ETHICS ISSUES IN IP PRACTICE

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I. Sources of Ethics Law

One of the most difficult aspects of applying the ethics rules to intellectual property lawyers is the determination of the governing body of ethics rules. Traditionally, state supreme courts promulgate ethics rules. Almost all those rules, except for California’s, are based upon some version of the American Bar Association’s ethics rules. The ABA Model Code of Professional Responsibility was replaced in the 1980s with the ABA Model Rules of Professional Conduct.

Unfortunately, California went its own way and enacted the California Rules of Professional Conduct. As of the Spring of 2011, the Supreme Court of California was on the verge of adopting a wholesale revision of its rules to align the California approach with the ABA Model Rules.

Federal courts typically adopt some set of ethics rules in their local rules. For example, each United States District Court in the state of California adopts the California Rules of Professional Conduct through a local rule of the federal court.

This combination of state and federal ethics rules is typically found throughout the country. However, intellectual property lawyers often practice before the US Patent and Trademark Office. The PTO has its own ethics rules (37 C.F.R., Part 10) and, unfortunately, they are based upon the outdated language of the old ABA Model Code. This sometimes leaves intellectual property lawyers in the dark and without proper guidance as to the current state of the ethics rules.

In addition to the sources of ethics rules already discussed, legislatures sometimes regulate the legal profession. For example, there are any number of federal statutes that affect the law of lawyering. And state legislatures get involved as well. California’s State Bar Act, which is found that California Business and Professions Code § 6000, et seq., extensively regulates the attorney-client relationship.

In addition to ethics rules, lawyers are bound by governing appellate opinions that deal with the law of lawyering.

When the ethics rules, statutes, and case law are not clear, lawyers may turn for guidance to advisory opinions of ethics committees. The largest and best-known of those committees is the ABA’s committee. But most state bars have some vehicle for issuing ethics opinions. Indeed, in California, even county-based bar associations promulgate advisory ethics opinions.

Finally, we recently saw the publication of the American Law Institute’s Restatement of the Law Governing Lawyers. This comprehensive treatment of ethics law (i.e., the law governing lawyers) has provided much guidance to the courts.
Given that wealth of sources of ethics law, how can an intellectual property lawyer determine which law governs? In general, federal law is the supreme law of the land, but the federal government has traditionally given the states great leeway in the regulation of lawyers. That is changing. The federal–state boundary regarding the regulation of lawyers is currently a contested one. My sense is that over the next decade federal regulation will begin to assert dominance over state regulation at the margin, but the bread and butter, day-to-day practice of most lawyers will still be covered by state ethics law. For example, in the context of patent lawyers, prosecution will be governed by PTO ethics rules, licensing practice will be covered by state ethics rules, and IP litigation will be governed by the ethics law of the forum (i.e., the tribunal).

II. Ethics and the Attorney Client Relationship Lifecycle

It is helpful to locate ethics law within the framework of the lifecycle of the attorney-client relationship. So, we should begin with the ethical duties that arise even before the attorney-client relationship is created.

A. Ethical Duties Prior to the Creation of the Attorney Client Relationship

Model Rule 1.18 governs the ethical duties that apply when meeting with prospective clients. This is a moment of risk for the prospective client and for the lawyer. In such meetings, the lawyerly duty of confidentiality already applies, even though no attorney-client relationship has yet been created. Moreover, attorney-client privilege protects the contents of the communications.

Perhaps the most common risk scenario during the meeting with prospective clients is the situation where the prospective client believes that he or she has hired a lawyer but the lawyer believes that no attorney-client relationship has yet been created. If a relationship has been created, the lawyer owes the client any number of fiduciary duties. So it is important that the lawyer uses well-rehearsed oral disclaimers and clear writings to ensure that the lawyer’s expectations match the client’s expectations as to whether a relationship has yet been created.

B. Defining the Attorney Client Relationship

Assuming that the client and the lawyer decide to create the relationship, the next important step is to define the attorney-client relationship. That requires a good definition of four elements: (1) who is the client; (2) who is not the client; (3) what is within the scope of the representation; and (4) what is outside the scope of the representation. Attorneys are reasonably good at explaining who the client is, and what work is being contemplated. Attorneys often stumble by failing to explain who is not the client, and what work falls outside the scope of the relationship.

1. Client Identity
When lawyers attempt to define the client, certain scenarios often lead to confusion and trouble. Those scenarios include the natural person client with a disability, representation of corporations, representation of partnerships, and other organizational representations. Representations of persons with a disability are governed by Model Rule 1.14. Representation of organizational entities is governed by Model Rule 1.13.

Lawyers and clients often struggle with the finding that client when the legal representation involves a corporation that is part of a corporate family tree. For example, if the lawyer represents a wholly owned subsidiary, is the parent corporation also a client? The case law on that issue has been contradictory and vague and the Model Rules could be clearer (see, MR 1.7 & 1.13). For that reason, lawyers and clients are wise to address the issue up front and reach a written agreement with the client as to the precise identity of the client.

Law firms are increasingly using so-called “one client clauses” to establish which entities, if any, really our clients. Those clauses state that a particular corporate affiliate is the only client and death the law firm does not represent any officers, directors, employees, agents, or other organizational affiliates of the client. Corporate clients often push back on such clauses and want to sleep all the corporate affiliates into the definition of the client. Many times, law firms can agree to that provision. Sometimes they cannot. A lot of firms should be wary of defining a number of entities as clients if the law firm is not interacting with those entities and the filling fiduciary duties towards them. One potential compromise is to define the client as solely being the one corporate affiliate to whom the legal work is directed, and then to agree that other corporate affiliates will be treated as if they were clients for purposes of the conflict of interest rules.

Does this definition of the client have any particular wrinkles in the intellectual property setting? It does. Intellectual property lawyers often represent a corporation but must deal extensively with inventors who are not the client. In fact, patent prosecution attorneys often obtain powers of attorney from inventors who are not the client. Additionally, intellectual property lawyers may represent a licensee but have need for extensive discussions with the licensor. Sometimes the patent prosecution lawyers are chosen by the licensee, which has a contractual right to control the prosecution of certain patents. But those patents may still be owned by the licensor. Unless the attorney uses writings and clear oral communications to avoid confusion, it may be later alleged that the lawyer was engaged in a conflict of interest.

Recent cases have addressed client definition in the context of corporate affiliate conflicts, representations of trade associations comprised of various entities, representation of a small entity independent of its founder, representation of a licensee

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1 The Second Circuit has attempted to offer some clarity, in its recent decision, GSI Commerce Solutions Inc. v. Babycenter L.L.C. (2nd Cir.; Aug. 18, 2010), which holds that adversity to a client’s affiliate will be considered a conflict if it offends the reasonable expectations of the client. But that test is necessarily open-ended and somewhat vague. Hence it is important for lawyers to raise this issue with clients and confirm the agreement in writing.
and licensor, and representation of witnesses at deposition. A number of recent claims against lawyers appear to have been preventable if the attorney had only defined the client with more care.

2. **The Scope of the Representation**

In addition to defining the client identity, the lawyer should take care to define the scope of the representation. Lawyers may reasonably limit the scope of the representation. When defining the scope, lawyer should bear in mind that the client controls the objectives of the representation and the lawyer consults with the client about the tactics and means used in the representation. **Model Rule 1.2** covers those points.

For the intellectual-property lawyer, it is important to document the scope of the subject matter that the client wishes to include in its patent applications, as well as the geographic scope of protection. In the best of all worlds, the lawyer will insist that the client put in writing the geographic jurisdictions for which patent protection will be sought.

C. **Ethical Duties during the Attorney Client Relationship**

Once we have created and defined the attorney-client relationship, the lawyer is off and running, fulfilling her various ethical duties.

1. **Duty of Confidentiality**

No less than other lawyers, intellectual property lawyers must fulfill their duty of confidentiality to the client. That duty is regulated by **Model Rule 1.6** and by **CRPC 3-100**. But intellectual property lawyers have a strong duty of candor to the patent and trademark office, and must disclose any information material to the patentability of the application. **(PTO Rule of Practice 1.56)** In rare situations, a lawyer may know the confidences of one client that bear on the patentability of a second client’s innovations. When the duty of confidentiality prevents the lawyer from disclosing those confidences from the first client, the safe course is to withdraw from representation for the second

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client on that particular matter. That way, the lawyer can fulfill her ethical duties to the first client and avoid breaching her ethical duty to the PTO regarding the second client.4

2. Duty of Loyalty

The lawyer owes a duty of loyalty to the client, which is often analyzed under the comfort of interest rules. The basic distinction in the law of conflicts is between conflicts with current clients and conflicts with former clients. Current client conflicts are governed by Model Rule 1.7. In brief, a lawyer cannot act materially adverse to a current client without my clients informed consent.5

Former client conflicts are principally governed by Model Rule 1.9. In brief, a lawyer may act adverse to a former client unless the lawyer previously learned conferences that are material to the new representation adverse to the former client, or if the prior representation of the former client was on a matter that is the same or substantially related to the new matter at first to the former client.6

Obviously, then, is easier to be adverse to former clients than to current clients. For that reason lawyers occasionally attempt to “fire” a current client for the purpose of taking on a specific matter at first to that client. Dropping a current client like a hot potato in order to commence a matter adverse to the recently fired client is a breach of the duty of loyalty. This is known as the “hot potato doctrine,” and it is found in the case law.

Once we have determined whether any particular lawyer has a conflict, we must next ask whether that conflict is imputed to others in the firm (or other work setting). The imputation rule—found at MR 1.10(a)—was recently amended so that a timely and well constructed ethical screen can prevent imputation when a lawyer moves from one private practice job to another. But be careful! Most states have not yet enacted the amended version of the imputation rule and may retain the older case law that tends to impute conflicts. (Imputation in the case of laterals from the bench or from government lawyer positions are governed by MR 1.11-1.12, and tend to permit screening to prevent imputation.)

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4 The only Federal Circuit case addressing this point, Molins PLC v. Textron, Inc., 48 F.3d 1172 (Fed. Cir. 1995), offered three different conclusions from three different judges. Thus, managing the issue is more a matter of prudence than one of doctrine.


One of the difficult issues for intellectual property lawyers is deciding when patent prosecution work for one economic competitor should be considered a legal conflict of interest when the lawyer also represents a second economic competitor. This is sometimes called “subject matter conflicts” and sometimes “technology too close.” We do not have a great deal of case law on this topic, but we do have a handful of well-publicized incidents. Accordingly, one prudent course of action for the intellectual-property lawyer is to discuss with her clients their expectations about which economic and technical technological competitors the lawyer may represent. The client’s expectations may be reduced to writing that is then sent back to the client. Good communication between lawyers and clients can often manage this ethical issue.

3. Duty of Communication

As is true of all attorneys, intellectual property attorneys must communicate with the client so that the client can make informed decisions and can appreciate the significant developments in the matter. Model Rule 1.4. We’ve seen quite a few cases where lawyers missed a filing deadline in the United States or abroad and in some cases the lawyers failed to communicate that unfortunate development with the client. They try to fix the matter on their own. If the missed deadline is a significant development, it should be shared with the client. The lawyer can also explain to the client what steps the lawyer will take to correct the situation and what impact the missed deadline has or may have on the client. Such disclosures are part of the lawyer’s ethical duty. They also go a long way towards building a relationship of trust with the client.

4. Duties to the Tribunal and Litigation Opponents

During the course of the attorney client relationship, the lawyer has duties to the opponent, opponent’s counsel, and the court itself. These duties are found in the Model Rules 3.1 – 3.9.

We have seen a number of recent cases involving litigation positions and behavior that have resulted in sanctions against counsel. Even though intellectual property matters are high-stakes, litigators must abide by the traditional norms, embodied in the ethics rules, about the limits of advocacy. We have also seen a number of case against lawyers, asserting that the lawyer’s performance fell below the standard of care, perhaps because of inaccurate advice about the merits of the claim or defense, or because of pressure and

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advice rendered at settlement time, or perhaps because of failures to gather evidence and mount a defense.\textsuperscript{10}

Patent prosecution lawyers are not trial room advocates, but the rules of advocacy can still apply. (\textit{PTO Ethics Rules 10.23, 10.89}) For example, there is a doctrine of inequitable conduct, sometimes called “fraud on the Patent Office,” that serves to punish lawyers and their clients if the lawyer intentionally misled the PTO. Currently the PTO is considering whether to revise that doctrine to make it harder to allege and prove inequitable conduct. And in the trademark context, the Federal Circuit did tighten the doctrine. In the meantime, we continue to see the Federal Circuit issue new case law on the doctrine,\textsuperscript{11} even though it sometimes describes the doctrine as a “plague.”

\section*{D. Terminating the Attorney Client Relationship}

At some point, the attorney-client relationship may end. If so, the lawyer should confirm that fact in writing, should consider whether to return all the client files, and should take steps to expeditiously remove the lawyer’s name from the rolls at the PTO.

An issue that is frequently caused trouble for lawyers is the payment of maintenance fees. It is common that after the termination of an attorney-client relationship, the client must pay a maintenance fee on the patent. (In fact, this issue can also arise with current clients.) Missing the maintenance fee deadline can have severe consequences for the client—and hence for the lawyer as well. If the lawyer is truly ending an attorney-client relationship, the lawyer should consider informing the client of all future deadlines, the consequences of missing those deadlines, and what must be done to meet the deadlines. In addition, the lawyer can inform the client that the lawyer is no longer calendaring those dates and that is the client’s responsibility to meet those deadlines. Finally, the lawyer can suggest that the client engage the services of commercial enterprises whose business model is predicated on reminding patent holders of the maintenance fee dates.

\section*{E. Ethical Duties that Survive the Attorney Client Relationship}

Are there any ethical duties that survived the attorney-client relationship? One, obviously, is the duty of confidentiality. (\textit{MR 1.6; 1.9(c)}) For that reason, lawyers can not be averse to former clients on matters when the lawyer had obtain confidences that could now usefully be used to the client’s detriment. This is the “former client conflict rule” that we discussed above. There is also a line of cases dealing with a lawyer’s ability to attack the work product that she once performed for a prior client. This law is somewhat uncertain, and so a lawyer should consult with the governing ethics law if she wishes to undertake a representation that would be detrimental to the patents she previously obtained for another client.


\textsuperscript{11} Larson, 559 F.3d 1317 (Fed. Cir. 2009); \textit{In re Bose}, 580 F.3d 1240 (Fed. Cir. 2009); \textit{Avid}, 2010 US App LEXIS 8644 (Fed. Cir.; Apr. 27, 2010); \textit{Therasense} (being briefed for en banc rehearing)
Appendix A
Ethics Hypotheticals and Analysis
Creation and Termination of the Attorney-Client Relationship

Controlling the creation and termination of the attorney-client relationship is critical to the practice of law. One common stumbling block is the prospective client—someone who wants to engage you. Even prior to the creation of the attorney-client relationship, it is possible for an attorney to have a duty of confidence toward a prospective client.

Hypothetical 1.1: Because you are an Internet savvy practitioner, you are accustomed to receiving much of your correspondence via email. In fact, your firm’s web site has a “Contact Us” button on the pages of its web site dealing with your firm’s trademark practice. The button generates an email that goes to you, because you handle most of the trademark matters. One morning you find in your electronic inbox a lengthy email describing a potential new trademark matter that sounds interesting to you. The sender is planning to use a mark that will be close to its competitors’ marks. The sender’s name seems vaguely familiar. You run a conflicts check and realize that the email was sent from one of your client’s main competitors.

What do you do? Can you share the facts with your existing client? How can you avoid this situation?

Law: The creation of an attorney-client relationship arises (1) through the mutual manifestation of client and attorney, or (2) through the manifestation by the client coupled with the attorney’s reasonable knowledge that the client is reasonably relying upon the attorney to provide legal service. Restatement Third, The Law Governing Lawyers §14. (“Restatement”) Some state court common law decisions hold that the creation of the relationship turns on the reasonable expectations of the putative client. The duty of confidentiality owed to prospective clients is similar to the duty owed to existing clients. See, Restatement §15.

Terminating the attorney-client relationship is another critical moment. It often starts the malpractice statute of limitations running; it terminates many of the duties owed to the client; and it begins to free up the attorney to be adverse to the former client.

Hypothetical 1.2: You are listed as counsel of record for a trademark client, and the date for the “section 8” fee and declaration of use rolls around. Your client, a once high-flying dotcom, doesn’t respond to your phone calls or emails, and you read on the web that the client may be out of cash and out of luck.

Law: The attorney-client relationship may terminate for many reasons, including the client’s discharge of the lawyer; the lawyer’s mandatory or permissive withdrawal; the client’s breach of the contract via failure to pay or other reasons; and the completion of the engagement. See, generally, Restatement §§31-33.

How can the IP practitioner manage the “tail-end” of the IP prosecution process? Under what circumstances does the lack of recent billings mean that the relationship has ended? How should the IP practitioner handle client files?

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Conflicts of Interest

Please note at the outset, that the law on conflicts of interest can vary from jurisdiction to jurisdiction. California, for example, adopted its own code, the California Rules of Professional Conduct (“CRPC”). Most states adopted the ABA’s Model Rules of Professional Conduct (“MR”). A few states still use the ABA’s Model Code. Some practitioners might find that the federal government has promulgated important standards, such as the PTO Rules. Also, please note that we are dealing mostly with the basic rules on conflicts of interest, rather than parsing all the sub-rules.
For present purposes, let’s discuss what is sometimes called the “Current Client Rule,” and the “Former Client Rule.” (Sometimes these are known, respectively, as the rules on “Concurrent” and “Successive” conflicts.)

**The Current Client Rule** says that you cannot engage in a representation directly adverse to a current client unless you obtain consent after consultation with each client (or, in California, unless you obtain the informed written consent of each client). (MR 1.7; CRPC 3-310(C) & (E))

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Hypothetical 2.1: You represent Acme in its copyright and trademark work. One of Acme's competitors, Beta, wants to hire you for trademark work. Does this present a conflict of interest? Would it present a problem if Beta wanted to hire you for work unrelated to trademarks?

Hypothetical 2.2: You firm represents Acme in trade dress work and represents Beta in some tax work. Acme asks you to review its new retail store design. Acme is worried because for years its competitor, Delta, has used a somewhat similar store design. Acme may need your help designing around Delta’s design. Your main contact at Acme says, “while you’re at it, please take a quick look at all our main competitors’ store designs.” Beta is a competitor of Acme, but you know that its store design is radically different than Acme’s.

Hypothetical 2.3: You are General Counsel at Acme, Inc., and are unhappy with the firm that does your IP counseling. When you look for a new firm, what consideration do you give to conflicts of interests: the firm’s broad-ranging experience in an IP field; and the fact that some IP firms represent numerous companies in your industry?

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**The Former Client Rule** is more complicated. It is beyond the scope of today’s discussion to analyze all the permutations of Model Rule 1.9. For present purposes, we’ll focus on the aspect of the rule that says that you cannot engage in a representation adverse to a former client unless you obtain consent after consultation with each client (or, in California, unless you obtain the informed written consent of each client), if the representation is “substantially related” to your previous representation of the former client or if during your previous representation of the former client you learned confidences that are material to the current representation against your former client. (MR 1.9; CRPC 3-310(E))

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Hypothetical 2.3: Several years ago you prepared and filed several copyright registrations for Beta. They haven’t sent you any work in three years. Acme approaches you to file a copyright infringement suit against Beta. See, Original Appalachian Artworks, Inc. v. May Department Stores Company, 640 F.Supp. 751, 755 (N.D. Ill. 1986) (not all trademark work for a former client is substantially related to all other trademark work subsequently adverse to the former client).

Hypothetical 2.4: You represent Acme in a copyright suit against Beta, the publisher of an infringing product. Because Beta is small, it uses Delta as a master publisher and distributor. Delta is a former client of your firm’s. You formerly did some copyright and licensing work for them. (Conversely, as a “current client” problem, you are approached to jointly defend Beta and Delta on the matter. Can you?)

Hypothetical 2.5: You represent a franchisor on some trademark issues. The franchisor terminates the relationship and sends its legal work elsewhere. Two years later, the franchisor and some franchisees enter into a dispute. The franchisees claim that the franchisor imposes unreasonable exclusive dealing requirements; the franchisor claims that the franchisees have been selling product lines designed to look deceptively similar to the franchisor’s goods. See, Merle Norman Cosmetics, Inc. v. USDC for the Central District of California, 856 F.2d 98 (9th Cir. 1988).

Hypothetical 2.6: You are hired to prosecute marks for a family business that splits into two friendly corporations. Thereafter, you work for only one of the corporations. A trademark dispute
develops between the two corporations and you defend one of them against the other. See, Brennan’s Inc. v. Brennan’s Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979).

Hypothetical 2.7: You formerly did trademark work for Acme relating to its sports shoes. Thereafter, Acme terminates its relationship with you. Acme sues Beta for patent infringement on the very shoes for which you did the trademark work. You are hired to represent Beta. See, CITC Industries, Inc. v. Manow Industrial Corp., 1978-1 Tr. Cas. (CCH), ¶61,947 (S.D.N.Y. 1978)

(3)
Conflicts in Clearing and Prosecuting Marks

The day-in and day-out practice of clearing and prosecuting marks raises conflicts issues.

Hypothetical 3.1: Acme says they’ve chosen the mark “ALI-ABA” for their new product. (Disclaimer: this is just a hypothetical.) Acme asks you to order a search from Thomson & Thomson or Corsearch and forward it straight to Acme. Do you run a conflicts check at that point? Can you? When in the process to you check for conflicts? Suppose 200 marks are identified in the report. Suppose that upon review, only 20 marks need substantial analysis, and only 5 are tough cases.

Hypothetical 3.2: Suppose that one of the marks identified in the search seems far afield of Acme’s proposed mark. You realize that the mark belongs to Beta, a current real estate client of your firm’s. You want to quickly pop on the web to see what kind of use Beta makes of the mark. You are not going to say anything to Acme yet; you just want to look at Beta’s use. Is that being adverse to a current client? Alternatively, suppose that Beta was formerly an IP client of your firm’s before it sent all its legal work to a rival. Now can you do the web search?

(4)
Investigations & Third Parties

Fact gathering is part of what IP lawyers do. Not always do the targets of the investigation want to be investigated. Sometimes the client wants to do some communicating or investigating itself. Here are some ethics issues concerning investigations and third parties.

Contacting represented parties is governed by MR 4.2 (CRPC 2-100). Honesty in dealings with third parties is governed by MR 4.1.

Hypothetical 4.1: Client, upset about a cybersquatter, hires a non-attorney investigator to make discrete inquiries with the URL owner, without revealing the client’s identity, about the sale of the site. The owner does not respond. Client hires you to initiate legal proceedings, which you do. Opposing counsel makes an appearance. The next day, the owner contacts the investigator and indicates a willingness to sell. Client wants you to counsel investigator on how to handle the negotiations.

Hypothetical 4.2: After winning a trademark and copyright infringement injunction, you “test” the defendant’s compliance by hiring an investigator to approach the defendant and purchase items that were banned by the injunction. In doing so, the investigator lies about her identity and purpose. See, Apple Corps Ltd. v. International Collectors Society, 15 F. Supp.2d 456, 475-76 (D.N.J. 1998)(offering approval of some dissembling); Gidatex v. Campaniello Imports, Ltd., 82 F.Supp.2d 119 (D.N.J. 1998)(approving limited deception for purposes of uncovering wrongdoing). But see, Monsanto Company v. Actua Casualty & Surety Co., A.2d 1013 (Del. Sup. 1990)(condemning investigator’s use of false identities when interviewing former employees of plaintiff); In re Conduct of Gatti, 330 Or. 517, 8 P.3d

(5)
Reliance on Opinion of Counsel

Hypothetical 5.1: Acme wants to design a computer game that looks as close as legally possible to the top selling game. You advise them to seek a written opinion from Opinion Counsel as to the legality of the Acme’s final game. Thereafter, when Acme is sued, you handle the defense. Plaintiff says it may seek statutory damages and seeks a finding of willfulness. You and Acme must decide whether to assert the defense of good faith reliance on counsel. Acme asks you about the implications of that assertion. What do you tell them?