – The Rutherford Institute**

Handle, on a *pro bono* basis, suits involving the freedom of religious speech.

### **Concordia Lutheran Church, San Antonio, Texas**

*Teacher:* Sunday College Student Group: 2003 - Present

*Teacher:* 11 & 12 Grade Sunday School Class: 1994-1997

### **Victory Assembly of God, Universal City, Texas**

Assist in mission work; business and legal consultant

**Association of Corporate Counsel:** *President, South/Central Texas Chapter 2005*

### **Texas General Counsel Forum**

*President:* Austin/San Antonio Chapter; 2002 & 2003

*State Wide Board of Director*, 2000 – 2003

**Wausau Insurance Company:** *National Client Advisory Board Member 2002 & 2003*

### **State Bar of Texas**

### **San Antonio Bar Association**

## **LICENSES**

State Bar of Texas, November 3, 1989

United States Supreme Court, December 7, 1992

United States Circuit Court - 5<sup>th</sup> Circuit, August 15, 1991

United States District Court--(Western District-April 10, 1990; Southern District-November 13, 1992)

## **PERSONAL**

Married to Amber Clark. Four Children: Soccer Coach: Boerne Soccer League. Raise quarter horses.

# BURLINGTON RESOURCES

## Frederick J. Plaeger II

Vice President and General Counsel  
Burlington Resources Inc.



**Rick Plaeger** is the Vice President and General Counsel of Burlington Resources Inc. in Houston, TX. Burlington Resources is one of the world's largest independent oil and gas exploration and production companies, with operations in the United States, Canada, the United Kingdom, South America, Africa and China.

Prior to joining Burlington in 1997, Rick was Vice President, General Counsel and Corporate Secretary of The Louisiana Land and Exploration Company in New Orleans, Louisiana, and was formerly a partner in the New Orleans Law Firm of Milling Benson & Woodward. He received his Bachelor of Science

Degree in Business and Juris Doctor Degree in Law from Louisiana State University and upon graduation served as a Law Clerk for the Hon. Marcel Livaudais, Jr. in the United States District Court for the Eastern District of Louisiana.

Rick is admitted to practice law in Texas and Louisiana and before the United States Supreme Court and various Federal and State Courts. He is a member of the Executive Committee of the Institute for Energy Law of the Center for American and International Law (Chairman 2005 - ), the Board of Directors of the Texas General Counsel Forum (President - Houston Chapter 2004 - ), Chairman of the American Petroleum Institute – General Committee on Law, the Independent Petroleum Association of America – Legal Committee and a member of the Association of Corporate Counsel and American, Houston and Louisiana Bar Associations. He is also a member of the Board of Trustees of the Houston Ballet Foundation. He is listed in Who's Who in American Law, Who's Who in America and Who's Who in the World and as a "2004 Texas Super Lawyer" by Texas Monthly Magazine.

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### BIOGRAPHICAL INFORMATION

#### EDUCATION

B.A., Southern Methodist University (1971)  
J.D., University of Texas School of Law (1975)

#### PROFESSIONAL ACTIVITIES

Executive Vice President & General Counsel, CenterPoint Energy, Houston, Texas

Board Memberships: Houston Community College System Foundation; Manned Space Flight Education Foundation Inc.; Texas Aviation Hall of Fame; Federal Relations and Government Relations Advisory Committees of the Greater Houston Partnership; Southern Regional Advisory Board of the Institute of International Education

Member and Past President of Houston Bar Association  
Member and Past Director of State Bar of Texas  
Past Chair of Texas Commission for Lawyer Discipline  
Fellow of the American Bar Foundation  
Past Chair and Sustaining Life Fellow of the Houston Bar Foundation  
Sustaining Life Fellow of the Texas Bar Foundation

#### LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS

Co-Author/Speaker: *The Current State of the Electric Power Industry: An Uneasy Mix of Free and Regulated Markets*, Conference Book for the 56<sup>th</sup> Annual Program on Oil and Gas Law, Institute for Energy Law, The Center for American and International Law, Houston, February 17-18, 2005

Author/Speaker: *Restructuring The Electric Industry in Texas/Restructuring Reliant Energy*, (2002); *Electric Utility Deregulation*, Business Owners and Managers, Southwest Region Conference, Houston, April 2000

Author/Speaker: *Restructuring the Texas Electric Industry: An Analysis of Senate Bill 7*, Houston Bar Association Corporate Counsel CLE Program, October 1999

Author: *Unique Obstacles to Caspian Energy Projects*, *World Energy Magazine* (1998)

Listed in *Who's Who in American Law*, *The Best Lawyers in America* and the *World's Leading Lawyers*



**Katherine S. Yates  
CPS Energy  
San Antonio, Texas**

Katherine Yates is currently serving as in-house counsel to CPS Energy, an electric and gas utility owned by the City of San Antonio. CPS Energy has assets of over \$6 billion, serves a territory of over 1,500 sq. miles, and is the largest publicly owned utility in the U.S. Ms. Yates was hired directly upon graduation from law school, and has subsequently developed a substantial expertise in the preparation, negotiation and administration of transactional documents associated with most of CPS Energy's procurements and construction projects. Her primary role includes providing assistance and counsel to CPS Energy business units on matters such as the procurement of goods and services, financial risk management, bonding, insurance, construction delivery methods, and environmental and regulatory compliance. She has held positions on project teams for several high-profile high-dollar construction projects such as the construction of power plants, substations, customer service and office buildings, and transmission and distribution facilities. Ms Yates received a B.S. in Biology from Texas A&M in 1978, and her J.D. from St. Mary's Law School in 1983. She is currently serving her third year of a three-year term on the Construction Law Counsel of the State Bar, is a member and past Chairman of the Construction Law Section of San Antonio, and is a member of the American Corporate Counsel Association and Texas Public Power Association. She served as a speaker for the 2005 Construction Law Section 19<sup>th</sup> Annual Conference and wrote the article: The New Reality of Risk: Practical Techniques for Managing Changing Market Conditions for Materials.



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**4<sup>TH</sup> ANNUAL ADVANCED**

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## A MUNICIPAL LAWYER'S PERSPECTIVE ON ETHICS

Let me say first that any examples used in this perspective are NOT based on my personal experiences.

Ethics must be an “applied” practice rather than simply a policy in the file drawer. And in-house counsel is the primary employee who must strike a principled balance between competing moral imperatives. After 21 years with a large municipally-owned utility, I am now senior counsel with much more responsibility and accountability than when I started. I have had the good fortune of working for and with many CEOs and senior management who have fostered and implemented strategies and policies designed to comply with the law as it changed and who encouraged ethical conduct. The same good fortune can't be said of other lawyers employed by entities such as Enron, Tyco, and WorldCom that are now casualties due to the unethical practices of some senior management.

But reconciling my duty to the client with my employment responsibilities is not always easy. I have the same obligations as outside counsel—to advise my client on a broad range of issues—but I am also bound by a host of other items such as my employee handbook, corporate policies, municipal codes, and, of course, the lawyer's ethical canons.

That a lawyer has a general duty to maintain a client confidence is unquestionable. And it is equally the rule that counsel must not assist criminal or fraudulent conduct.<sup>1</sup> However, a lawyer must be able to discuss the legal consequence of any proposed course of conduct with a client and, in doing so, give an honest opinion about the actual consequences that appear likely to result from the client's conduct.<sup>2</sup> Thus, it is important to note that the duty of confidentiality is not absolute, and ABA Model Rule 1.13(b) reflects perhaps the only guidance for an in-house lawyer:

If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a manner related to the representation that is a violation of a legal obligation to the *organization*, or a violation of law which reasonably might be imputed to the *organization*, and is likely to result in substantial injury to the *organization*, the lawyer shall proceed as is

reasonably necessary in the best interest of the *organization*.

It cannot be clearer: The obligation of an in-house counsel is to the company. In determining how to proceed, the in-house counsel must consider the seriousness of any possible looming violation, the motivation behind the person's conduct, the accountability level of the person within the organization, the organization's policies and other fact-specific relevant matters. Although most of us would not expect to give advice until asked, ABA Model Rule 1.4 may obligate us to act if the employee, on behalf of the organization, proposes a course of action that is likely to result in adverse legal consequences—substantial or otherwise.

The lines of ethical behavior become blurred when there exists a tension between the lawful ethical behavior of employees and the business goals and objectives set by senior management. Objectives such as meeting sales or production targets, reducing expenses, and minimizing or eliminating public scrutiny or criticism all contribute to this tension. The ethical dilemmas associated with these corporate expectations are squarely on the shoulders of the in-house counsel, and he or she must have the moral courage to critically review and challenge potential unethical actions proposed by the CEO, senior management, or any employee. Doing so, moreover, may come at great personal risk given that employment-at-will is still alive and well in most organizations and at the discretion of those you may be criticizing! Consider a CEO reluctant to disclose information that is vital to an upcoming vote by the organization's governing board or the CEO's request that you generate business or garner political favor by using your legal contacts.

Equally murky is the legal responsiveness expected of the in-house counsel serving in a dual role as a business leader or member of an executive team. Being part of the “inner circle” can be rewarding in many ways: You get better assignments, have access to important people, and are there when important decisions are made. But there is a price to pay for being part of that inner circle. Giving objective advice and maintaining objectivity becomes a real challenge. Constraining a senior management client or even getting her to listen to you can be extremely difficult. You face a host of likely conflicts and ethical dilemmas:

- The validity or legality of your advice is questioned;
- You are asked to take on a personal matter or a business role that demands that you wear both a business and legal hat;

<sup>1</sup> ABA Model Rule 1.6 (b)

<sup>2</sup> ABA Model Rule 1.2, cmt. 6.

- You are asked to serve on a committee tasked with the responsibility of overseeing or governing an activity which you helped design or implement;
- You are asked to use your business influence to generate new business or garner political favor not control legal risk;
- You are asked to withhold information or keep a problem confidential when there is less than clear precedent to do as asked;
- You are asked for your legal advice on a matter that you have an inherent bias, personal stake, or conflict of interest.

The consequences of cutting corners on these type ethical challenges can have dire personal consequences to you as a lawyer, as well as expose you to material violations of law. Thus, the first conversation you must have with senior management is that you are not their personal lawyer. You represent the organization. Severe and endless consequences result from not making this clear at the beginning of your relationship with these individuals.

The in-house attorney, serving also in a business capacity, might risk missing the bright line separation from his legal obligations. An in-house counsel may be asked to serve in more than just a legal capacity because he has enhanced issue-recognition and risk management skills. Serving in a dual role can compromise the independence, candid assessment and objective legal judgment of counsel as he is confronted with the equally persuasive responsibility of being a team player. Although courts have recognized that the communication between counsel and employees is protected by the attorney-client privilege<sup>3</sup>, there is no such privilege when the lawyer gives strictly business advice. For this reason, others must know that you are giving business advice when you are asked to perform in a dual capacity. ***In-house counsel should never be afraid of admitting a conflict!*** Better that the quality of the representation suffers than to be liable for not giving objective legal advice.

Effective counseling of a municipal entity centers on the lawyer assisting others in the development of policies such as a code of conduct, receipt of gifts, contribution expenditures, and employee recognition expenditures. Orientation of new hires, annual ethics training, ethics audits, and the appointment of a chief ethics officer provide consistent approaches to any ethical challenges. Enforcement of legal and ethical violations is critical to institutionalizing ethical behavior, and the CEO and senior management play an essential role in providing the focus and examples of higher ethical behavior expected from a public servant.

It is also imperative that in-house counsel design and implement business ethics and compliance management systems that are capable of detecting and correcting misconduct ***at all levels of the organization.***

And a lawyer saying it is legal doesn't make it the right thing to do! Ask in advance of the dilemma:

- Just because it's legal, should we allow it here?
- If we don't, can the integrity and trust placed on us by the public be called into question?
- How is the public served by our behavior?
- How would this look on the front page of the newspaper?
- If this allowed, will other employees see it as an excuse to go farther?
- Is there any reason preventing us from erring on the side of caution and taking the high road?

Even if the law permits an activity and even if senior management can provide a sound rationale for the policy or decision, that may not be enough to avoid negative press or political fallout. The press loves a good scandal, and reports issued by an investigative body usually provide enough fodder for the local media to create significant attention and pressure on municipal officials and senior officers. The complexity of municipal constraints demands a thoughtful and deliberate approach by counsel prior to dealing with these individuals. An open door policy is always better, because a consistent withholding of information will only cause negative perceptions from those that consider it their "right" to know the inner workings of the municipal organization. Alternatively, non-public confidential information or trade secrets, to which the press or investigative agency is not entitled, should be protected from public disclosure. The key to maintaining positive feelings is to simply explain to interested parties why the information must be withheld. Senior management must also be counseled on being careful with their comments to the press and others lest the exception to disclosure be lost based on a careless comment. It is critically important that counsel advise management that while mistakes must be admitted with no unnecessary apologies, the explanation of why and how it happened must be explained to the public. Assuming an action was done for a good reason, the spokesperson often can articulate the connection between the decision and the greater public good without looking silly or false. A municipal lawyer may be the least prepared for these ethical dilemmas and yet may be the most called-upon to navigate his way out of these potential traps in a manner that preserves the client's interest while maintaining his own integrity and reputation.

<sup>3</sup> ABA Model Rule 1.6 (a)



Legal limits and ethical limits are NOT the same thing, and in-house counsel must be mindful of the difference. In-house counsel must serve as a voice of moral and ethical conscience for the municipality's actions. Despite the complexities of dealing with corporate ethics, the smell test and simple thinking is still the best compass for lawyers who prefer not to trip on the hurdles!



## SUGGESTED READING

Badgerow, Walking the Line: Government Lawyer Ethics, 12 Kansas J.L. & Pub Policy 437 (Spring 2003).

Giesel, The Legal Advice Requirement of The Attorney - Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations, 48 Mercer L. Rev. 1169 (1997).

Killbride, Identifying The Client in the Corporate Setting and the Attorney-Client Privilege, 6 Geo. J. Lethal Ethics 1129 (1993).

Machtinger, and Welch, “In-House Ethical Conflicts: Recognizing and Responding to Them” ACC Docket 22, no. 2 (February 2004): 22-36.

Salkin, A 1999 Survey of Issues in Ethics for Municipal Lawyers, 14 BYUJ Pub. L. 209 (2000).

Weaver, Client Confidence in Disputes Between In-House Attorneys and their Employer – Clients: Much Ado About Nothing or Something, 30 U.C. Davis L. Rev. 483 (1997).

Weiss, In-House Counsel Beware: Wearing The Business that Could Mean Losing the Privilege, 11 Geo. J. Legal Ethics 393 (1998).

There are a million ethical issues in today's businesses and unfortunately there is no perfect decision measurement for all these issues. Those in international businesses are much more complicated and much more delicate, along with being tenfold in numbers. Home / Uncategorized / Ethical Issues in Business No One Told You About. There are a million ethical issues in today's businesses and unfortunately there is no perfect decision measurement for all these issues. Those in international businesses are much more complicated and much more delicate, along with being tenfold in numbers. Ethical issues of compliance are often tied to companies as a whole straying from the way they are legally responsible to conduct business. Businesses are required to comply with all environmental, federal and state regulations. If they do not, they can put the health and livelihood of those within and outside of their company at risk. Although they may not always break laws, business governance problems break trust within an organization and can cause future problems within a company hierarchy. Examples can include falsifying reports to deceive stakeholders and managers abusing positions of power when dealing with lower-level employees. Publicly traded companies can face severe SEC penalties, but smaller private companies have to govern themselves. bodies about perceptions of ethical issues facing the profession, the causes of ethical failure and the role of ethics education. Given the context outlined above, the aim of this paper is to identify professional accounting body perceptions of: . the likelihood of ethical issues arising in different types of organisations; . the perceived causes of ethical failure; and. In an attempt to gain a greater appreciation of the professional accounting bodies' commitment to ethics education, this study investigates their views as IFAC members. The study examines member body views on the ethical issues that face accountants in differing types of business enterprises, the causes of ethical failure and their views on the role of professional bodies in ethics education, including placement of ethics.