

Ethical Considerations for the Attorney Practicing Free Software



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Overview of Ethics Discussion

Part I: Representing Free Software Clients

Q&A

Part II: Practicing Free Software

Q&A

Break

Part III: More General Ethical Considerations Relevant to Free Software

But, First ...

What are ethics?

- “1) the discipline dealing with what is good and bad and with moral duty and obligation; 2) a: a set of moral principles or values; b: a theory or system of moral values; c: **the principles of conduct governing an individual or a group**; d: a guiding philosophy.” *Merriam-Webster’s Dictionary*
- “Legal ethics. The customs of the legal profession, involving the moral duties that its members owe **one another**, their clients, and the courts.” *Black’s Law Dictionary*
- Sources: Model Rules, Model Code, PTO Code

Can they be taught?

- Intuitive Decisions
- Conflicting Scenarios
- Sensitivity to Repercussions

Part I: Representing Free Software Clients

As Compared to Other Clients

Why and What

Pro Bono Obligations

Taking Ownership Interest in a Client

Duty of Loyalty

Representing Free Software Clients: As Compared to Other Clients

Differences from Traditional Representation

- More Technologically Sophisticated: Declining with Creep
- No Litigation / Community Norms Govern

Similarities with Traditional Representation

- Importance of Financial Impact of Legal Choices
- Legal Sophistication
- Applicable Substantive Law

Representing Free Software Clients: Why and What

Legally and Technically Challenging Subject Matter

Client Development

- Diverse Industries
- Entrée for Other Matters

Typical Matters

- License Review and Evaluation
- Audit / Risk Profiling
- Due Diligence / M&A
- Policy / Good Offices Creation

Representing Free Software Clients: Fulfilling Pro Bono Obligations

NY CPR EC 2-25: A lawyer has an obligation to render public interest and pro bono legal service. A lawyer may fulfill this responsibility by providing professional services at no fee or at a reduced fee to individuals of limited financial means or to public service or charitable groups or organizations, or by participation in programs and organizations specifically designed to increase the availability of legal services. In addition, lawyers or law firms are encouraged to supplement this responsibility through the financial and other support of organizations that provide legal services to persons of limited means.

"Although New York will not disbar a lawyer for failing to do pro bono work, our Code of Professional Responsibility makes clear that pro bono work is an 'obligation.'" Evan A. Davis, President of the Association of the Bar of the City of New York, April 9, 2001.

Representing Free Software Clients: Taking Ownership Interest in a Client

DR 5-104: Deals Between A and C Not Allowed, Unless ...

- Fair and Reasonable Terms ...
- are Fully Disclosed in Writing in a Manner Reasonably Understandable by C, and
- A Advises C to seek Independent Legal Advice on the Deal, and
- C Consents in Writing to (1) Deal and (2) A's Inherent Conflict of Interest.

Ongoing Conflict of Interest

- Disinterested Lawyer Test of DR 5-101(A)
- Different from contingency fee litigation?

Representing Free Software Clients: Fulfilling Duty of Loyalty

Direct Conflicts of Interest

- Easy Identification; Difficult Remedy
- Rare for Free Software Clients

Indirect Conflicts of Interest

- Trap for the Unwary Licensing Attorney

Political / Philosophical Conflicts of Interest

- Microsoft v Sun
- Brand v Generic

Part II:

Practicing Free Software

Counseling Free Software Licensors

- Good Practices
- Investigating Compliance
- Contingency Fee Litigation

Counseling Free Software Licensees

- Manifested Demand for Free Software Legal Services
- Good Practices
- Rendering a Free Software Opinion

Practicing Free Software: Counseling Free Software LicensORs

Good Practices

- Lab Notebooks
- Clean Room Development
- Pre-Distribution Clearance Procedures

Investigating Compliance: Duty of Honesty To Adverse Parties

- Special Ops
- Use of Non-Lawyers
- Ex Parte Contacts

Contingency Fee Litigation

Practicing Free Software: Counseling Free Software License EEs

Manifested Demand for Free Software Legal Services

- GPL's Never Been Tested in Court
- SCO's Lawsuit is Chilling Free Software Adoption
- Pronouncements of Various Free Software Players

Clients Claim Uncertainty, Perceive Susceptibility to Legal Risk

Good Practices

- Review Committee: Pre-Approved Licenses List
- Record Keeping

Practicing Free Software: Counseling Free Software Licensees

Rendering a Free Software Opinion: Potential Risk Transfer Vehicle

- Better to Advise or Advocate
- Better to be Candid or Confidential

Ethical Duties in Rendering an Opinion

- Duty of Competence
- Duty of Communication
- Duty of Candor Despite Risk of Exposure

Practicing Free Software: Counseling Free Software Licensees

Characteristics of an Objective Opinion

- Wishy-Washy v. Guarantee
- Internal Indicia of Comprehensiveness
- Knowing the Audience
- Dealing with Uncertainty
- Unknowable Basis for Analysis

Conflicts Attendant to Giving Opinions

- Direct Conflict
- Trap of the Indirect Conflict
- The Testifying Advocate

Part III: More General Ethical Considerations Relevant to Free Software

Jurisdiction and Governing Rules

Issues for the Attorney Writing and Litigating Software Patents

- Duty of Loyalty
- Duty of Honesty
- The Patent System and Software Patents Specifically

Miscellaneous Tidbits: What Relationships Teach About Ethics

Jurisdiction and Governing Rules

Intra-State Representation

Inter-State Representation

- No Single Answer

Federal Court Representation

- The Federal “Standard”

Agency Representation

- Federal Regulations

Issues for the Attorney Writing or Litigating Software Patents: Duty of Loyalty

Taking an Interest in Client's Patents and Applications

- Conflicting Ethical Rules: 37 CFR 10.64
- Only Issued Patents?
- Value Capped as Reasonable Fee for Work: No Real Upside
- Moving On: The Intractable Entanglement

Conflicts of Interest

- Patent Prosecution: Difficult to Manage and Predict
- Patent Litigation: Clear Cases and Not So Clear Cases
- Prosecution and Litigation: The Testifying Advocate

Duty of Loyalty Hypo

Facts

- Client A asks Firm to opine re Client B's Software Patent
- Client B is only represented by Firm with respect to Automobile Patents
- Firm not involved in procurement of Software Patent

May the Firm Give an Opinion to Client A?

- No Advocacy Against Other Client. MR 1.7, Comment 3
- VA Legal Ethics Opinion 1774

Issues for the Attorney Writing or Litigating Software Patents: Duty of Honesty

Honesty to the Client: Disclosure and Consent

- *Buechel v. Bain*

Honesty to the PTO: Inequitable Conduct

- Test: Materiality + Intent
- Remedy
- The *Molins* Trap: MPEP § 2004 v. Confidentiality
- In Practice: The Ever Present Smear Campaign

Honesty to Adverse Parties: Special Operations

The Patent System and Software Patents Specifically

Patent Law in General

- Property Law and the Collective Action Problem
- Intellectual Property: Similar & Different than Real Property
- Duty of Zealous Representation
- Access to Meritorious Resolution

Software Patents

- Flawed System? Relation to Copyrights
- Effect on Individual Rights
- Potential Conflict with Ethics? To whom are duties owed?
- Remedies

Miscellaneous Tidbits: What Relationships Teach About Ethics

Avoiding Commitment

- Being Richard Nixon: IAALBTINLA
- Being Jerry McGuire: “You Had Me At HTML”
- Penalty for Failing to Wear Ear Plugs

Are you Sure We're Alone? ABA Formal Opinion 99-413

“I Think We Should See Other People”

- Avoiding MAE
- “Other People” Does Not Include Your Family and Friends

Recap of Ethics Discussion

Part I: Representing Free Software Clients

- Pro Bono Obligations
- Taking Ownership Interest in a Client
- Duty of Loyalty

Part II: Practicing Free Software

- Counselling Free Software Licensors
- Counselling Free Software Licensees

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- Issues for the Attorney Writing or Litigating Software Patents
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Thank You!



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