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Tips for Avoiding Ethical Dilemmas as In-House Counsel

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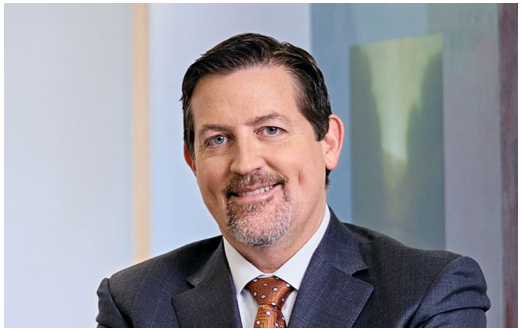
Presenters



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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: 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 1: 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 1: 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
  - attorney's access to information relating to individual owner's interests.

Scenario 1: 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 2: 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 Alpha'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.

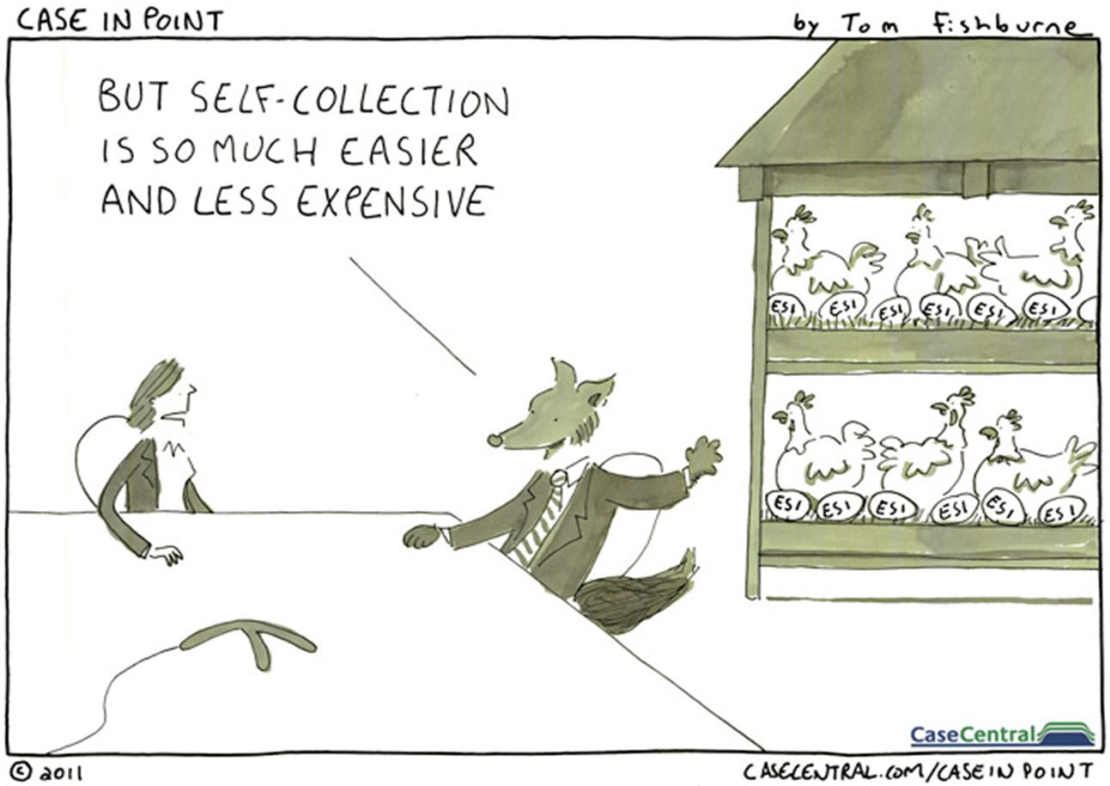
Step 4: Preliminary Injunction Hearing

- 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 3: 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.

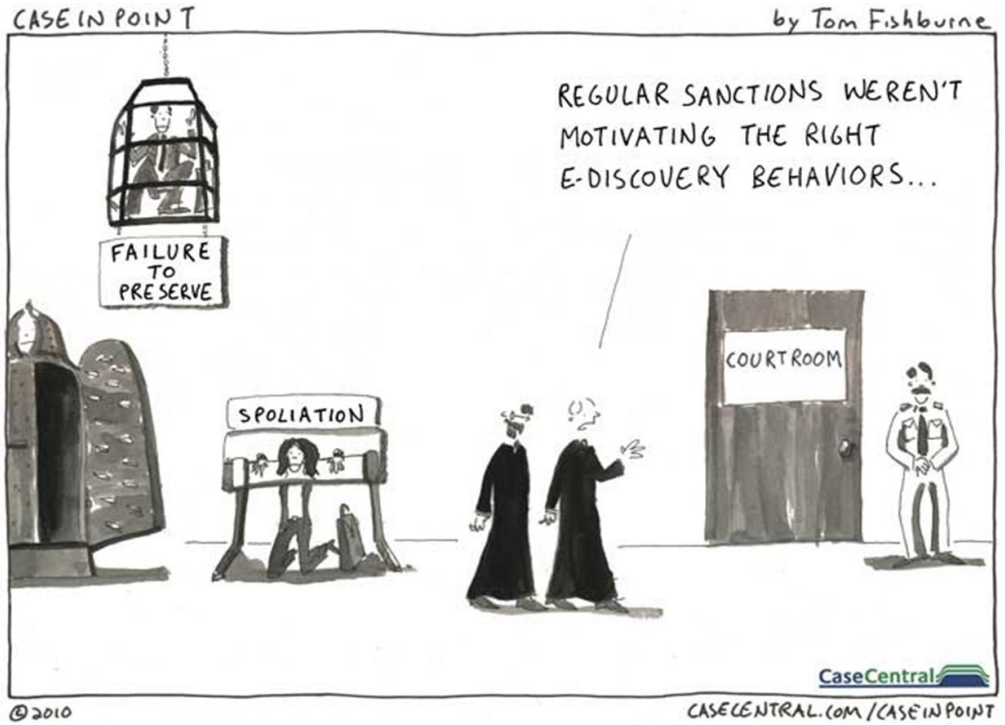
What Could Go Wrong?



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

Serious Issue Emerges

- 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

Lack of Transparency Compounds Problems

- 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 sanctioned and 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.

Do not ignore warning signs that a search was inadequate.

Qualcomm v. Broadcom – Post script

Qualcomm did not appeal the $8.5 million sanction

Sanctioned attorneys asserted due process right to challenge their sanctions.

- Two years of discovery
- Sanctioned attorneys deposed 7 Qualcomm engineers, 3 of Qualcomm's in-house attorneys, 2 of Qualcomm's in-house paralegals, and one of the sanctioned attorneys themselves; all sanctioned attorneys submitted declarations
- 3-day evidentiary hearing

Recent Developments in Ethics Law

- California Lawyers Working Outside California
- Ethical Walls

California Lawyers Working Outside of California

COVID has changed the way we practice law

- Remote work
- California lawyers working for California firms or companies want to live in and work from other states
- What does this mean from a legal ethics perspective?

California Lawyers Working Outside of California

California's rule for California lawyers practicing elsewhere

California Rules of Professional Conduct, Rule 5.5(a)

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction **where to do so would be in violation of regulations of the profession in that jurisdiction**; or

(2) knowingly* assist a person* in the unauthorized practice of law in that jurisdiction.

California Lawyers Working Outside of California

Other state's rules for foreign lawyers working in the state

- *Many* states have a rule similar to Rule 5.5(b) of ABA Model Rules

> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> > (1) except as authorized by these Rules or other law, **establish an office or other systematic and continuous presence** in this jurisdiction for the practice of law; or
> >
> > (2) **hold out to the public or otherwise represent that the lawyer is admitted** to practice law in this jurisdiction.

California Lawyers Working Outside of California

ABA Formal Opinion 495 (Dec. 2020)

- "[I]n the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, **a lawyer may practice the law authorized by the lawyer's licensing jurisdiction** for clients of that jurisdiction, **while physically located in a jurisdiction where the lawyer is not licensed** if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized."

California Lawyers Working Outside of California

California State Bar Proposed Formal Opinion (Aug. 2021)

- "The committee recognizes that **lawyers working remotely may temporarily or permanently relocate to another state where the lawyer is not licensed to practice law**. California licensed lawyers practicing California law remotely in another state where they are not licensed **should consult the multijurisdictional practice and unauthorized practice of law rules and authorities of the state where they are physically present**."

- "The ABA and some other state bar ethics committees have issued opinions regarding unauthorized practice of law considerations for attorneys remotely practicing the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted due to COVID-19 or other circumstances."

California Lawyers Working Outside of California

Takeaways

- Rules in California and other states increasingly allowing California attorneys to live in other states while practicing law in California
- BUT have to check local rules for the jurisdiction and follow as the rules develop
- And consider taking or passing into local bar

Ethical Screens

- The California Rules of Professional Conduct now expressly allow for use of ethical screens to avoid imputed conflicts **without client consent** in some cases.
- Previously recognized only in case law.

Ethical Screens

Rule 1.10(a) of the California Rules of Professional Conduct

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon rule 1.9(a) or (b) and arises out of the prohibited lawyer's association with a prior firm,* and

(i) the prohibited lawyer **did not substantially participate in the same or a substantially related matter**;

(ii) the prohibited lawyer is **timely screened** from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule, which shall include a description of the screening procedures employed; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

Ethical Screens

Key elements of an effective screen

- Imposition of screen in a timely manner
- Screened lawyer can't share in fees from the matters at issue
- Notice to affected clients
- Prohibitions against communications across the screen
- Limitation of prohibited person's access to screened matter's file
- Limitation of access of firm lawyers or other personnel to the prohibited person's documents and information

Thank You