



Archetype IPSM

Federal Circuit Friday

www.archetype-ip.com

July 2021

“Atticus, you must be wrong . . .”

“How’s that?”

“Well, most folks seem to think they’re right and you’re wrong . . .”

“They’re certainly entitled to think that, and they’re entitled to full respect for their opinions,” said Atticus, “but before I can live with other folks I’ve got to live with myself. The only thing that doesn’t abide by majority rule is a person’s conscience.”

Harper Lee, *TO KILL A MOCKINGBIRD* (1960), p. 113-114.

In light of the filing of *Steiner v. eBay et al.*¹ this week, I’m departing from traditional Federal Circuit Friday content to reflect on the role of corporate legal departments in setting tone and shaping company culture and to address a difficult issue that all lawyers face – the persistent and often intense pressures to “go along to get along” and compromise one’s ethical obligations and integrity in the process.

You are likely familiar with the story. According to the complaint,² the plaintiffs are a married couple that operate a small ecommerce trade publication (called EcommerceBytes) that reports “on the inner-workings of various ecommerce companies, to keep subscribers and readership for their trade publication – many of whom are eBay sellers – up to date and informed.” The trade publication reported unflatteringly about eBay, allegedly angering eBay’s Chief Executive Officer, Senior Vice President & Chief Communications Officer, and others among eBay’s executive leadership. What the plaintiffs allege happened next is *the stuff of legend*.

It would not be possible to recount or even fairly summarize the full scope of the disturbing and horrific allegations in *Steiner v. eBay*, but I will quote a little bit from the complaint for context:

- “eBay, a multinational Fortune 500 Company with a market value of over \$47 billion, engaged in a systematic campaign to emotionally and psychologically torture Ina and David Steiner, the two-person team behind a small ecommerce trade publication, EcommerceBytes.”
- “eBay . . . engaged in a coordinated effort to intimidate, threaten to kill, torture, terrorize, stalk and silence the Steiners, in order to stifle their reporting on eBay.”
- “eBay, through its Chief Executive leadership, sent a directive and enlisted at least seven members of the eBay security staff . . . to deal with the Steiners.”
- Among other things, the Steiners allege that eBay employees (themselves and through third parties) . . .
 - “[T]aunted Ina Steiner using a phony Twitter handle pretending to be an eBay seller, and directly threatened her to stop reporting on eBay.”
 - Had packages sent to David Steiner, including “live spiders, cockroaches, a bloody pig mask, a funeral wreath, and a book entitled ‘Grief Diaries: Surviving Loss of a Spouse.’”
 - Had pornographic magazines sent “to the Steiner’s neighbors’ home in David Steiner’s name, to defame the Steiners and attempt to disgrace them and tarnish their reputation within their community.”
 - “[M]enacingly stalked and tailed the Steiners in a black van and other rental vehicles, repeatedly circling the block, tracking their every move, and following David Steiner when he left the residence.”
 - “[A]ttempt[ed] to break into the Steiner garage in order to install a GPS tracking device on their vehicle.”
 - “[P]osted the Steiner’s address on Craigslist and other websites, inviting strangers to the Steiner’s home for sex parties, and advertising yard sales, announcing that would-be visitors should knock on the door at all hours because ‘Everything must go!’”

¹ US District Court for the District of Massachusetts Case No. 1:21-cv-11181, filed July 21, 2021.

² All factual allegations herein are recounted from the complaint. I have not independently verified any facts, and express no opinion on the merits of the allegations. However, five former eBay employees have pled guilty to criminal offenses stemming from the various incidents described in the complaint. As of this writing, the complaint can be obtained here: <https://www.scapicchiolaw.com>.

Archetype IPSM

Federal Circuit Friday

- “[P]lotted to destroy evidence, mislead the [local police] investigation, and divert attention away from eBay.”
- “[C]reate[d] a fake dossier, and a phony ‘persons of interest’ file on the Steiners to make them appear crazy, and ensure the Defendants could deflect their own blame when interacting with law enforcement.”

As the Steiners’ complaint says, this alleged conduct “shocks the conscience.”

Role of the Legal Department in Company Culture and Executive/Employee Conduct

Accepting the Steiners’ allegations as even partly true, *something* about eBay’s company culture permitted a group of senior executives and other high-level employees to believe that they could conduct themselves in a truly appalling and criminal way, hide it, and suffer no consequences. This was not a middle manager embezzling funds, a lone executive trading on inside information, or a small group of hourly workers selling weed out by the loading docks. The allegations relate to a group including the CEO and other high-level officers and employees engaging in a campaign to intimidate, harass, and unlawfully destroy a small mom-and-pop newsletter in apparent retaliation for, and to terminate, unflattering reportage.³ Indeed, the Steiners expressly call out eBay’s internal culture, alleging that “the culture itself within eBay fostered an almost cult-like atmosphere where employees were not only expected, but required, to fulfill company directives, regardless of criminality” and that “the sick and dysfunctional culture was well known and rose to the top echelons.”

When the story first broke in June 2020, eBay’s former head of litigation and global intellectual property penned an op-ed about how eBay, once a “highly ethical company,” had since lost its moral compass.⁴ The author shared a helpful and insightful anecdote:

When my former boss and mentor Michael Jacobson, eBay’s first general counsel and Silicon Valley’s longest-tenured GC, retired in 2015 after serving in the role for 17 years, I asked him about some of his proudest accomplishments during his long and successful reign. Half-jokingly he chuckled, “Part of my job was to keep the executives out of jail and I think I was pretty successful at that.” Wise and simple words to live by and easily accomplished if you lead with integrity.

So, what happened at eBay? Did the culture shift in way suggesting that “winning at all cost” was okay as long as you didn’t get caught? What was the tone set from the top, and was there ambiguity in it? What could or should eBay’s legal department have done (or done differently) to set the tone and help develop a company-wide culture of respect for law?⁵

A corporate legal department – in particular the general counsel or chief legal officer – has a preeminent role in setting a tone of respect for the law and a culture of lawfulness, integrity, and honesty. “As advisors and liaisons to senior corporate officers, directors, boards, and board committees, general counsel have a great deal to do with the way business managers perceive both their particular legal obligations and corporate responsibility in general.”⁶ Further, “[g]eneral counsel are ideally situated to serve as leaders in the struggle to define the parameters of corporate conscience” and “[t]hey can and should be held accountable for promoting integrity on the part of corporations and their constituents.”⁷ Whatever eBay’s general counsel and legal department

³ If the Steiners’ reporting included false assertions of fact damaging to eBay’s business or to eBay’s or its executives’ reputations, then there are legal means for addressing that. To my knowledge, eBay never sought judicial redress for any falsity in the Steiners’ reporting.

⁴ OP-ED FROM CLO OF TURO MICHELLE FANG: WHATEVER. IT. TAKES. HOW EBAY LOST ITS MORAL COMPASS, Corporate Counsel, June 16, 2020. Ms. Fang departed eBay in 2015.

⁵ I’ve not seen any allegation (and I do not believe) that any eBay in-house lawyer had any involvement with or advance knowledge of the conduct directed toward the Steiners. Even assuming the proclivities of the involved senior executives and other employees were so well hidden that neither the general counsel nor any other member of eBay’s legal team had any inkling of what they were doing and what kind of people they were, the existence of such a group of people at eBay nevertheless suggests that something had gone seriously askew in tone or culture at eBay.

⁶ Sarah H. Duggin, THE PIVOTAL ROLE OF THE GENERAL COUNSEL IN PROMOTING CORPORATE INTEGRITY AND PROFESSIONAL RESPONSIBILITY, 51 St. Louis U. L.J. 991, 992 (2007).

⁷ *Id.*

Archetype IPSM

Federal Circuit Friday

may have done to set the tone and shape the culture, the Steiners' allegations and the guilty pleas by former eBay employees⁸ demonstrate that it was not enough.

Over my career I've worked for a large number of life sciences and other technology companies. I've been fortunate that in every case save one I was impressed by the fundamental integrity and ethics of the general counsel and other senior lawyers. They wanted to win cases, support business expansion, enable profitability, defend the company, and reduce risk as much as anyone else – and they pushed hard on all those points – but there was always a very clear moral, ethical, and legal line across which nobody in the company dared tread.

The sole exception involved a general counsel who was a less accomplished lawyer than most and seemed to compensate by being overly willing to “go along to get along” with the other senior executives. Succumbing to the temptation to “go along to get along,” or giving the appearance of such willingness, fatally undermines the ability to set a tone of respect for law or shape a culture of lawfulness, integrity, and honesty. It also presents significant ethical traps for the unwary.

Dangers for Lawyers “Going Along to Get Along”

Sam Rayburn⁹ famously said “If you want to get along, you have to go along.” Sound advice, at least in politics. But in lawyering that advice can lead to challenges because lawyers are held to different ethical standards than politicians or businesspeople. Even where a plan of action is perfectly acceptable according to business ethics or prevailing politics, a lawyer may face an ethics problem.

Like everyone else, lawyers can feel significant pressures to “go along to get along.” There are financial pressures (e.g., stock, bonuses, raises – even continued employment in some cases), professional pressures (e.g., zealous advocacy, obtaining favorable results, attracting enviable clients and interesting work), and ego pressures (e.g., advancement/promotion, fancy-sounding titles, corner or window offices). It's understandable that lawyers will sometimes be tempted to push or exceed ethical boundaries to satisfy their clients. What is neither understandable nor acceptable is breaching your ethical obligations, pushing ethical boundaries without substantial good cause (*i.e.*, a good reason rather than merely a good excuse), or participating in, condoning, or excusing unlawful activity.

Most lawyers immediately recognize unlawful conduct, or they will at least get a feeling that something isn't right and they need to check into it. But not all lawyers have their ethical obligations, which are often complex and nuanced, in the forefront of their minds when faced with a “go along to get along” decision.

There are many situations in which ethics issues arise when a lawyer is asked or pressured to “go along to get along.” Some may involve fairly common issues that involve judgment, like how aggressively to resist discovery or object at depositions,¹⁰ whether to hold back a reference from an information disclosure statement,¹¹ and evaluating conflicts of interest for a newly-hired lawyer.¹²

⁸ Five former eBay employees have already pleaded guilty to conspiracy to commit cyberstalking and conspiracy to tamper with witnesses. One has been sentenced to 18 months in prison and the others are awaiting sentencing.

⁹ The 43rd Speaker of the United States House of Representatives.

¹⁰ *E.g.*, Cal. Rule of Professional Conduct 3.2, Delay of Litigation (“a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.”); Federal Rule of Civil Procedure 30(d)(2) (district court may “impose an appropriate sanction – including the reasonable expenses and attorney’s fees incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent.”).

¹¹ *E.g.* 37 CFR §1.56 (“Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability”); Cal. Rule of Professional Conduct 1.9, Misconduct (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation.”); Cal. Business & Professions Code 6106 (“The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”).

¹² *E.g.* Cal. Rule of Professional Conduct 1.9, Duties to Former Clients (“A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired [confidential information of the former client] that is material to the matter”). In this rule “firm” refers not only to law firms but also to in-house legal departments.

Archetype IPSM

Federal Circuit Friday

Others may involve more rarified situations having less obvious ethics issues or very clear and obvious ethical problems. Atypical or exceptional situations might include things like being asked to:

- Approve commencement of litigation when there is an odor of malice and intent to harass in the air.¹³
- Forego supervision of an inexperienced direct report despite their obvious (and fully understandable) lack of the requisite competence with the complex legal task at issue.¹⁴
- Withhold information from a senior executive to ensure that the legal department does not “look bad.”¹⁵
- Continue employing a person as a “lawyer” after discovering they were not admitted to the state bar.¹⁶
- Conduct a “walk-by visual inspection” of the gender and race of a newly-hired lawyer who had exercised their option to “decline to state.”¹⁷

When I have encountered “go along to get along” situations that might implicate an ethics issue, I educated myself on the relevant law and facts to determine if there was an ethics issue and how close I could come to the requested action without breaching my ethical obligations. In most cases, upon further investigation and analysis the request turned out to be okay or I found a middle ground that was ethical and satisfactory to everyone. In others I explained my reasons and just said “no.” In some cases, I became less popular with my superiors or others – on one occasion, *much* less popular. But that was a price I was willing to pay because *nobody* is going to twist my arm into compromising my ethics.

* * *

Sometimes the price of “going along to get along” can be your integrity. For five eBay employees, the price included criminal conviction (and prison for at least one, so far).¹⁸ As lawyers we must guard against the temptation to compromise our ethics, at every peril to ourselves – even if it means we must decline a representation, resign our position, or be fired. A clear conscience and commitment to ethical law practice creates more value in the long term than whatever you might purchase with the proceeds of selling your integrity.

¹³ *E.g.*, Cal. Rule of Professional Conduct 3.1, Meritorious Claims and Contentions (“A lawyer shall not: (1) 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.”).

¹⁴ *E.g.*, Cal. Rule of Professional Conduct 5.1, Responsibilities of Managerial and Supervisory Lawyers (requiring lawyer having “managerial” or “direct supervisory” authority over another lawyer to use reasonable efforts to “ensure that inexperienced lawyers are properly supervised” and comply with the rules of professional conduct, including Rule 1.1, Competence (requiring lawyers to “apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service”). Contrary to popular myth, there is no “in-house lawyer” exception to this rule – indeed, the rules make explicit that in-house legal departments are subject to the rules governing competence and supervision.

¹⁵ *E.g.*, Cal. Rule of Professional Conduct 1.4, Communication with Clients (“A lawyer shall . . . keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information” and “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); Cal. Business & Professions Code 6068(m)(“It is the duty of an attorney to . . . respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments.”).

See also Cal. Rule of Professional Conduct 1.9, Misconduct (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation.”); Cal. Rule of Professional Conduct 4.1, Truthfulness in Statements to Others (“In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”); Cal. Business & Professions Code 6106 (“The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”).

¹⁶ *E.g.*, Cal. Rule of Professional Conduct 5.5, Unauthorized Practice of Law (“A lawyer admitted to practice law in California shall not . . . knowingly assist a person in the unauthorized practice of law”).

¹⁷ *E.g.*, Cal. Rule of Professional Conduct 8.4.1, Prohibited Discrimination, Harassment and Retaliation (“In relation to a law firm’s [or in-house legal department’s] operations, a lawyer shall not: (1) on the basis of any protected characteristic, (i) unlawfully discriminate or knowingly permit unlawful discrimination; (ii) unlawfully harass or knowingly permit the unlawful harassment of an employee.”). The motive behind the requested “walk by visual inspection” would likely determine whether there is a real ethics issue, but why have any part in it?

¹⁸ See n.7, above.