



Tips for Avoiding Ethical Dilemmas as In-House Counsel

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Potentially Conflicting Ethical Obligations

- Ethical Obligations to the Client
- Ethical Obligations to the Court
- Ethical Obligations to the Adversary

Ethical Obligations to the Client

Duty of Zealous Representation

- A lawyer must “act with commitment and dedication to the interests of the client.” CRPC 1.3(b)
- “The duty of a lawyer both to [the] client and to the legal system is to represent [the] client zealously within the bounds of the law.”
People v. McKenzie, 34 Cal.3d 616, 631 (1983).
 - See also ABA Model Rule 1.3 comment; N.D. Cal. Guidelines for Professional Conduct (lawyers have an “underlying duty to zealously represent their clients”)

Ethical Obligations to the Client

Duty to Maintain Confidentiality

- “It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Cal. Bus. & Prof. Code 6068(e)(1);
see also CRPC 1.6
- Sole exception: an attorney may, but is not required to, reveal a client’s confidential information if disclosure is necessary to prevent a criminal act that is likely to result in the death of, or substantial bodily harm to, an individual.

Ethical Obligations to the Court

Duty of Candor

A lawyer must:

- Disclose controlling legal authority known to the lawyer to be directly adverse to the position of the client. CRPC 3.3(a)(2)

A lawyer must not:

- Make false statements of fact or law to the court. CRPC 3.3(a)(1)
- Offer evidence the lawyer knows to be false. CRPC 3.3(a)(3)
 - A lawyer may refuse to offer the evidence.

Ethical Obligations to the Court

Duty to Remediate

- If the lawyer comes to know that material evidence offered to the court is false, the lawyer “shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”
 - But the lawyer must still abide by the duty of confidentiality to the client.

Ethical Obligations to Adversaries

Duty of Fairness to Opposing Parties and Counsel

A lawyer may not:

- “Unlawfully obstruct another party’s access to evidence, including a witness.”
CRPC 3.4(a)
- “Destroy or conceal a document or other material having potential evidentiary value,”
or counsel or assist another person in doing so. CRPC 3.4(a)
 - *Potential criminal penalties: Cal. Pen. Code § 135; 18 USC §§ 1501-20*
- “Suppress any evidence that the lawyer or the lawyer’s client has a legal obligation
to reveal or to produce.” CRPC 3.4(b)
- Falsify evidence. CRPC 3.4(c)

Ethical Obligations to Adversaries

Duty to Bring Only Meritorious Claims and Defenses

- A lawyer shall not “bring *or continue* an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.” CRPC 3.1

Duty Not to Delay

- “[A] lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.” CRPC 3.2

Scenario 1: Buying Time

- Vignette No. 1



Scenario 1: Buying Time

No wiggle room

- “In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding . . .”
CRPC 3.2
- ABA Model Rule 3.2, comment: “Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.”

Scenario 2: Representing a Small Company

- You are in-house counsel for a small startup.
- You are helping the company negotiate a deal to be acquired. Part of the deal involves equity and non-compete terms for the company's founders.
- One of the founders asks you to explain the deal terms to her.
- She also asks you if she should sign the deal.
- Who do you represent at that moment? Can you answer the questions?

Scenario 2: Representing a Small Company

General rule

- “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” CRPC 1.13(a)
- True even if corporate legal counsel’s advice affects the principals.
Skarbrevik v. Cohen, England & Whitfeld, 231 Cal. App. 3d 692 (1991).
- True even in the context of a small, closely held corporation.
Sprengel v. Zbylut, 253 Cal. App. 5th 1028 (two 50% owners of LLC)

Scenario 2: Representing a Small Company

But it's complicated

- “[A]n attorney for a closely-held corporation may owe professional duties to individual owners with whom he or she has had ‘close interaction.’” *Sprengel, supra*.
- Depends on totality of the circumstances, including:
 - size of company;
 - kind and extent of contacts.

Scenario 2: Representing a Small Company

So what does this mean?

- Your client is the company, not the owner.
- Explaining the deal terms to the owner does not change that.
- But advising the owner on whether or not she should sign *may* change that, depending on the circumstances.
- Clear communication is important.
- Permissible to represent both—but watch out for potential conflicts and consent rules. CRPC 1.13(g)

Scenario 3: Dealing with Possible Deception/Lies

- Former employee sues for wrongful discharge, alleging that your CEO sexually harassed her.
- You interview CEO, who agrees to cooperate fully and categorically denies allegations and says he has never done anything of that sort.
- In the course of investigation, you discover that CEO sexually harassed and secretly paid off two other women who left the company many years ago.
- You confront CEO with this evidence and he admits prior conduct but insists he did not do what current complaint alleges.
- What should you do?

Scenario 4: False Evidence

Step 1: TRO Defeated

- Alpha sued Beta for theft of trade secrets.
- Among other allegations, a former Alpha employee (Mr. Doe) worked in Beta's overseas office, and Alpha claimed that Mr. Doe took Beta's info with him.
- Alpha moved for a TRO.
- Your outside counsel defended Beta and filed a declaration from Mr. Doe, saying he took nothing of Alpha's with him.
- The Court denied the TRO.

Step 2: Uh-Oh!

- While Mr. Doe was visiting the Bay Area, your outside counsel interviewed him in preparation to defend a preliminary injunction motion.
- Mr. Doe confessed that he took lots of Alpha docs to Beta.

Step 3: Acting Responsibly

- Beta put Mr. Doe on paid leave.
- A separate lawyer was hired for him.
- Beta filed a document entitled “Withdrawal of Reliance on Doe’s Declaration.”
- Doe’s computers were secured and isolated.

Step 4: Preliminary Injunction Hearing

- The Judge asked tons of questions, but few, if any, about Mr. Doe.
- The Judge denied the preliminary injunction, except as to those matters to which Beta agreed to be enjoined.
- Judge refused to shut down the product line.

Scenario 5: Common Issues in Internal Investigations

- Authorities investigating potential FCPA violations
- You hire outside counsel to conduct internal investigation
- What do you do about:
 - Scope of investigation
 - Documenting investigation
 - Privilege protection or waiver
 - Interviewing employees
 - Discipline

Scenario 5: Common Issues in Internal Investigations

- Scope
 - Must be independent, objective, appropriately conducted, and properly documented
 - DOJ Guidance: *Evaluation of Corporate Compliance Programs* (June 2020); <https://www.justice.gov/criminal-fraud/page/file/937501/download>
 - What does “appropriately conducted” mean?
 - “Have the company’s investigations been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory managers and senior executives?”
Id.
 - *Yates* memo (revised)

Scenario 5: Common Issues in Internal Investigations

- Work product
 - Witness statements may not be privileged
 - Disclosing aspects of investigation could waive privilege
- Choosing to waive privilege
 - Effect on criminal/regulatory exposure
 - Civil exposure and other ramifications
- Interviewing witnesses
 - *Upjohn* warning
- Disciplining employees

Scenario 6: e-Discovery Nightmare

- *Qualcomm v. Broadcom* patent case
- Broadcom served a mountain of broad document requests.
- The document collection would take many hours of attorney time.
- To save costs, the client divided the labor: in-house personnel handled the document collection alone, and outside counsel handled the pleadings.

What Could Go Wrong?

CASE IN POINT

by Tom Fishburne



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What Could Go Wrong?

A lot of things!

- Monetary sanctions
- Case-ending sanctions
- Adverse jury instructions
- Referral to State Bar for Investigation



Qualcomm v. Broadcom – A Cautionary Tale

Facts

- Patent case
- Broadcom contended that Qualcomm waived its infringement claims by participating in a standards-setting group.
- Qualcomm denied involvement in the group.
- Broadcom served boatloads of discovery requests—millions of pages ended up being produced.
- Qualcomm managed the document collection in house, while outside counsel drafted and signed the pleadings.

Qualcomm v. Broadcom – A Cautionary Tale

Facts (continued)

- During a deposition, Broadcom asked the witness about an email indicating that a Qualcomm employee was receiving emails from the standards setting group.
- Qualcomm continued to deny any early involvement in the group.

Qualcomm v. Broadcom – A Cautionary Tale

The Sh*t Hits the Fan

- While prepping a Qualcomm witness *during trial*, outside counsel discovered an email welcoming the witness to the standard setting group's list serve.
- Outside counsel (finally) searched the witness's laptop and found 20 more emails to the list serve. None were produced during discovery.

Qualcomm v. Broadcom – A Cautionary Tale

The Sh*t Hits the Fan

- Outside counsel decided not to produce any of the emails during trial.
- Outside counsel told the court that there was no evidence of emails sent to the standard setting group's list serve.
- The existence of the emails were revealed on cross-examination.

Qualcomm v. Broadcom – A Cautionary Tale

Sanctions Against Counsel *AND* Qualcomm

- The Court awarded \$8.5 million against Qualcomm (all of Broadcom's attorneys' fees and costs for the entire lawsuit).
- Six outside attorneys were referred to the State Bar for investigation and possible disciplinary action.
- Outside *and* in-house attorney were ordered to meet with the Magistrate Judge in chambers to identify the failures in Qualcomm's case management and discovery protocols and to develop a protocol for the future.

Qualcomm v. Broadcom – A Cautionary Tale

From the sanctions order:

- Qualcomm’s lawyers “chose”:
 - “Not to look in correct locations for correct documents.”
 - “To accept the unsubstantiated assurances of an important client that its search was sufficient.”
 - “To ignore warning signs that the document search and production were inadequate.”
 - “Not to press Qualcomm employees for the truth.”

Qualcomm v. Broadcom – A Cautionary Tale

From the sanctions order:

“For the current ‘good faith’ discovery system to function in the electronic age, **attorneys and clients must work together** to ensure that both understand how and where electronic documents, records, and emails are maintained and to determine how best to locate, review, and produce responsive documents. **Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate search.**”

Qualcomm v. Broadcom – Lessons Learned

Outside counsel cannot leave document collection up to the client alone.

The client and outside counsel have to work together to identify all locations of responsive documents.

Inadequate document discovery can hurt both the client and outside counsel.

Thank You
