



2020 MCLE MINI-MARATHON

1:40

RESOLVING ETHICAL SITUATIONS
WITH YOUR CLIENT

1 HR
ETHICS

WRITTEN MATERIALS

Cary Chen

Senior Vice President & General Counsel, Recology

Larry Low

Chief Legal Officer, Orrick

Theodore (Ted) Ting

Senior Vice President & Assistant General Counsel,
Bank of America

Roland Chang, Moderator

Senior Associate, Orrick

Resolving Ethical Situations with Your Client

January 22, 2020

Cary Chen, Senior Vice President and General Counsel, Recology

Larry Low, Chief Legal Officer, Orrick, Herrington & Sutcliffe LLP

Theodore (Ted) Ting, Senior Vice President and Assistant General Counsel, Bank of America

Roland Chang, Senior Associate at Orrick, Herrington & Sutcliffe LLP





- Panelist introductions
- Background refresher
- Communications with represented / unrepresented persons
- Conflicts of interest
- Truthfulness in litigation and transactional matters

Background Refresher



- First overhaul of California's ethics rules since 1989
- Re-drafting process took years
 - Required over a year of review
 - Rewriting by the California Supreme Court
- Based on the ABA Model rules, although many rules are still distinct
- ABA Model Rules and opinions are not binding in California
 - But often consulted, especially where California rules are silent

Background Refresher



- Changes bring California's ethics rules more in line with the other states in terms of numbering system
- California's existing 46 rules became 69 rules
 - 27 new rules
 - 42 modified rules
- The rules are “binding on all members of the State Bar”
- Effective on November 1, 2018

Communication with a Represented Person



- **Rule 4.2 (a)**
 - In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

Communication with a Represented Person - Comments



- Applies even though the represented person initiates or consents to the communication.
- "Subject of the representation," "matter," and "person" are not limited to a litigation context. Applies to communications with any person.
- Indirect communications refer to situations in which the lawyer seeks to communicate with a represented person through an intermediary.
- Represented persons can communicate directly with one another; lawyers can advise a client concerning such a communication.

Communicating with an Unrepresented Person



- **New Rule 4.3 (a)**
 - In communicating with an unrepresented individual, the lawyer shall not state or imply that the lawyer is **disinterested**.
 - The lawyer is obligated to make **reasonable efforts** to correct any misunderstanding.
 - If interests of the unrepresented person are in conflict with the client's interests, the lawyer **must not give legal advice** to that person, but **may** advise them to secure counsel.

Communicating with an Unrepresented Person



- **New Rule 4.3 (a)**

- In communicating with an unrepresented individual, the lawyer shall not state or imply that the lawyer is **disinterested**.
- The lawyer is obligated to make **reasonable efforts** to correct any misunderstanding.
- If interests of the unrepresented person are in conflict with the client's interests, the lawyer **must not give legal advice** to that person, but **may** advise them to secure counsel.

Communicating with an Unrepresented Person



- **New Rule 4.3 (b)**
 - A lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another of which the lawyer is not otherwise entitled to receive.

Communicating with an Unrepresented Person - Comments



- "A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client."
- **"The rule does not prohibit a lawyer from negotiating the terms of a transaction or settling the dispute with an unrepresented person."**
- "So long as the lawyer discloses [] representation of an adverse party, the lawyer may . . . explain the lawyer's own view of the meaning of the document and the underlying legal obligations."



- **Old Rule 3-310, now New Rule 1.7- Conflict of Interest: Current Clients**
 - Representing directly adverse interests prohibited without the informed written consent from each client.
 - A new standard for less-clear situations applies (uses the Model Rules formula).
 - Whether there is a “significant risk” the lawyer’s representation of the client will be “materially limited” by the lawyer’s responsibilities to another client, a former client or a third person, or by the lawyer’s own interests.



- **No Prior Rule, now New Rule 1.8.2 Use of Current Client's Information**
 - A lawyer cannot use a client's information protected by the Business and Professions Code section 6068 (e)(1) to the disadvantage of the client unless the client gives informed consent.
 - B&P section 6068(e)(1) protects confidential information unless lawyer reasonably believes disclosure is necessary to prevent a criminal act likely to result in death of, or substantial bodily harm.



- **Old Rule 3-310, now New Rule 1.9 Duties to Former Clients**
 - Old rule lumped former clients with current.
 - Prohibits representing another person in the same or substantially related matter in which the person's interests are materially adverse to former client.
 - Unless former client gives informed written consent.
 - Prohibits using info protected by B&P section 6068(e) to disadvantage of former client.

Imputation of Conflicts of Interest



- **No Prior Rule now New Rules 1.8.11 and 1.10**
 - When lawyers are associated in a law firm, a prohibition in rules 1.8.1 through 1.8.9 that applies to any lawyer applies to all.
 - Exception for “personal interest of the prohibited lawyer” or
 - Prohibited lawyer did not substantially participate in the substantially related matter, and the lawyer is screened and written notice provided to affected former clients
 - “substantial” impacted by various factors modeled after ABA Model Rules

Truthfulness in Statements to Others



- **Rule 4.1**
 - "In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6."

Negotiations?



- Rule only refers to **statements of fact**. Whether a particular statement should be regarded as one of fact can **depend on the circumstances**.
 - For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact.
 - Estimates of price or value placed on the subject on the transaction and a party's intentions as to an acceptable settlement are ordinarily in this category.



- **Rule 3.3**

- A lawyer shall not:
 - "knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."
 - "offer evidence that the lawyer knows to be false." If false material evidence has been offered, the lawyer shall take reasonable remedial measures.



- **Rule 1.2.1**

- A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.
- A lawyer may: (1) discuss the legal consequences of any proposed course of conduct with a client and (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.

Cary Chen



Senior Vice President and General Counsel
Recology

Education

- J.D., University of California, Hastings College of Law
- B.A., Economics, Stanford University

Cary Chen is Senior Vice President, General Counsel and Corporate Secretary at Recology, a privately-owned integrated resource recovery company headquartered in San Francisco. He leads the team responsible for overseeing all corporate development and legal matters for the company, including corporate governance, M&A, litigation, labor and employment, environmental and real estate.

Before joining Recology, Cary was associate general counsel at GREE, a mobile gaming startup, where he focused on M&A, strategic investments and intellectual property matters. Before joining GREE, he was an associate at

Morrison & Foerster in San Francisco, where he represented public and private companies in corporate matters.

In 2018, he was named one of NAPABA's Best Under 40. He serves as president of the board of directors of APA Family Support Services, a non-profit organization dedicated to promoting healthy families by preventing child abuse and domestic violence.

Larry Low



Chief Legal Officer San Francisco

Education

- J.D., University of California, Hastings College of the Law
- B.S., Business Administration, University of California, Berkeley

Clerkship

- Associate Justice William P. Clark, California Supreme Court

Larry Low is Orrick's Chief Legal Officer. As the Chief Legal Officer, Larry is responsible for strategic planning and managing the firm's global legal affairs, including advising on and overseeing matters relating to governance, litigation, contracts, insurance, ethics and risk management.

In addition to his responsibilities to the firm, Larry represents public and private high growth technology companies, and venture capital funds. His clients are involved in a broad range of industries including, energy, semiconductors, Internet, software and consumer products. He has extensive experience in start-up enterprises, venture financings, public offerings, mergers and acquisitions, and advises companies and investors in cross border transactions involving Asia.

Larry was appointed in 1995 by President Clinton as one of four U.S. representatives to serve on the panel of arbitrators of the International Centre for the Settlement of Investment Disputes.

Larry has published articles that have appeared in publications of the California Continuing Education of the Bar and the Practicing Law Institute. He has made presentations to the Practicing Law Institute, Law Journal Seminars, Silicon Valley Association of Start up Entrepreneurs, Hastings College of the Law, University of California at Berkeley, Haas Business School and Boalt Hall School of Law and the California State Bar among others.

Theodore (Ted) Ting



**Senior Vice President and
Assistant General Counsel
Bank of America**

Education

- J.D., Loyola Law School, Loyola Marymount University
- B.A., Economics, University of California, Berkeley

Ted is the sole legal partner for several Bank of America business groups that address regulatory and customer complaints and service non-performing loans. He helps the business groups with strategic plans and day-to-day operations by advising on laws and regulations, regulatory agency agreements, court rulings, and investor agreements. He also directed litigation strategy on the Bank's portfolio of mortgage-related lawsuits.

Ted was a partner at Reed Smith LLP, where he litigated complex contract, real estate, trade secret, fraud, and unfair competition cases, including financial services class actions.

He is active in the Bay Area legal community, currently serving on the BASF In-House Section. He was also the President for the Asian American Bar Association of the Greater Bay Area from 2014-2015 and previously served on multiple boards, including the Alameda County Bar Association and the California Bar Foundation.

Roland Chang



Senior Associate San Francisco

Education

- J.D., University of Virginia School of Law
- B.A., Chinese Studies & Political Science, University of California, San Diego, *magna cum laude*

Roland Chang is a lawyer in Orrick's White Collar, Investigations, Securities Litigation & Compliance group. He represents foreign and domestic clients in connection with government enforcement actions, FCPA compliance monitorships, internal investigations, and criminal and civil litigation.

Roland has hands-on experience with all aspects of investigations, monitorships, and litigation, including jury trials, handling witness interviews, drafting reports, taking and defending depositions, and managing large teams.

Roland currently serves as a Director at Large for AABA. Prior to serving on the Board, Roland served as Co-Chair of the

AABA Education Committee and on the AABA Mentorship Committee. Roland has been recognized as a Northern California Super Lawyers Rising Star since 2016.

