

Ethically empowered licensing: doing well by doing right

Ethically empowered licensing is the key to building strong, sustainable business relations. At its heart is the Golden Rule: do unto others as you would have them do unto you

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“Too often in business today people tend to take a negative and legalistic approach to ethics as fundamentally no more than a matter of mere compliance, as if the main point of ethics or morality were just to stay out of trouble, legally and otherwise. This gets the focus all wrong. Ethics is not first and foremost about staying out of trouble. It’s not primarily about avoiding problems at all. Ethics is mainly about creating strength, in an individual person, a family, a community, business relationships, and life.”
If Aristotle Ran General Motors, Tom Morris (Henry Holt and Company, Inc 1997).

Licensing is universally regarded as a business enterprise of critical importance to economic development on a global scale. It is now widely accepted that the economy of the 21st century will be technology driven and will necessarily involve increasing numbers of multinational partnerships that can serve to foster stability in international relations. To accomplish this lofty goal, it is essential for those involved in licensing to conduct themselves in an ethical manner.

The licensing profession

Generally speaking, the domestic and international licensing of technology and intellectual property rights is handled by two different professional groups. The first includes attorneys who are licensed to practise law by a regulatory group such as a commission charged with the responsibility of testing those aspiring to become licensed attorneys, and thereafter regulating the

conduct of such licensed attorneys to ensure they comply with certain rules of professional conduct. Of course, any attorney who is licensed to practise law by such a commission may practise in many areas, including licensing. The second group includes licensing professionals – unlike attorneys, they are not licensed by any regulatory group, but rather can simply hold themselves out as such to the public. However, the Licensing Executives Society (USA & Canada), Inc (LES) has recently recognised the importance of establishing more confidence in the licensing profession.

As a result, LES has established the Certified Licensing Professional (CLP) certification as a professional designation intended to distinguish those who have demonstrated expertise in the licensing of intellectual property. The goal is to elevate the licensing profession by differentiating those who fulfil the necessary requirements to become certified, in order to promote and establish the professional standing of CLPs. To qualify for CLP certification, it is necessary to have a bachelor’s degree or higher from an accredited university and at least three years’ relevant professional experience in the licensing field.

For those who meet the educational and experience prerequisites, there is an examination consisting of 150 multiple-choice questions covering a variety of areas of licensing knowledge. Upon passing the examination, a licensing professional can use the CLP designation as instant verification of his or her credentials. On 5th May 2008, the CLP designation was conferred upon an inaugural class of 600 licensing professionals who successfully demonstrated their experience and proficiency.

In the press release announcing the inaugural class, it was stated that the CLP designation “is built on internationally applicable standards of practice, knowledge, and ethics to differentiate licensing professionals who have taken the steps necessary to become certified”. Rules of Conduct have also been adopted for CLPs. Rule 1 is titled “Obligation Under Other Rules of Ethics” and simply states: “The duties imposed by these rule of conduct shall be in addition to the rules of conduct imposed by membership or status in other professions or organizations.” While not explicitly stated, it can be presumed that Rule 1 was drafted in recognition of the fact that an attorney involved in licensing who becomes a CLP will be governed not only by the CLP Rules of Conduct, but also by the rules of conduct governing attorneys.

Ethical rules for CLPs

The CLP Rules of Conduct contain several behaviour-specific rules which deal with the ethical issues likely to be faced by a licensing professional during the course of representing his or her client/employer. For example, they include:

- The duty to make full and candid disclosures of his or her judgements and opinions as to potentially licensable properties to the client/employer.
- The duty to make a fair representation as to the nature, quality and extent of the subject matter being licensed.
- The duty to avoid representing conflicting interests in the same transaction without the knowledge and express consent of involved parties.
- The duty to disclose the fact that the licensing professional has an interest in the subject matter being licensed.
- The duty to respect and hold inviolate the confidences of a client.
- The duty to avoid false, deceptive or misleading advertising or solicitations of business in the course of working as a CLP.

If a CLP is charged with violating the CLP Rules of Conduct, the charge can be heard through a specified enforcement procedure leading to the possible discipline or expulsion of the CLP.

Finally, as a catch-all provision, each CLP is obliged to comply with all laws, regulations and rules of conduct which are imposed upon the CLP by reason of membership in any other professional organisations governing the conduct of persons engaged in

licensing. A final determination by a competent authority that the CLP has violated any such law, regulation or rule of conduct may be a basis for discipline or expulsion of the CLP without compliance with the enforcement procedures set forth in the CLP Rules of Conduct.

Ethical rules for attorneys

The rules of conduct for attorneys typically have much in common with the CLP Rules of Conduct. An attorney must comply with the following behaviour-specific rules which are similar to those for a CLP:

- The duty to keep a client reasonably informed about the status of a matter for which the attorney has been engaged to permit the client to make informed decisions regarding the representation.
- The duty to avoid making a statement of material fact or law to a third party in the course of representing a client which the attorney knows or reasonably should know to be false.
- The duty to avoid conflicts of interest by representing multiple clients in a single matter without disclosing the advantages and risks involved and securing the express consent of each client.
- The duty to avoid using or revealing a confidence or secret of the client known to the attorney, either during or after the termination of the professional relationship, unless the client consents after disclosure.
- The duty to avoid engaging in conduct which involves dishonesty, fraud, deceit or misrepresentation, or engaging in conduct that is prejudicial to the administration of justice.

While similar to the rules for CLPs, the rules for attorneys differ primarily due to the nature of the attorney-client relationship.

One interesting difference between the CLP Rules of Conduct and the rules of conduct for attorneys relates to the duty of a CLP to make a fair representation of the subject matter being licensed, in contrast to the duty of an attorney to be truthful in statements to others. The latter duty requires that: “In the course of representing a client a lawyer shall not make a statement of material fact...to a third person which statement the lawyer knows or reasonably should know is false.” It may be asked whether this rule requires an attorney to answer truthfully a licensor’s question as to whether he or she has authority to make a higher offer on behalf of the client; whereas

nothing in the CLP Rules of Conduct would appear to require such a response.

One answer to this question may be that an attorney (similar to a CLP) has a duty to avoid using or revealing a confidence or secret of the client known to the attorney unless the client consents after disclosure. While apparently the CLP does not have the same duty of “truthfulness in statements to others”, it is probably the case that an attorney could avoid the dilemma posed by what seem to be directly contradictory duties by responding to this question that he or she is not at liberty to disclose whether he or she has authority to make a higher offer because of the duty to maintain the confidences of the client. Regardless, the fact remains that both the CLP Rules of Conduct and the rules of conduct governing attorneys are behaviour-specific rules that attempt to impose ethics on those obligated to operate under them.

Regulated ethics

Most people are very much aware that ethical obligations are a part of the professional responsibilities for an attorney. It is now clear that licensing professionals who aspire to become a CLP will also have similar ethical obligations. The ethics imposed by behaviour-specific rules on attorneys and CLPs may aptly be described as “regulated ethics”.

As regulated ethics, there is the perception that ethics is about restrictions and constraints – that is, about prohibiting professionals from doing what might otherwise be beneficial. However, as Tom Morris noted in *If Aristotle Ran General Motors*, “[t]his gets the focus all wrong” and tends to make people “take a negative and legalistic approach to ethics as fundamentally no more than a matter of mere compliance, as if the main point of ethics...were just to stay out of trouble”. Nevertheless, rules such as the CLP Rules of Conduct and the rules of conduct governing attorneys do serve to create reasonable expectations of those in a profession.

However, if it were only about rules for regulating the conduct of attorneys and CLPs, ethics would be nothing more than promulgating rules for every possible ethical situation, monitoring for compliance and enforcing the rules whenever violations occurred. When so viewed, the behaviour of those in a profession would be judged by nothing more than determining whether any rules had been violated. The emphasis would be on compliance with rules –

unethical conduct would be seen as violations of rules and ethics would be considered as nothing more than “playing by the rules”; but ethical dealings involve far more than just staying out of trouble.

The point can be strongly argued that we cannot do without at least some behaviour-specific rules to regulate the conduct of those in a profession. But it is clear that the focus of ethics should transcend the sphere of regulated ethics. It is impossible to cover by rule every possible behaviour that might present an ethical issue. And as we have seen, rules such as those governing attorneys can sometimes conflict. Moreover, as Plato said with simple eloquence, “Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws.”

Thus, acting ethically extends well beyond complying with the behaviour-specific rules that may be promulgated by a regulatory group or commission. Unethical practices are always self-destructive over the long run, so it is always best to act and live in an entirely ethical manner.

Instinctive ethics

While it is necessary to comply with the CLP Rules of Conduct and the rules of conduct for attorneys, this alone is not sufficient. Good professional ethics should not be primarily about complying with certain behaviour-specific rules; on the contrary, it should be about how we conduct ourselves and how we treat other people. In other words, ethical behaviour should be based upon instinctive or values-driven ethics premised on being a good person.

Ask anyone involved in licensing and chances are they will tell you that in their experience, those in the field have a tendency to work well together, both personally and professionally. This is because most attorneys and licensing professionals already practise instinctive, or values-driven, ethics in their business dealings. Whether they do so consciously or not, and regardless of their motivation, this is an excellent strategy since good business deals should achieve something beneficial for both parties. People need to feel their goals and concerns have been considered and addressed and, on balance, that the deal is a fair one that makes sense. More to the point, it is just good business to practise instinctive ethics by taking into account the legitimate concerns of others, since good business is ultimately about strong relationships.

For an attorney or CLP to practise instinctive, values-driven ethics while at the same time complying with the rules of regulated, behaviour-specific ethics, it is really necessary to be cognisant only of a single rule. Abiding by what most agree is the greatest rule of all – the Golden Rule – makes it easy to master the ability of doing well by doing right. If you do unto others as you would have them do unto you, it is impossible to act in an unethical manner and, moreover, the results that flow from this in the context of licensing are extremely beneficial.

It is simply good business for attorneys or CLPs who will be negotiating a deal on behalf of their employers/clients to get to know each other as persons and to treat each other in every respect in accordance with the Golden Rule. From the exchange of pleasantries at the outset of a conversation to the discussion of even the most contentious points, the negotiation will almost certainly be far more cordial and productive. Simply stated, most people have a strong tendency to mirror back the treatment they receive, so treating a licensing counterpart in accordance with the Golden Rule will make it almost impossible for you to be treated otherwise.

However, if such treatment of a licensing counterpart is not mirrored back to you, even though you have taken the time to get to know your counterpart as a person and have consistently treated him or her in accordance with the Golden Rule with regard to even the smallest of matters and concerns, there is still a benefit for making

the effort. Much will be revealed about your counterpart and his or her employer/client, which may suggest that the best option is to walk away from the deal rather than enter into a possibly volatile and dangerous relationship. There are many instances where an attorney or CLP has battled across the table in a manner demonstrating a lack of respect for basic human dignity in a purported effort to get the best possible deal, only later to have the entire deal collapse into a courtroom wrangle as one or both parties feel wronged or deceived.

Acting ethically by invoking the Golden Rule is instinctive rather than regulated and is values-driven rather than behaviour-specific. It is never wrong to do the right thing and it is always beneficial because of what is gained in the process. As such, the Golden Rule is a valuable tool for attorneys and CLPs in negotiating and successfully concluding worthwhile licences.

Ethically empowered licensing

By remaining cognisant of the Golden Rule in business dealings, a licensing professional can achieve a new, higher level of professional practice that may aptly be described as ethically empowered licensing. Routinely invoking this simple but profound rule makes it all but impossible to avoid practising instinctive, values-driven ethics. When this is done, you will find yourself “doing well by doing right” as the result of building strong, sustainable business relations, which will lead to nothing less than ultimate personal and professional fulfilment.



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